APPENDIX cont.

PLEADINGS		DATE FILED
11.	Wife's Supplemental Memorandum in Support of Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract	07/31/17
12.	Husband's Supplemented Response to Amended Petition for Civil and Criminal Contempt and in the Alternative, Breach of Contract	08/07/17
13.	Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract	06/05/18
14.	Trial Transcript - Volume I, September 12, 2017, pg. 17	12/19/18
15.	Trial Transcript - Volume I, September 12, 2017, pgs. 26-29	12/19/18
16.	Trial Transcript - Volume I, September 12, 2017, pgs. 32-33	12/19/18
17.	Transcript of Ruling of 29th day of November, 2017, pgs. 6-7	12/11/18
18.	Transcript of Ruling of 29th day of November, 2017, pgs. 16-30	12/11/18

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IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, SHELBY COUNTY

KELLY COLVARD PARSONS,

Plaintiff/Counter-Defendant,

vs.

No. CT-004932-13
Div. II

RICHARD JEARL PARSONS,

Defendant/Counter-Plaintiff.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF AMENDED PETITION FOR CIVIL AND CRIMINAL CONTEMPT AND IN THE ALTERNATIVE, FOR BREACH OF CONTRACT

TO THE HONORABLE JAMES RUSSELL, JUDGE OF DIVISION II OF THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE:

Comes now the Plaintiff/Counter-Defendant, Kelly Colvard Parsons (hereinafter "Wife") by and through her counsel of record, and, in support of this Supplemental Memorandum in Support of Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract, respectfully states to the Court as follows:

BACKGROUND

Richard Jearl Parsons (hereinafter "Husband") and Wife were married on March 21, 1992. Two children were born of the parties' marriage, namely Logan Grey Parsons (hereinafter "Logan"), born on March 8, 1997 (PA: 20) and Richard Kelan Parsons (hereinafter "Kelan"), born on May 22, 2001 (PA: 16). Logan is a rising junior at the University of Memphis, while Kelan is a rising tenth grader at St. George's Independent School.

Prior to the parties' marriage, Wife obtained her Bachelor of Business Administration and her Master of Arts in teaching from the University of Memphis. In 2004, Wife began working at Hutchison School as a Physical Education teacher. Currently, in addition to teaching Physical Education, Wife runs a "Parent's Night Out" program once a month and coaches the Pom-Pom Girls team at Hutchison School. At the time of the parties' divorce, Wife's income was approximately $54,000 to $55,000 a year.

Husband graduated from Western University with a degree in Business Administration and in 1985, he began working for the Federal Aviation Administration (hereinafter "FAA") as an air traffic controller. (Husband's Deposition, at 6). Husband worked full time for the FAA from 1985 until November of 2013, when he retired from his position as air traffic controller. Id. at 24. During his deposition of April 21, 2014, Husband testified that pursuant to federal law, he was forced to retire from the FAA in November of 2013 upon attaining the age of fifty-six (56). Id. In regards to Husband's post-retirement income, Husband detailed that he was paid once a month by the US Office of Personnel Management and received a Civil Service Annuity of $5,325 and a FERS Benefit Supplement (hereinafter "FERS Supplement") in the amount of $1,370 each month.

During his deposition of April 21, 2014, Husband was questioned about his FERS Supplement and testified as follows:

> MR. MOSKOVITZ: ... How long are you eligible to receive that [FERS Supplement] of about $1,370?
>
> HUSBAND: My current understanding is that it is included in my annuity until I turn 62.
>
> ...

> MR. MOSKOVITZ: Look if you will, that FERS benefit supplement, that $1,370 a month, is that in lieu of Social Security for you because you are a federal employee or were a federal employee?
>
> HUSBAND: I'm under the understanding that that is from Social Security because I am forced to retire prior to age 62 because I'm not eligible to draw Social Security until that time. Id. at 31, 34.

Husband further testified that similar to Social Security, in order to continue to receive the FERS Supplement, his **earned income** could not exceed $15,120 a year. Id. at 37-38.

During Wife's deposition of January 27, 2014, Wife indicated that although she knew that Husband was forced to retire at age fifty-six (56) from the FAA as an air traffic controller, she hoped that Husband would not retire, as the parties have two young children. (Wife's Deposition, at 44-45). However, Husband's counsel labeled Wife's desire for Husband to continue working as "wishful thinking" and questioned Wife as follows:

> MR. RICE: So [Husband] told you he was going to retire in his mid-50s. Did he tell you it made good financial sense for him to do that?
>
> WIFE: No.
>
> MR. RICE: He just told you he was going to retire in his mid-50s, correct?
>
> WIFE: Yes.
>
> MR. RICE: Then he retired in his mid-50s, correct?
>
> WIFE: Yes.
>
> MR. RICE: But you thought, despite what your husband had consistently said, that he was going to do something other then [sic] retire in his mid-50s?

WIFE: Yes.

MR. RICE: Does that sound like wishful thinking to you?

WIFE: No.

MR. RICE: Why?

WIFE: Because we have two children that are young and have to be taken care of. Id.

Subsequently, Wife testified that she hoped that Husband would work part-time, earning less than the FERS Supplement cap of $15,000, yet Husband's counsel berated Wife for the idea that Husband would work at all and questioned Wife as follows:

MR. RICE: You say your husband is supposed to go back to work. What do you say he's supposed to go back to work doing?

WIFE: Well, he's an intelligent, able-bodied, human being, so there are plenty of things out there to be done.

MR. RICE: Now, remember, I talked to you earlier about when you answer a question, I'm looking for specifics? Do you understand there was no specific answer to what I just asked you in that generalization that you just gave me, okay? So I'm looking for specifics. You say that this man who has been an air traffic controller, now reached his retirement age that he told you about from the get-go and retired at that age, did just what he said, you say he's supposed to get another job?

WIFE: Right.

MR. RICE: Despite the fact that it's going to cost forfeiting benefits if he gets it and makes more than $15,000?

WIFE: Well, he can make $15,000 or less.

MR. RICE: Okay. What do you say he should go do and work full time and make less than 15,000 dollars?

WIFE: I never said he needed to work full time.

MR. RICE: So now you're accepting him working part time, correct?

MR. MOSKOVITZ: Object to form.

WIFE: I have always accepted him to work part time.

MR. RICE: All right. What do you think he should do, what jobs?

WIFE: Whatever will make him happy and he brings home a paycheck.

MR. RICE: He's happy being retired and doing jobs around the house and spending more time with the kids.

MR. MOSKOVITZ: Object to form.

WIFE: That's not a question.

MR. RICE: What's the matter with him getting to do that at his age?

WIFE: We are not financially – we do not have the financial means for him to stay at home and do nothing. Id. at 73-74.

Subsequently, during Husband's deposition of April 21, 2014, Husband testified that he had procured a part-time job with Raytheon Corporation. (Husband's Deposition, at 36-38). He further testified that his earnings from Raytheon **would not exceed** the FERS Supplement cap of $15,000 a year and stated as follows:

MR. MOSKOVITZ: Are your plans, Mr. Parsons, to procure employment?

HUSBAND: Be more specific, please.

MR. MOSKOVITZ: Do you have a job now?

HUSBAND: No. I am currently applying for it and have been accepted but it's in the process of being processed. It's not confirmed because there's security checks and drug testing.

MR. MOSKOVITZ: I would assume you'll pass the drug testing. Is that your expectation?

HUSBAND: Absolutely.

MR. MOSKOVITZ: Okay. Who is the job with, I'm sorry?

HUSBAND: It's with Raytheon Corporation.

MR. MOSKOVITZ: Doing what?

HUSBAND: My class – I think my title would be casual employee for training of new air traffic controllers.

MR. MOSKOVITZ: Is it part time or full time?

HUSBAND: **It would be considered part time. It's a casual, what they call a casual job.**

...

MR. MOSKOVITZ: All right. Tell me the knowledge that you do have about the job in terms of hours and pay.

HUSBAND: What I do know, I'll be paid $26.50 an hour and that they said the maximum amount that I could – maximum hours that I would be allowed to work is 1,500 in a year, but what I do know is that there was three positions being filled at the same time and the discussions with the hiring manager or the manager that I'll be under would be that basically **I will be scheduled to where I would probably make about $15,000 a year, which would be equal to the Social Security cap because I receive that what you want to call the FERS benefit.** Id. at 35-37 (emphasis added).

In sum, on April 21, 2014, Husband testified that although he was currently receiving a Civil Service Annuity of $5,325 and a FERS Supplement of $1,370 from the US Office of Personnel Management, he would soon be a "casual employee" of Raytheon Corporation and earn approximately $15,000 a year so as to not affect his FERS Supplement. Id.

On July 10, 2014, the parties' signed a Martial Dissolution Agreement, which was incorporated into their Final Decree of Divorce entered with the trial court on July 16, 2014. (Trial Exhibit 3). The parties' Marital Dissolution Agreement contains a paragraph titled "Noncompliance," which details,

> Should either party incur any expense or legal fees in a successful effort to enforce or defend this Marital Dissolution Agreement, in whole or in part, the Court **SHALL** award reasonable attorney fees and suit expenses to the party seeking to enforce this Agreement. No breach, waiver, failure to seek strict compliance, or default of any of the terms of this Agreement shall constitute a waiver of any subsequent breach or default of any of the terms of this Agreement. Id. at 4.

Additionally, the paragraph titled "Federal Retirement Benefit" provides, in pertinent part, as follows:

> Husband is eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. Wife is entitled to fifty percent (50%) of Husband's gross monthly annuity under the Civil Service Retirement System. **Wife is entitled to fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System.** The United States Office of Personnel Management is directed to pay Wife's share directly to Wife.
>
> ...
>
> The parties shall retain Attorney Blake Bourland to prepare any necessary documents required for the division of this gross monthly annuity and FERS supplement and the parties shall equally divide the cost of same.
>
> Prior to Wife's receipt of fifty percent (50%) of the annuity and FERS supplement, Husband shall pay to Wife fifty percent (50%) of said benefits to compensate Wife while the necessary documents are being processed, in the amount of two thousand six hundred eight dollars ($2,608) monthly, due on the 1st day of July, 2014, and the first business day of the month each month thereafter until Wife's receipt of the pension and FERS benefit. Id at 11-12 (emphasis added).

Further, the paragraph titled "Alimony Waived" details the parties' agreement to waive any claim to alimony of any kind in their divorce. Id. at 15.

On August 22, 2014, a Court Order Assigning Benefits under the Federal Employees Retirement System (hereinafter "Court Order"), drafted by Blake Bourland (hereinafter "Mr. Bourland"), was entered with the trial court. (Trial Exhibit 13). Said Court Order provides, in pertinent part, as follows:

> [Husband] is entitled to certain retirement benefits under FERS based upon employment with the United States Government. [Wife] is entitled to fifty percent (50%) of [Husband's] Monthly Annuity. [The United States Office of Personnel Management] is directed to pay [Wife's] share directly to [Wife]. Payments shall continue to [Wife] for the remainder of [Husband's] lifetime. In the event that [Husband] predeceases [Wife], the [Wife] is entitled to the maximum allowable former spouse survivor annuity under 5 U.S.C. § 8341(H)(1). Id.

The Court Order defines "Monthly Annuity" as "(i) the gross monthly annuity, as defined in 5 CFR § 838.103 and (ii) any annuity supplement under FERS to which [Husband] is or may become entitled." 5 CFR § 838.103, referenced in the Court Order, defines gross annuity as "the amount of monthly annuity payable to a retiree or phased retiree after reducing the self-only annuity to provide survivor annuity benefits, if any, but before any other deduction." 5 CFR § 838.103.

At the time of the parties' divorce, Husband's gross monthly FERS Supplement totaled $1,370. Thus, pursuant to the Marital Dissolution Agreement and the Court Order Assigning Benefits under the Federal Employee Retirement System, Wife became entitled to fifty percent (50%) of this amount, or $685 a month, upon the entry of the parties' Final Decree of Divorce.

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. (Trial Exhibit 4). This figure is comprised of one-half of Husband's Civil Service Annuity, totaling $2,662 a month, and one-half of Husband's FERS Supplement, totaling $685 a month. This income figure also includes Husband's earned income of $15,000 a year, or $1,250 a month, from Raytheon Corporation, 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." (Husband's Deposition, at 37). When all of these amounts are added together, they total the **exact** monthly income figure of $4,597 contained within the parties' Parenting Plan for Husband's income ($2,662 + $685 + $1,250 = **$4,597**).

Likewise, Wife's income was listed at $8,264 a month in the parties' Permanent Parenting Plan. (Trial Exhibit 4). Consistent with the parties' Marital Dissolution Agreement, Wife's gross monthly income included half of Husband's FERS Supplement, or $685 a month, and half of Husband's Civil Service Annuity, or $2,700 a month. It also included Wife's gross monthly income from Hutchison School of $4,879 a month, or $58,548 a year. Though the parties entered into the Permanent Parenting Plan in July of 2014, this income figure was consistent with Wife's 2014 W-2 from Hutchison School, which reflects gross income of $56,888 for the year.

In regards to child support, the parties' Permanent Parenting Plan provides, "Given the current incomes of the parties, each party agrees to waive the nominal amount of child support calculated by the child support calculator ($6.00)." Id. at 5. Accordingly, despite the fact that the Parenting Plan lists Wife as the primary residential parent of the minor children and provides that the children will spend 235.5 days with

her and 129.5 days with Husband, Husband was not obligated to pay child support to Wife given his income of $4,597 a month and Wife's income of $8,264 a month. Id. at 1, 5.

On June 22, 2015, Wife filed her Petition for Civil and Criminal Contempt, alleging that Husband failed and refused to pay Wife fifty percent (50%) of his FERS Supplement from December of 2014 to June of 2015. (Trial Exhibit 2). Wife additionally alleged that Husband failed and refused to reimburse Wife for his share of the parties' children's expenses pursuant to the Permanent Parenting Plan, including, but not limited to, St. George's Independent School fees, books, meals, and other expenses, the cost of Camp Bear Track, the cost of competitive soccer, and uncovered reasonable and necessary medical, dental, and orthodontic expenses.

Prior to Wife's filing of said Petition for Civil and Criminal Contempt, Wife and Wife's counsel sent numerous correspondences to Husband and his counsel regarding the nonpayment of the FERS Supplement, including, but not limited to, the following:

a. In December of 2014, Wife sent Husband an email in which she stated, "I [did] not receive half of the FERS supplement as required by the MDA therefore you owe me half of it. The amount is $685." On December 16, 2014, Husband responded to Wife's request with a handwritten note, which stated, "Contact [your] lawyer." (Trial Exhibit 14)

b. On January 15, 2015, after receiving an email from Mr. Bourland in which he relayed that the FERS Supplement may not be divisible by the U.S. Office of Personnel Management, Wife's counsel forwarded said email to Husband's counsel and

requested that Husband pay Wife's fifty percent (50%) share of his gross FERS Supplement directly to Wife. (Trial Exhibit 17).

c. In an email dated January 27, 2015, Wife requested that Husband send her a check for $1,370, representing fifty percent (50%) of Husband's December 2014 and January 2015 FERS Supplements, or $2,055, representing fifty percent (50%) of Husband's December 2014, January 2015, and February 2015 FERS Supplements. (Trial Exhibit 16).

d. On March 9, 2015, Wife's counsel sent Husband's counsel an unfiled Petition for Civil Contempt, in which Wife alleged that Husband failed to pay Wife her share of his FERS Supplement in December of 2014, January of 2015, February of 2015, and March of 2015. (Trial Exhibit 18).

On June 22, 2015, after Wife had not received any percentage of Husband's FERS Supplement for the months of December 2014, January 2015, February 2015, March 2015, April 2015, May 2015, or June 2015, Wife filed her Petition for Civil and Criminal Contempt. As Husband owed Wife fifty percent (50%) of his gross FERS Supplement, or $685 a month, the total arrearage for the seven (7) months that he failed to pay Wife any of this amount was $4,795, calculated as of June 22, 2015.

On June 26, 2015, **following** the filing of Wife's Petition for Civil and Criminal Contempt, Husband paid Wife $3,451 towards the $4,795 arrearage. (Trial Exhibit 19). On July 2, 2015, Wife's counsel sent Husband's counsel a letter reiterating that Wife is entitled to fifty percent (50%) of Husband's gross monthly annuity, or $685 a month, rather than a reduced amount of the annuity. On July 13, 2015, Husband paid Wife

$493, rather than $685, for her share of his FERS Supplement for July of 2015. (Trial Exhibit 20).

On July 27, 2015, Husband's counsel sent Wife's counsel a letter which detailed as follows:

> Enclosed please find correspondence [Husband] received from the United States Office of Personnel Management. **[Husband's] annuity supplement has been reduced to Zero Dollars ($0.00) and this reduction will begin with [Husband's] monthly payment dated August 1, 2015.** As Ms. Parsons is aware, the parties' Marital Dissolution Agreement states, "Wife is entitled to fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System." **Please be advised 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.** (Trial Exhibit 5) (emphasis added).

The letter from the United States Office of Personnel Management, attached to the above correspondence, indicated that because Husband's earned income in the previous year exceeded the earnings limit of $15,120, Husband FERS Supplement would be reduced from $1,370 to $0 beginning August 1, 2015. Id.

To date, Husband has only paid Wife a percentage of her share of the FERS Supplement due from **December of 2014 through July of 2015**, creating an arrearage of $1,536 ($685 x 8 months = $5,480 due; $5,480 – $3,451 – $493 = $1,536). Additionally, Husband made **no payments** to Wife for her share of the FERS Supplement from August 2015 through July 2017, creating an arrearage of $15,755 ($685 x 24 months = $16,440). Thus, the total amount due from Husband for Wife's share of the FERS Supplement through July 2017 is $17,976 ($1,536 + $16,440 = $17,976).

In April of 2015, months after the Final Decree of Divorce and Permanent Parenting Plan were entered on July 16, 2014, Wife received Husband's 2014 federal income tax return, which revealed that Husband's 2014 **earned income** totaled $52,309. (Trial Exhibit 9). Said earned income not only exceeded the FERS Supplement earnings limit of $15,120 a year, it greatly exceeded what was contemplated by the parties' Marital Dissolution Agreement and Permanent Parenting Plan. Wife was unaware of Husband's significant 2014 earned income until Wife received Husband's 2014 income tax return in April of 2015.

The hearing of Wife's Petition for Civil and Criminal Contempt was conducted before this Honorable Court on March 2, 2016 and March 3, 2016. On March 8, 2016, the Court issued its oral ruling on Wife's Petition for Civil and Criminal Contempt. During said oral ruling, the Court gave Wife leave to amend her Petition for Civil and Criminal Contempt, detailing, "[T]his Petitioner may seek redress under a breach of contract theory." On May 19, 2016, an Order Dismissing Petition for Civil and Criminal Contempt was entered with the trial court.

On June 22, 2016, Wife filed her Notice of Appeal, pursuant to Tennessee Rule of Appellate Procedure 3, with the Tennessee Court of Appeals. On March 30, 2017, the Tennessee Court of Appeals vacated the Order Dismissing Petition for Civil and Criminal Contempt and remanded this case for such further proceedings as may be necessary consistent with the Court of Appeals' opinion.

On June 23, 2017, Wife filed her Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract (hereinafter "Amended Petition"). As detailed in said Amended Petition, Wife maintains that Husband is in

contempt of this Honorable Court for his failure to pay Wife fifty percent (50%) of his gross FERS Supplement under the Civil Service Retirement System from December 2014 to the present. However, in Wife's Amended Petition, Wife alleged that in the alternative and based upon the Court's leave to amend her Petition for Civil and Criminal Contempt, Husband is in breach of contract for his failure to pay Wife fifty percent (50%) of his FERS Supplement under the Civil Service Retirement System from December 2014 to the present.

LAW AND ARGUMENT

In Husband's Response to Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, Breach of Contract (hereinafter "Husband's Memorandum"), Husband alleges, "The case at bar is substantially similar to Howell" and submits, "[T]he State lacks the authority to vest in Wife any interest in the FERS Supplement because the power to vest is preempted." (Husband's Memorandum, at 8) (citing Howell v. Howell, 2017 U.S. LEXIS 2946 (2017)). Wife submits that Husband's argument is disingenuous, as the Howell Court held that state courts are prohibited, pursuant to **federal law**, from awarding a **veteran's disability benefits** to the veteran's former spouse. Howell, 2017 U.S. LEXIS at *13-14.

Wife respectfully submits that Howell has no effect on the division of Husband's FERS Supplement, because Husband's FERS Supplement is a benefit resulting from his employment with the Federal Aviation Administration, not the military. Furthermore, the division of Husband's FERS Supplement is expressly authorized by Section 8467 of title 5 of the United States Code. Accordingly, contrary to Husband's allegations, Wife's interest in Husband's FERS Supplement vested as of the date of the entry of the Final

Decree of Divorce, and this Court's ability to enforce the parties' Final Decree of Divorce is not preempted by Howell or federal law.

Wife alleges that Husband's failure to compensate Wife to the extent of her vested interest in his FERS Supplement constituted a unilateral modification of the parties' Marital Dissolution Agreement in violation of Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). Wife further submits that the provisions of the parties' Marital Dissolution Agreement pertaining to the division of their estate are contractual, and when Husband impaired Wife's right to receive the benefits of the parties' Agreement and refused to compensate her for same, Husband breached the duty of good faith and fair dealing implicit in every contract. Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004).

Finally, Wife submits that even if the USFSPA controlled the division of Husband's retirement benefit, Husband could not use this federal law to undermine the contractual agreement entered into by the parties to divided said benefit. Tennessee courts have held that parties are free to contractually determine the division of military retirement pensions and disability benefits, and a court may order a party to pay such monies to give effect to the agreement. Selitsch v. Selitsch, 492 S.W.3d 677 (Tenn. 2015); Collins v. Collins, 2016 Tenn. App. LEXIS 551 (Tenn. Ct. App. Aug. 1, 2016) (a copy of which is attached hereto).

Husband cannot use Howell to undermine the parties' Marital Dissolution Agreement, nor can he unilaterally modify the Agreement once it has been approved by the trial court. Therefore, Wife alleges that this Honorable Court should enforce the parties' Final Decree of Divorce and hold that Wife is entitled to a one-half interest Husband's FERS Supplement, calculated as of the date of the entry of the Final Decree

of Divorce, or $685 a month. Wife alleges that this Court should also order Husband to pay Wife $17,976 for Wife's fifty percent (50%) of Husband FERS Supplement from December 2014 through July 2017, as well as post-judgment interest, and award Wife all of her attorney fees related to her Petition for Civil and Criminal Contempt, Amended Petition for Civil and Criminal Contempt, and appeal.

A. Howell v. Howell, 2017 U.S. LEXIS 2946 (2017)) has no bearing upon the present case, as Husband's FERS Supplement is not military retirement pay and this Court's ability to divide Husband's FERS Supplement and enforce the parties' Final Decree of Divorce is not precluded by federal law.

In Howell v. Howell, 2017 U.S. LEXIS at *9, during the trial of the parties' divorce, the Arizona trial court anticipated husband's eventual retirement from the Air Force and awarded wife fifty percent (50%) of husband's projected military retirement. Shortly thereafter, husband retired and wife began receiving fifty percent (50%) of his military retirement pay, or $750 a month. Id.

Several years later, husband elected to receive a portion of his military retirement pay in tax-free disability benefits. Id. Pursuant to federal law, in order to receive disability benefits from the military, husband was required to waive an amount of retirement pay equal to the disability benefits. Id. *See* 38 U.S.C. § 5305. Consequently, due to husband's waiver of retirement benefits in favor of disability pay, wife's share of husband's **military retirement pay** was reduced from $750 a month to $625 a month, or by $125 a month. Id.

Wife asked the Arizona trial court to enforce the parties' final decree of divorce and restore her share of husband's total retirement pay. Id. The trial court held, and the Arizona Supreme Court affirmed, that wife had a vested interest in her one-half (1/2) share of husband's military retirement pay prior to his waiver of a portion of said

retirement pay for disability benefits. Id. Accordingly, the court ordered husband to ensure that wife received her full fifty percent (50%) of husband's military retirement, or $750 a month, without regard to the amount of retirement husband waived to receive disability benefits. Id.

Upon husband's petition for certiorari, the U.S. Supreme Court ultimately held that federal law preempts a trial court's ability to order a veteran to "reimburse" or "indemnify" his spouse for the reduction of her share of his military retirement pay caused his receipt of disability benefits. Id. at *13-14; 10 U.S.C. § 1408. In reversing the trial court's ruling, the Supreme Court detailed that the Uniformed Services Former Spouses' Protection Act (hereinafter "USFSPA") authorizes state courts to treat veterans' "disposable retired pay" as community property divisible upon divorce. Id. at *4 (citing 10 U.S.C. § 1408(c)). However, the USFSPA expressly **excludes** from its definition of "disposable retired pay" amounts deducted from that pay "as a result of a waiver... required by law in order to receive" disability benefits. Id. (citing 10 U.S.C. § 1408(a)(4)(A)).

Therefore, the U.S. Supreme Court held that 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. Id. at *10. Furthermore, the Court detailed that federal law precludes state courts from ordering a veteran to indemnify or reimburse his spouse when he waives a portion of his military retirement pay in favor of disability pay and this waiver results in a reduction of his spouse's share of his retirement benefit. Id. at *13-14. The Howell Court reasoned that under federal law, a state court's order requiring a veteran to reimburse his spouse for the disability-waived

portion of his military retirement pay is, in effect, a division of the waived portion of the veteran's retirement pay in violation of 10 U.S.C. § 1408. Thus, the Court opined, "**State courts cannot "vest" that which (under governing federal law) they lack the authority to give.**" Id. at *13 (citing 38 U. S. C. §5301(a)(1), which provides that disability benefits are generally nonassignable) (emphasis added).

To understand the reasoning behind the U.S. Supreme Court's decision in Howell, it is important to look to the Court's decisions preceding Howell and Congress' reaction to same. In 1981, the Supreme Court held that the federal statutes then governing military retirement pay prevented state courts from treating **any portion** of military retirement pay as community property divisible upon divorce. McCarty v. McCarty, 453 U.S. 210, 224 (1981). The Court noted that the language in the statute and its history made it "clear that Congress intended that military retired pay 'actually reach the beneficiary.'" Id. at 28.

In direct response to McCarty, Congress enacted the USFSPA, which authorizes state courts to treat "disposable retired pay" as community property. 10 U.S.C. § 1408(c)(1). The statute defines "disposable retired pay" as "the total monthly retired pay to which a [military] member is entitled" minus certain deductions. 10 U.S.C. § 1408(a)(4)(A). Among the amounts required to be deducted from a veteran's total monthly retired pay are any amounts that a veteran waives in order to receive disability benefits. Id. The point of this provision is to ensure that, in the context of divorce, disabled veterans keep all of their disability pay, as disability pay fills the gap for pay that veterans will no longer be able to make in the future due to their disability. *See* McCarty, 453 U.S. at 228 (holding that the purpose of federal preemption of state

community property law is to ensure that the military benefit "actually reach[es] the beneficiary.")

In 1989, the U.S. Supreme Court interpreted the USFSPA in Mansell v. Mansell, 490 U.S. 581, 586 (1989), a case in which a veteran was ordered to pay his former spouse fifty percent (50%) of his total military retirement benefits, including the portion of retirement pay he waived so that he could receive disability benefits. The veteran subsequently argued that his final decree of divorce should be modified to omit the provision requiring him to share his total retirement pay with his former wife. Id.

The U.S. Supreme Court ultimately agreed with husband and held that the USFSPA "completely preempted the application of state community property law to military retirement pay." Id. at 588. The Court detailed that the Act provided a "precise and limited" grant of power to divide federal military retirement pay. Id. Through the USFSPA, Congress granted state courts the authority to treat "disposable retired pay" as community property. Id. at 589. However, in defining "disposable retired pay," Congress specifically excluded military retirement pay waived by a veteran in order to receive disability payments. Id. The Court opined that the legislative history of the Act, read as a whole, indicates that Congress intended both to create new benefits for former spouses and to place limits designed to protect military retirees on state courts. Id. at 593.

In Howell v. Howell, when confronted with the issue of whether a state court can order a veteran to "reimburse" or "indemnify" his spouse for the reduction in her share of his military retirement pay resulting from his receipt of disability benefits, the U.S. Supreme Court looked to its decision in Mansell and stated that Mansell "determines the

outcome here." Howell, 2017 U.S. at *10. As previously detailed, in Mansell, the Court held that federal law completely preempts the States from treating waived military retirement pay as divisible community property. Id. (citing Mansell, 490 U.S. at 594-95).

Relying upon Mansell and the plain language of 10 U.S.C. § 1408, the Howell 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**. Id. at *12-14. Such an order is, in effect, a division of the waived portion of the veteran's retirement pay, which "displace[s] the federal rule and stand[s] as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Id. at *14. Thus, the Howell Court preempted "all such orders" which require a veteran to indemnify his former spouse for the loss of her share of his retirement benefits resulting from the veteran's receipt of service-related disability benefits. Id.

Wife respectfully submits that the U.S. Supreme Court's holding in Howell has no bearing upon the present case. In Howell, the U.S. Supreme Court held that pursuant to **federal law**, a state court cannot divide the disability-waived portion of military retirement pay, nor can it order a veteran to indemnify his spouse for her loss of military retirement pay related to a disability waiver. Id. at *12-14. *See* 10 U.S.C. § 1408. In the present case, Husband's FERS Supplement is a benefit resulting from his employment with the Federal Aviation Administration, not the military. Accordingly, 10 U.S.C. § 1408, Howell, and Mansell do not determine the outcome in the instant case.

Furthermore, federal law expressly provides for the division of Husband's FERS Supplement in accordance with the entry of the parties' Final Decree of Divorce.

Section 8467 of Title 5, United States Code, permits state courts to award a former spouse FERS benefits, detailing,

> (a) **Payments under this chapter which would otherwise be made to an employee**, Member, or annuitant (including an employee, Member, or annuitant as defined in section 8331) based on service of that individual **shall be paid** (in whole or in part) by the Office or the Executive Director, as the case may be, **to another person if and to the extent expressly provided for in the terms of –**
>
> (1) **any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation**. 5 CFR § 8467 (emphasis added). *See also* 5 CFR § 838.101.

The only limit on a State court's authority related to an FERS Supplement is contained within 5 CFR § 8470, which provides that an FERS benefit is not "assignable, either in law or equity," except under the provisions of the above-cited 5 CFR § 8467, and is not "subject to execution, levy, attachment, garnishment or other legal process, except as otherwise may be provided by Federal laws." 5 CFR § 8470.

In sum, federal law expressly permits a trial court's division of an FERS Supplement pursuant to divorce. Id. In Howell, wife could not obtain a vested interest in fifty percent (50%) of husband's military retirement and disability pay because **federal law** prohibited the Arizona trial court from awarding wife any portion of husband's disability-related waived retirement pay. Howell, 2017 U.S. at *9. *See* 10 U.S.C. § 1408. Under federal law, wife's share of husband's military retirement pay was subject to a later reduction if husband chose to waive retirement benefits to receive disability benefits. Id. at *11-12. Pursuant to 10 U.S.C. § 1408(a)(4)(A), the state trial court did not have the legal authority to extinguish this future contingency, as "State courts

cannot 'vest' that which (**under governing federal law**) they lack the authority to give." Id. at *13 (emphasis added).

In the present case, no federal law prevents the division of Husband's FERS Supplement. To the contrary, 5 CFR § 8467 expressly authorizes this division and provides, "Payments under this chapter which would otherwise be made to an employee... **shall be paid** (in whole or in part)... to another person in and to the extent expressly provided for in the terms of any court decree of divorce." 5 CFR § 8467. Accordingly, because this Honorable Court has the authority, under the Code of Federal Regulations, to divide Husband's gross FERS Supplement and award Wife fifty percent (50%) of the same, Wife obtained a vested interest in her share of Husband's FERS Supplement on the date of the entry of the parties' Final Decree of Divorce.

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 x 12 months = 8,220). Husband's earned income in 2014, 2015, and 2016 totaled $52,309, $34,553, and $37,301, respectively.

Unlike Husband, who is unaffected by the loss of the FERS Supplement, Wife's monthly income has been reduced by $685 a month due to the loss of her share of the Supplement. Husband's decision to earn income far in excess of the FERS Supplement cap of $15,120 a year effected a reduction in the whole of his FERS Supplement,

including a reduction in the half in which Wife had a vested interest. As described in greater detail below, although Husband certainly had the legal right to earn income in excess of $15,120 a year, his doing do so frustrated Wife's receipt of the property in which she had a vested interest. Elliott v. Elliott, 149 S.W. 3d 77, 84 (Tenn. Ct. App. 2004).

Based on the foregoing, Wife submits that 10 U.S.C. § 1408, Howell, and Mansell have no bearing upon the present case, as Husband's FERS Supplement is not military retirement pay, nor was it waived so that Husband could receive military disability benefits. Rather, Husband's FERS Supplement is a benefit derived from his employment with the FAA, and it was reduced from $1,370 a month to $0 a month because Husband's earned income far exceeded the FERS Supplement earnings limit of $15,120. There is no federal statute that prevents the division of Husband's FERS Supplement. In fact, division of Husband's FERS Supplement is expressly authorized by Section 8467 of title 5 of the United States Code.

Therefore, as described in greater detail below, this Honorable Court should find that Wife obtained a vested interest her share of Husband's FERS Supplement, or $685 a month, as of July 16, 2014, the date of the entry of the parties' Final Decree of Divorce. Husband's failure to compensate Wife to the extent of her vested interest amounts to an impermissible modification of the division of the parties' marital property and a violation of the Final Decree of Divorce incorporating the Marital Dissolution Agreement. Therefore, regardless of OPM's ability to divide the FERS Supplement or Husband's receipt of the FERS Supplement, Wife is entitled to $685 a month.

B. Husband's failure to compensate Wife to the extent of her vested interest in his FERS Supplement constituted a unilateral modification of the parties' Marital Dissolution Agreement in violation of Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993), as well as a breach of the duty of good faith and fair dealing implicit in every contract under Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004).

Upon Husband's retirement from the FAA in November of 2013, he began receiving retirement income in the form of an FERS Supplement in the gross amount of $1,370 a month. During Husband's deposition of April 21, 2014, Husband testified that he received the FERS Supplement because he retired at age fifty-six (56) and would not be eligible to draw Social Security until he turned sixty-two (62) years old. (Husband's Deposition, at 24, 34). When asked about the duration of the FERS Supplement, Husband testified as follows:

> MR. MOSKOVITZ: ... How long are you eligible to receive that annuity supplement of about $1,370?
>
> HUSBAND: My current understanding is that that is included in my annuity until I turn 62.
>
> ....
>
> MR. MOSKOVITZ: Okay. Help me, Mr. Parsons, understand from your understanding the limitations there are with what you can go out and earn without it impacting what's contained on Page 3 of your interrogatories in Subsection B, that income you receive from the FERS.
>
> HUSBAND: My understanding is that there's a cap just like people that have Social Security but it's somewhere close to $15,000. Id. at 31, 37.

In regards to Husband's income from his "casual job" with Raytheon Corporation, Husband testified, "I would probably make about $15,000 a year, which would be equal to the Social Security cap because I receive that what you want to call the FERS benefit." Id. at 36-37.

On July 10, 2014, the parties signed their Marital Dissolution Agreement, which provided, "Wife is entitled to fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System." (Trial Exhibit 3). Per the parties' Marital Dissolution Agreement, the United States Office of Personnel Management (hereinafter "OPM") was directed to pay Wife's share of the FERS Supplement directly to Wife. However, Husband was ordered to pay fifty percent (50%) of Wife's share of the FERS Supplement directly to Wife on the first day of each month while the necessary documents were being processed, prior to Wife's receipt of fifty percent (50%) of the FERS Supplement directly from OPM.

At the time that the parties entered into their Marital Dissolution Agreement, Husband's FERS Supplement totaled $1,370 per month, therefore, the Agreement granted Wife the right to receive $685 a month. In anticipation of receiving $685 a month from Husband's FERS Supplement until Husband turned sixty-two (62) and $2,407 a month from Husband's Civil Service Annuity, Wife waived her claim to alimony of any kind. Upon the entry of the Final Decree of Divorce on July 16, 2014, the parties' property division became a judgment of this Court, and the incorporation of the parties' Marital Dissolution Agreement into the Final Decree made this property division nonmodifiable. *See* Towner v. Towner, 858 S.W.2d 888, 890 (Tenn. 1993).

Following the entry of the parties' Final Decree of Divorce, despite the mandates of the Marital Dissolution Agreement, the Court Order Assigning Benefits under the Federal Employee Retirement System, and the Final Decree of Divorce, OPM did not pay Wife's share of Husband's FERS Supplement, or $685 a month, directly to Wife.

Instead, OPM continued to pay the full amount of the FERS Supplement, or $1,370 per month, directly to Husband.

Although Husband received one hundred percent (100%) of the FERS Supplement each month, Husband failed and refused to pay Wife any percentage of this Supplement from December of 2014 to June 22, 2015, when Wife filed her Petition for Civil and Criminal Contempt. **Following the filing of Wife's Petition**, on June 26, 2015, Husband paid Wife $3,451 towards the $4,795 FERS Supplement arrearage, and on July 13, 2015, Husband paid Wife $493 towards the $685 due to Wife for the FERS Supplement for the month of July 2015. (Trial Exhibits 19 & 20).

Subsequently, on July 27, 2015, Husband's counsel sent Wife's counsel a letter which stated that Husband's FERS Supplement had been reduced from $1,370 a month to $0 a month due to Husband's 2014 income. Said letter continued, "Please be advised that because Fifty Percent (50%) of Zero Dollars ($0.00) is Zero Dollars, Ms. Parsons will not receive a FERS Annuity Supplement payment beginning August 1, 2015." (Trial Exhibit 5).

As revealed by Husband's 2014 income tax return, received by Wife in April of 2015, Husband's 2014 earned income far exceeded what was contemplated by the parties' Marital Dissolution Agreement and Permanent Parenting Plan, which were premised upon Husband's assertions that his earned income would total $15,000 a year. This fact is made blatantly apparent in the agreed Permanent Parenting Plan, entered with the Court on July 16, 2014, whereby Husband's gross income is reflected as $4,597 a month, which, pursuant to the Marital Dissolution Agreement, is comprised of half of Husband's Civil Service Annuity, totaling $2,662 a month, and half of

Husband's FERS Supplement, totaling $685 a month. (Trial Exhibit 4). This income figure also includes Husband's earned income of $15,000 a year, or $1,250 a month, from Raytheon Corporation. 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**).

Tennessee courts have routinely 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 888, 889 (Tenn. 1993), 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 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.

Subsequently, in Johnson v. Johnson, 37 S.W.3d 892, 897 (Tenn. 2001), the Tennessee Supreme Court held that once parties obtain a vested interest in the property allocated to them in a marital dissolution agreement, neither party may frustrate the other's receipt of the property in which he or she has a vested interest. A party's failure to compensate his or her spouse to the extent of his or her vested interest constitutes a unilateral modification of the marital dissolution agreement in violation of Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993). Id.

The holding in Johnson has been limited by the U.S. Supreme Court's decision in Howell, to the extent that 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. Accordingly, the Court's decision in Howell overrules Johnson **in part**, as **federal law** preempts state courts from dividing military retirement pay waived by a veteran in order to receive disability benefits. Howell, 2017 U.S. at *13-14.

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. Elliott, 149 S.W.3d at 84; Flowers v. Flowers, 2007 Tenn. App.

LEXIS 75 (Tenn. Ct. App. Feb. 6, 2007) (a copy of which is attached hereto); Pruitt v. Pruitt, 293 S.W.3d 537 (Tenn. Ct. App. 2008); Minor v. Minor, 2014 Tenn. App. LEXIS 41 (Tenn. Ct. App. Jan. 31, 2014) (a copy of which is attached hereto).

In Elliott v. Elliott, 149 S.W.3d at 81, the parties entered into a marital dissolution agreement in which husband agreed to transfer one-half (1/2) of his Home Depot stock options to wife. Following the entry of the parties' final decree of divorce, husband and wife discovered that Home Depot's employee stock plan would not permit husband to transfer these stock options to wife. Id.

In an attempt to equally divide the stock options, wife's counsel prepared a QDRO that was entered with the court. Id. However, Home Depot refused to honor the QDRO and advised wife that the only way that she could receive the benefit of her one-half (1/2) share of husband's stock options was for husband to exercise the options himself and transfer the proceeds to her. Id. at 81-82. Although husband initially told wife that he would exercise her stock options and transfer the proceeds to her, husband later decided that he was not going to exercise wife's options as agreed. Id. at 82. Wife then filed a petition for contempt or in the alternative, to modify the divorce decree. Id. at 82-83.

During the hearing of wife's petition, husband alleged that all he agreed to do in the parties' marital dissolution agreement with respect to the stock options was to sign the paperwork transferring the options to wife. Id. at 84. Thus, husband alleged that the dilemma in which the parties found themselves was not one of their own making, as Home Depot refused to divide the stock options. Id.

The trial court disagreed with husband and granted wife's petition, concluding that husband obstructed the division of the parties' martial assets, as husband impermissibly impeded the transfer of the cash value of the stock options to wife. Id. at 83. The trial court then entered a judgment in favor of wife for the value of the options on the date of the entry of the final decree, and awarded wife attorney fees and post-judgment interest. Id.

On appeal, the Tennessee Court of Appeals affirmed the trial court's conclusion that husband impermissibly impeded the division of the parties' marital estate, and that wife was entitled to recover damages as a result. Id. at 86. Citing Johnson, the Court opined,

> An MDA's provisions 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. The parties may not unilaterally modify an MDA once it has been approved by the trial court. In fact, both 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. Id. at 84 (internal citations omitted).

Similar to Johnson, the Court applied contract principles when interpreting the parties' marital dissolution agreement and detailed that a marital dissolution agreement, like other contracts, imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract. Id. at 84-85. This duty requires a party to do nothing that will have the effect of impairing or destroying the rights of the other party to receive the benefits of the contract. Id. at 85.

The Court held that once the parties discovered that the mechanism chosen by their attorneys to transfer the stock options had failed, they were obligated to deal with

each other fairly and in good faith to effectuate the intent of their martial dissolution agreement. Id. at 86. Husband's refusal to exercise wife's stock options and transfer the proceeds of these options to wife constituted a breach of his duty of good faith and fair dealing under the marital dissolution agreement. Id.

The Court held that the fact that husband viewed his conduct as justified was irrelevant, as "subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." Id. Thus, the Court affirmed the trial court's conclusion that husband obstructed the division of the martial estate and awarded wife damages. Id.

Similarly, in Flowers v. Flowers, 2007 Tenn. App. LEXIS at *2, the parties' property settlement agreement provided that husband would designate his ex-wife as the sole and irrevocable beneficiary of his IRA account and other pension benefits. After discovering that husband failed to designate ex-wife as beneficiary of the foregoing accounts, ex-wife filed a petition for contempt, alleging that husband failed to comply with the terms of the parties' final decree of divorce. Id. at *10. Husband passed away shortly thereafter, leaving over $365,000 in assets subject to the claims of ex-wife, his current wife, and his children. Id. At the time of husband's death, his second wife was designated as beneficiary of his pension benefits. Id. at *7.

The trial court awarded ex-wife 11.58% of husband's pension benefits and awarded husband's current wife the remainder of these benefits. However, the Tennessee Court of Appeals reversed this holding and awarded ex-wife one hundred percent (100%) of all of husband's pension benefits. Id. at *26. Citing Johnson, the Tennessee Court of Appeals held that by virtue of the property settlement agreement,

ex-wife's "interest in the retirement benefits and the IRAs were vested as of that date and could not be unilaterally altered." Id. at *21 (citing Johnson, 37 S.W.3d at 897). Thus, once the parties' property settlement agreement was incorporated into the parties' divorce decree, it became a judgment of the court not subject to modification. Id. at *19-21.

Likewise, in Pruitt v. Pruitt, 293 S.W.3d at 542, the Tennessee Court of Appeals cited Johnson for the proposition that once a final decree of divorce becomes a final, non-appealable judgment, it is no longer subject to modification. In Pruitt, the parties' marital dissolution agreement provided that wife would receive forty percent (40%) of husband's pension and retirement benefits, which would be accomplished by the entry of a QDRO. Id. at 540. The trial court entered the QDRO in January of 1997, several days after the entry of the parties' final decree. Id.

In 2004, husband retired and wife submitted the 1997 QDRO to husband's pension plan administrator. Id. at 541. For reasons that are not explained in the record, in 2006, the parties prepared a second QDRO, the provisions of which differed significantly from the 1997 QDRO, and entered it with the trial court. Id. After the plan administrator rejected the 2006 QDRO, Wife filed a petition for contempt against husband, alleging that he failed to secure her share of retirement benefits. Id.

The Tennessee Court of Appeals held that pursuant to the parties' marital dissolution agreement and the 1997 QDRO, wife was entitled to forty percent (40%) of husband's retirement benefits accrued up to the date of execution of the agreement. Id. at 545. Citing Johnson, the Court held,

> The QDRO and the MDA were incorporated into the Final Decree of Divorce, which became a final, non-appealable

> judgment in 1997. Therefore, the terms and provisions of the Final Decree, including those of the MDA and QDRO incorporated therein, were not subject to modification when the parties entered into the 2006 QDRO. Id. at 544 (citing Johnson, 37 S.W.3d at 895).

Additionally, in Minor v. Minor, 2014 LEXIS at *13, the Tennessee Court of Appeals cited Johnson when it held that husband and wife obtained a vested interest in the property allocated to them in their martial dissolution agreement, and neither party may frustrate the other's receipt of his or her vested interest. In Minor, husband was required to pay alimony in an amount that covered half of wife's monthly mortgage payments on the former marital residence until said mortgage was paid off in full. Id. at *4. Husband failed to fulfil his alimony obligation to wife and as a result, wife fell behind on her mortgage payment. Id. at *5

Several years after the entry of the parties' final decree, wife's home was sold in a foreclosure sale to the lender. Id. Husband then filed a petition to modify the final decree to terminate his alimony obligation, asserting that his alimony obligation ended when the marital residence was sold at foreclosure, because at that point, the mortgage was paid off in full. Id. at *7. The trial court terminated husband's alimony obligation, reasoning that once the foreclosure occurred, neither party had a further obligation to pay the mortgage, as it was paid in full under the terms of their marital dissolution agreement. Id.

On appeal, Wife alleged that husband's alimony obligation should not be terminated, as the parties could not have intended for this alimony provision to be applied in a way that would allow husband to willfully fail to make alimony payments, cause wife to lose her home in foreclosure proceedings, and then be rewarded for his

misconduct. Id. at *17-18. The Tennessee Court of Appeals agreed with wife and opined that any interpretation of the parties' marital dissolution agreement that allowed husband to reap a windfall from his willful failure to pay the required alimony would be both unwise policy and contrary to the well-settled principals of contract construction. Id. at *21.

The Court detailed,

> The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and **the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other**. Accordingly, the 'interpretation which evolves the more reasonable and probable contract should be adopted and a construction leading to an absurd result should be avoided.' Id. (internal citations omitted) (emphasis added).

The Court likened husband's actions to that of a parent who seeks to avoid his or her support obligation by becoming willfully underemployed or unemployed, stating,

> **In both situations, the 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.** *See* Elliott, 149 S.W.3d at 84 ("neither party may frustrate the other's receipt of his or her vested interest"). Id. at *22-23 (emphasis added).

Accordingly, the Court reversed the trial court's decision, holding that it would be inequitable to permit husband to terminate his alimony obligation by virtue of his own misconduct. Id. at *22.

Wife submits that Towner and its 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.

Furthermore, as detailed in Elliott, a reported opinion, a martial dissolution agreement's provisions pertaining to the division of the parties' marital estate are contractual, and every contract imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract. Id. at 84-85. This duty requires a contracting party to do nothing that will have the effect of impairing or destroying the rights of the other party to receive the benefits of the contract. Id. at 85.

In Elliott, similar to the present case, husband's employer refused to honor the parties' final decree of divorce and transfer one-half of husband's stock option plan to wife. Id. at 81-82. Husband asserted that his obligation with respect to the stock options ended when his employer refused to transfer these options to wife. Id. at 84. However, the Tennessee Court of Appeals held that once husband's employer refused to honor the parties' final decree, the parties "were obligated to deal with each other fairly and in good faith to effectuate the intent of the MDA." Id. at 85. The Court detailed that in frustrating wife's receipt of the property in which wife had a vested interest, husband impermissibly impeded the division of the marital estate, and wife was entitled to receive damages as a result. Id. at 86.

In Husband's Memorandum, Husband alleges, in pertinent part,

> Husband did not intend to contract that after 'necessary paperwork' for the FERS Supplement had been completed, OPM would refuse to remit the same to Wife, and the then attendant circumstances would reduce Husband's FERS Supplement entitlement to $0 and Husband would pay Wife $685 each month.

Wife submits that similar to Elliott, when the parties discovered OPM's refusal to divide the FERS Supplement and subsequently, when Husband's FERS Supplement was reduced to $0, the parties were obligated to deal with each other fairly and in good faith to effectuate the intent of the Marital Dissolution Agreement. Id. at 85. Pursuant to the parties' Agreement, Wife was entitled to a one-half interest in all amounts that Husband would receive from his FERS Supplement as a result of his retirement from the FAA, or $685 a month. Johnson, 37 S.W.3d at 896-97.

Husband's failure to compensate Wife to the extent of her vested interest in his FERS Supplement constituted a unilateral modification of the parties' Marital Dissolution Agreement, as well as a breach of his duty of good faith and fair dealing pursuant to the Agreement. Elliott, 149 S.W.3d at 86. Accordingly, akin to Elliott, this Court should find that Husband impermissibly impeded the division of the marital estate, and that Wife is entitled to recover damages as a result. Id.

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 Tenn. App. LEXIS at *21. 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 *23. 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.

Similarly, 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, "[H]is 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." Johnson, 37 S.W.3d at 897.

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 Tenn. App. LEXIS at *22. This Court should not allow Husband to frustrate Wife's receipt of the property in which she has a vested interest by wrongfully causing dilemma in which the parties' find themselves. Id. 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 *21.

As previously detailed, 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.

Therefore, just as this Court would not allow a parent to avoid his support obligation by becoming willfully underemployed, this Court should not permit Husband 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 *22. Allowing Husband to benefit from this conduct would be contrary to policy and the well-settled principles of contract construction. Id. at *21. Accordingly, this Court should enforce the parties' Final Decree of Divorce and hold that Wife is entitled to a one-half interest in all amounts Husband would ordinarily receive from his FERS Supplement, or $685 a month.

C. Even if the USFSPA controlled the division of Husband's retirement benefit, Husband could not use this federal law to undermine the contractual agreement entered into by the parties to divided said benefit.

Wife submits that Husband's reliance on Howell not only fails to take into account the fact that Howell is limited solely to the context of military retirement benefits, it also fails to acknowledge that Howell does not preclude a party's **contractual agreement** to divide a veteran's disability payments. In the present case, Husband's FERS Supplement is not military retirement pay, and the parties contractually agreed in their Marital Dissolution Agreement to equally divide Husband's gross FERS Supplement. Accordingly, even if Husband was a retired, disabled veteran, Howell and 10 U.S.C.S. § 1408 would have no effect upon the parties' Marital Dissolution Agreement.

The Tennessee Court of Appeals has held that the USFSPA does not preclude enforcement of the parties' **contractual agreement** to divide military funds that fall outside of the USFSPA's definition of "disposable retired pay." Selitsch v. Selitsch, 492 S.W.3d 677 (Tenn. Ct. App. 2015); Collins v. Collins, 2016 Tenn. App. LEXIS 551, at

*11 (Tenn. Ct. App. Aug. 1, 2016). In Selitsch, the parties consented in their marital dissolution agreement that husband would receive his disability benefit and the parties would share equally in husband's retirement benefits. Id. at 681. After the entry of the parties' final decree, Husband filed a Rule 60.02 motion in which he alleged that the parties mistakenly believed that his military retirement was marital property, as the USFSPA prohibits courts from treating disability benefits as marital property. Id. at 681-82.

Ultimately, the Tennessee Court of Appeals held that the agreement of the parties to share husband retirement benefit did not violate federal law, as the USFSPA does not preclude spouses from **contractually agreeing** to divide non-disposable retired pay. Id. at 686. The Court noted that this conclusion has been recognized by other state courts as well. *See* Poullard v. Poullard, 780 So. 2d 498, 500 (La. Ct. App. 2001) ("[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another"); Shelton v. Shelton, 78 P.3d 507, 510-11 (Nev. 2003) (holding that federal law does not prevent a husband from using his disability payments to satisfy a contractual obligation to his wife); Hoskins v. Skojec, 265 A.D.2d 706, 707 ("[P]arties are free to contractually determine the division of [military disability] benefits and a court may order a party to pay such moneys to give effect to such an agreement.").

Wife respectfully submits that Howell is inapplicable to the present case, as the Howell Court held that federal law prevents a state court from dividing a veteran's non-disposable retired pay pursuant to a divorce. Howell, 2017 U.S. at *13-14. In the present case, Husband's FERS Supplement is not military retirement pay, and the

division of Husband's FERS Supplement is expressly authorized by Section 8467 of title 5 of the United States Code.

Furthermore, the trial court did not make the initial division of Husband's FERS Supplement. To the contrary, the parties' agreed in their Marital Dissolution Agreement to equally divide Husband's FERS Supplement, which totaled $1,370 a month at the time of the parties' divorce. Therefore, even if the USFSPA controlled the division of Husband's retirement benefit, Husband could not use this federal law to undermine the contractual agreement entered into by the parties to divided said benefit. *See* Collins v. Collins, 2016 Tenn. App. LEXIS at *11 (holding, "[P]arties are free to contractually determine the division of military retirement pensions and disability benefits, and a court may order a party to pay such monies to give effect to the agreement.)

In the parties' Marital Dissolution Agreement, Husband voluntarily agreed that Wife would receive fifty percent (50%) of Husband's gross FERS Supplement, or $685 a month. The parties anticipated that following their divorce, Wife would receive $685 a month from the Office of Personnel Management. Once the parties discovered that the mechanism chosen by their attorneys to divide the FERS Supplement had failed, and subsequently discovered that Husband's FERS Supplement had been reduced to $0 due to his increased earned income, they were obligated to deal with each other in good faith to effectuate the intent of their Agreement. Elliott, 149 S.W.3d at 85.

Husband cannot use Howell to undermine the parties' Marital Dissolution Agreement, nor can he unilaterally modify the Agreement once it has been approved by the trial court. Id. at 84. Therefore, Wife alleges that this Honorable Court should enforce the parties' Final Decree of Divorce and hold that Wife is entitled to a one-half

interest Husband's FERS Supplement, calculated as of the date of the entry of the Final Decree of Divorce, or $685 a month. Wife alleges that this Court should also order Husband to pay Wife $17,976 for Wife's fifty percent (50%) of Husband FERS Supplement from December 2014 through July 2017, as well as post-judgment interest, and award Wife all of her attorney fees related to her Petition for Civil and Criminal Contempt, Amended Petition for Civil and Criminal Contempt, and appeal.

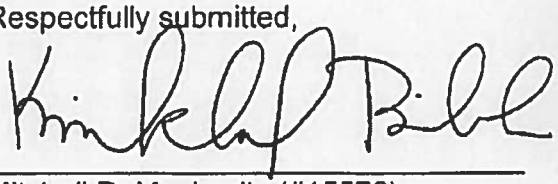
CONCLUSION

Wife respectfully submits that Howell v. Howell, 2017 U.S. LEXIS 2946 (2017)) has no bearing upon the present case, as Husband's FERS Supplement is not military retirement pay and this Court's ability to divide Husband's FERS Supplement and enforce the parties' Final Decree of Divorce is not precluded by federal law. Further, Wife submits that Husband's failure to compensate Wife to the extent of her vested interest in his FERS Supplement constituted a unilateral modification of the parties' Marital Dissolution Agreement in violation of Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993), as well as a breach of his duty of good faith and fair dealing implicit in every contract under Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004). Finally, Wife alleges that pursuant to the Tennessee Court of Appeals holding in Selitsch v. Selitsch, 492 S.W.3d 677 (Tenn. Ct. App. 2015), even if the USFSPA controlled the division of Husband's retirement benefit, Husband could not use this federal law to undermine the contractual agreement freely entered into by the parties to divide said benefit.

Wife alleges that Husband cannot use Howell to undermine the parties' Marital Dissolution Agreement, nor can he unilaterally modify the Agreement once it has been approved by the trial court. Therefore, Wife alleges that this Honorable Court should

enforce the parties' Final Decree of Divorce and hold that Wife is entitled to a one-half interest Husband's FERS Supplement, calculated as of the date of the entry of the Final Decree of Divorce, or $685 a month. Wife alleges that this Court should also order Husband to pay Wife $17,976 for Wife's fifty percent (50%) of Husband FERS Supplement from December 2014 through July 2017, as well as post-judgment interest, and award Wife all of her attorney fees related to her Petition for Civil and Criminal Contempt, Amended Petition for Civil and Criminal Contempt, and appeal.

Respectfully submitted,



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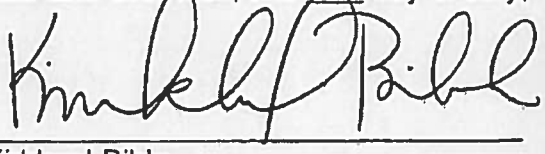
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been forwarded to Larry Rice and John Woods, Attorneys for Husband, 275 Jefferson Avenue, Memphis, Tennessee 38103, via facsimile and U.S. Mail, this 31st day of July, 2017.



Kirkland Bible

EMILY JOYCE COLLINS v. WILLIAM MICHAEL COLLINS

No. M2014-02417-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2016 Tenn. App. LEXIS 551

November 17, 2015, Session
August 1, 2016, Filed

PRIOR HISTORY: *Tenn. R. App. P. 3* [*1] Appeal as of Right; Judgment of the Chancery Court Affirmed. Appeal from the Chancery Court for Rutherford County. No. 11CV708. J. Mark Rogers, Chancellor.

DISPOSITION: Judgment of the Chancery Court Affirmed.

COUNSEL: John D. Drake, Murfreesboro, Tennessee, for the appellant, William Collins.

Robert J. Turner and J. Ryan Johnson, Nashville, Tennessee, for the appellee, Emily Joyce Collins.

JUDGES: RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

OPINION BY: RICHARD H. DINKINS

OPINION

Parties in divorce proceeding entered into an agreement on the day of trial, memorialized in writing, disposing of the marital assets and debts, adopting a parenting plan, and agreeing "as a division of marital assets" that Wife would "receive the sum of $2,100.00 per month directly from Husband's military pension." Husband filed motions both before and after the final decree was entered, seeking to modify the agreement by removing the provision that required him to pay $2,100.00 to Wife on the ground that the $2,100.00 payment exceeded fifty percent of his military retirement and included a monthly payment for service-related disability pay. The trial court denied Husband's [*2] motions and he appeals. Finding no error, we affirm the holding of the trial court.

OPINION

I. Factual And Procedural Background

William Collins ("Husband") and Emily Collins ("Wife") were married on May 23, 1993; throughout the marriage, Husband was enlisted in the United States Navy. On May 3, 2011, Wife filed a complaint for divorce; on January 29, 2013, when Husband's base pay was $7,356.60 per month, he and Wife entered into an agreed temporary order whereby he was to pay Wife $2,500.00 every two weeks in *pendente lite* alimony. Husband retired from the Navy in October of 2013 and began receiving retirement pay of $3,678.30 per month. Husband failed to make payments due to Wife on October 15, 2013 and on November 1, 2013, as a result of which Wife filed a petition for civil contempt on November 5, 2013.

The trial of the divorce and the contempt petition was set for December 17, 2013. On that date, Husband and Wife entered into an agreement, memorialized in writing and signed by both parties and their counsel, whereby Husband agreed, *inter alia,* to pay Wife $2,100.00 per month and Wife agreed to dismiss her contempt claims. Husband and Wife were placed under oath, and both confirmed [*3] their understanding and approval of the agreement in open court. For reasons not entirely clear from the record, the parties delayed in formulating the final decree and the trial court did not enter the Final Decree of Divorce until July 1, 2014; the decree declared the parties divorced on stipulated grounds, divided the marital estate and debts, adopted the parenting plan for the parties' child, and adopted the pertinent terms of the written agreement presented to the court on December 17, 2013 ("the December 2013 agreement").

Several events which led to this appeal took place after the parties reached the December 2013 agreement but before the court entered the Final Decree. On January 13, 2014, Husband received notice from the Department of Veterans Affairs that he had been determined to have service-related disabilities of 30% for generalized anxiety and 10% for gastric reflux, and that as a consequence, he would receive a disability benefit of $687.54 per month and his retirement pay would be reduced to $3,080.56 per month. On May 15, 2014, Husband filed a motion, styled "Motion to Set Aside Agreement of Divorce and Set Hearing" (herein "the May 15 motion"), wherein he "[gave] [*4] notice of his withdrawal from the announced agreement of the 17th day of December, 2013 that has not been finalized into a final order," asserting, *inter alia*, that he had entered the December 2013 agreement under duress, and that the terms of the agreement were "ill advised, financially burdensome, unconscionable and unfair." Husband requested that the court "set aside any announced order of divorce and to reset this matter for further hearing where the issues of the division of Husband's military retirement, survivor benefits, child support and parenting time may be properly litigated." The motion did not cite a rule of civil procedure in support of the requested relief.

On July 1, 2014, the trial court entered the Final Decree of Divorce, which includes the following language:

> This cause came to be heard . . . on the 17th day of December, 2013, . . . whereas the parties reached an Agreement on the morning of the hearing, said Agreement being announced to the Court and the Court finding such is fair and reasonable.
>
> ***
>
> It is further **ORDERED, ADJUDGED and DECREED** that as a division of marital assets, Wife shall receive the sum of $2,100.00 per month directly from Husband's military pension, [*5] beginning January 1, 2014 and said payment shall continue for the entirety of Husband's life. . . .
>
> In the event that Husband becomes disabled and/or is no longer eligible to receive his retirement benefit for any reason, then he shall continue to pay unto Wife the sum of $2,100.00 per month for the entirety of his life.
>
> The parties agree and stipulate that this Order may be supplemented, if necessary to comply with any rules and regulations of the U.S. Military in order to divide said retirement in accordance with the above terms.

On July 29 Husband filed another motion (herein "the July 29 motion"), also styled "Motion to Set Aside Agreement of Divorce and Set Hearing, asking the court to "set aside the final order in this cause pursuant to *Tennessee Rules of Civil Procedure 60.02(1)* for mistake, inadvertence, surprise or excusable neglect"; the grounds asserted in support of the motion were substantially the same as those asserted in the prior motion. After a hearing, the court entered an order denying the motion, holding in part:

> 3. That both Parties were represented by counsel at every stage of the proceeding.
>
> 4. That both parties are well educated.
>
> 5. That litigation in this matter extended from May of 2011 to December of 2013. [*6]
>
> 6. On December 17, 2013, both parties were represented at the trial in this cause and announced an agreed order in open court.
>
> 7. That both parties confirmed that they were freely and voluntarily entering into this agreement.
>
> 8. That both parties took an oath that they freely and voluntarily entered into this agreement.
>
> 9. That the Court then went through the terms of the agreement in open court.
>
> 10. That the Court's Divorce Coordinator had contacted the previous attorneys in this cause to submit a Revised Final Decree and Permanent Parenting Plan within thirty (30) days. Prior counsel failed to do so.
>
> 11. As to the Father's claim of duress, the court finds that the pressures of litigation and the threat of contempt are simply the normal pressures anyone would experience during litigation, which is in and of itself stressful, but not duress.
>
> 12. That no one protested this agreement at trial.
>
> 13. That there was no mistake or caveat of *Rule 60* which entitled the Father to relief.
>
> 14. That this was not an Irreconcilable Differences Divorce and that there was no Marital Dissolution Agreement triggering contractual relief.

Husband appeals, contending that the case should be remanded for the trial court [*7] to consider the motion filed on May 15, 2014, and that the trial court erred in allowing a division of Husband's retirement pay which exceeded 50% and which included payment for a service-related disability.

II. ANALYSIS

A. Husband's Motions to Set Aside Agreement and Set Hearing

We first address Husband's contentions regarding the two motions, both of which he styled "Motion to Set Aside Agreement and Set Hearing." Citing *Tenn. R. App. P. 4(e)*,[1] Husband contends that the trial court never disposed of the May 15 motion and that "the trial court retains jurisdiction (and conversely, this court lacks jurisdiction) until the trial court enters an order" disposing of the May 15 motion. Husband argues that, although he failed to cite a rule for the relief requested in the May 15 motion, he intended that it be treated as a motion to alter or amend pursuant to *Tenn. R. Civ. P. 59.04*.

> 1 *Tenn. R. App. P. 4(e)* provides, in relevant part, that "[t]he trial court retains jurisdiction over the case pending the court's ruling on any *timely filed motion*..." (emphasis added).

Motions filed pursuant to *Rule 59* must "be filed and served within 30 days *after* judgment has been entered." *Tenn. R. Civ. P. 59.02* (emphasis added). In this case, the final decree was not entered until July 1; thus, under *Rule 59.02*, the [*8] May 15 motion was not timely and his reliance on *Rule 4(e)* is misplaced. His contention that this case should be remanded to the trial court is without merit.

Husband argues that the July 29 motion which cited *Tenn. R. Civ. P. 60.02* as the basis for relief, was filed within thirty days of entry of the Final Decree and that, therefore, the court had an obligation to treat it as a *Rule 59* motion. Wife disagrees and contends that the July 29 motion should be treated as a *Rule 60* motion. We agree that the July 29 motion, having been filed within 30 days of entry of the Final Decree, was to be treated as a *Rule 59* motion, notwithstanding the fact that it cited *Rule 60* in support of the requested relief. *See Ferguson v. Brown, 291 S.W.3d 381, 386-88 (Tenn. Ct. App. 2008)* (holding that a party may obtain relief pursuant to *Rule 59.04* from an order entered as a result of mistake, inadvertence, or excusable neglect by a party's counsel notwithstanding the fact the party erroneously stated in its motion that it was seeking relief pursuant to *Rule 60.02(1)*).

Appellate courts review decisions dealing with *Rule 59.04* and *Rule 60.02* motions under an abuse of discretion standard since these requests for relief are "addressed to the trial court's discretion." *McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997)*. An appellate court is not permitted to substitute its judgment for that of the trial court under an abuse [*9] of discretion standard. *Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003)*. Only when a trial court has "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining" is the trial court found to have abused its discretion. *State v. Stevens, 78 S.W.3d 817, 832 (Tenn. 2002)* (quoting *State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)*).

B. Division of Military Retirement Funds and Disability Awards

Husband asserts that the agreement awards Wife an amount exceeding 50 percent of his disposable retired pay and includes pay that was subject to a disability award in violation of the Uniformed Services Former Spouses Protection Act (hereinafter referred to as the "Act"), *10 U.S.C. § 1408*. The Act permits state courts to divide a military retiree's "disposable retired pay" in a divorce proceeding, but "the Federal Government will not make community property payments that exceed 50 percent of disposable retired or retainer pay." *See Johnson v. Johnson, 37 S.W.3d 892, 895 (Tenn. 2001)* (quoting *10 U.S.C. § 1408(c)(1)*); *Mansell v. Mansell, 490 U.S. 581, 585, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989)*. The Act defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled less any amounts . . . deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation [*10] under title 5 [Government Organization and Employees] or title 38 [Veteran's Benefits]." *10 U.S.C § 1408(a)(4)(B)*.

This case presents issues similar to those in *Gonzalez v. Gonzalez, No. M2008-01743-COA-R3-CV, 2011 Tenn. App. LEXIS 21, 2011 WL 221888 (Tenn. Ct. App. Jan. 24, 2011)*, and *Selitsch v. Selitsch, No. 12CV-1621, 492 S.W.3d 677, 2015 Tenn. App. LEXIS 841, 2015 WL 6730955 (Tenn. Ct. App. Oct. 14, 2015)*. In *Gonzalez*, this Court considered whether a final decree violated the Act by awarding the wife 100 percent of the husband's military retirement pay. *Gonzalez, 2011 Tenn. App. LEXIS 21, 2011 WL 221888, at *1*. We adopted the reasoning employed in cases in other jurisdictions "that the 50% limit in [the Act] only addresses the amount of the

pension that can be paid directly to the former spouse by the government." *2011 Tenn. App. LEXIS 21, [WL] at *3, *5.* Finding "no legal authority prohibiting [the husband] from agreeing to provide his ex-wife with 100% of his retirement pay as part of a comprehensive property settlement," we held that the final decree did not violate the act. *2011 Tenn. App. LEXIS 21, [WL] at *5.*

The husband and wife in *Selitsch* negotiated an agreement, whereby the husband agreed to pay the wife one-half of his retirement pay. *Selitsch v. Selitsch, 2015 Tenn. App. LEXIS 841, 2015 WL 6730955, at *1.* At the time the parties entered into the agreement, the husband was retired from the military with a 100 percent disability rating, and thus, did not have any disposable retired pay that was subject to division as marital property. *Id.* The husband filed a *Rule 60.02* motion to set aside the agreement, [*11] contending that the parties mistakenly believed his military retirement pay was marital property. *Id.* On appeal, this Court ruled that the Act "did not preclude spouses from contractually agreeing to divide non-disposable retired pay." *2015 Tenn. App. LEXIS 841, [WL] at *7.* The husband did not dispute the fact that "the trial court did not make the initial division," but rather it was undisputed that the husband and the wife "agreed to share equally Husband's retirement"; therefore, this Court affirmed the denial of the motion. *2015 Tenn. App. LEXIS 841, [WL] at *7.*

In this case, we are not persuaded that Husband's arguments differ in any significant respect from the arguments rejected in *Gonzalez* and *Selitsch.* While Husband asserts that the agreement violates the Act because it awards Wife roughly 57 percent of his retirement pay, the agreement we upheld in *Gonzalez* awarded the wife 100 percent of the husband's retirement pay. As we stated in *Selitsch*, parties are free to contractually determine the division of military retirement pensions and disability benefits, and a court may order a party to pay such monies to give effect to the agreement. Similar to the lower court in *Selitsch*, the trial court in this case did not make the initial division of Husband's [*12] military benefits. Rather, Husband and Wife entered into a contractual agreement, whereby Husband voluntarily agreed to pay Wife $2,100.00 per month directly from his military pension. Moreover, the parties in this case specifically noted in their agreement that "[i]n the event that Husband becomes disabled and/or is no longer eligible to receive his retirement benefit for any reason, then he shall continue to pay unto Wife the sum of $2,100.00 per month for the entirety of his life." Based on the language in the agreement, it is clear that the parties contemplated the possibility of Husband's retirement pay changing and intended Husband's obligation to pay Wife $2,100.00 per month to remain, irrespective of such change. Thus, we reject Husband's insistence that he entered into the agreement under a mistake of fact.

Parties seeking relief under *Rule 59.04* have the burden of showing that the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *Stevens, 78 S.W.3d at 832.* Here, Husband has not carried this burden. The parties' agreement does not violate the Act and the trial court did not err by denying Husband's Motion [*13] to Set Aside Agreement and Set Hearing.

C. Frivolous Appeal

Wife contends that Husband's argument is "devoid of merit in that it fails to address any legal standards as to why the trial court's interpretation of *Rule 60.02* was an abuse of discretion and instead goes directly to the merits" and should be deemed frivolous in order that she be awarded attorneys' fees incurred in defending this case.

This court is authorized to award just damages against the appellant if we determine the appeal is frivolous or that it was taken solely for delay. *Tenn. Code Ann. § 27-1-122.* A frivolous appeal is one that is devoid of merit or has no reasonable chance of success. *Wakefield v. Longmire, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2004).* The statute, however, is to be "interpreted and applied strictly so as not to discourage legitimate appeals." *Id.* (quoting *Davis v. Gulf Ins. Group, 546 S.W.2d 583, 586 (Tenn. 1977).* Although we have ruled adversely to Husband concerning the issues he raised, we are unable to conclude that his appeal is devoid of merit. Accordingly, we do not find this appeal frivolous.

III. Conclusion

For the reasons set forth above, the judgment of the trial court is affirmed.

RICHARD H. DINKINS, JUDGE

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ROSE MARIE PURCELL FLOWERS (CLAYPOOL) v. ROBERT THOMAS FLOWERS, SR., ET AL.

No. M2005-01536-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT NASHVILLE

2007 Tenn. App. LEXIS 75

November 14, 2006, Session
February 6, 2007, Opinion Filed

SUBSEQUENT HISTORY: As Corrected February 7, 2007.

PRIOR HISTORY: [*1] *Tenn. R. App. P. 3*; Appeal as of Right; Judgment of the Circuit Court Reversed in Part, Affirmed in Part. Modified in Part and Remanded. A Direct Appeal from the Circuit Court for Davidson County. No. 86D-1980. The Honorable Muriel Robinson, Judge.

DISPOSITION: Judgment of the Circuit Court Reversed in Part, Affirmed in Part, Modified in Part and Remanded.

COUNSEL: Alan Mark Turk of Brentwood, Tennessee For Appellant, Rose Marie Purcell Flowers (Claypool).

L. Robert Grefseng of Columbia, Tennessee For Appellee, Janice Flowers.

JUDGES: W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and WILLIAM C. KOCH, JR. P.J., M.S., joined.

OPINION BY: W. FRANK CRAWFORD

OPINION

This case involves a dispute between the former wife of the decedent and the widow of the decedent over the proceeds of certain retirement accounts of the decedent. The dispute arises from a property settlement agreement incorporated in the final decree of divorce between decedent and his former wife on the one hand and a antenuptial agreement and property settlement agreement between decedent and his widow on the other hand. The trial court awarded former wife a portion of the life insurance policy and [*2] two of the decedent's retirement plans and awarded the widow part of the insurance proceeds and the proceeds of a Wal-Mart profit sharing account. Former wife has appealed, and both parties present issues for review. We reverse in part, affirm in part, modify in part and remand.

OPINIONThe instant litigation started when the appellant, Rose Marie Purcell Flowers (Claypool) (hereinafter referred to as "Appellant" or "First Wife") filed a petition for contempt against Robert Thomas Flowers, Sr., resulting from his alleged violation of a property settlement agreement incorporated in a final decree of divorce between First Wife and Mr. Flowers. As pertinent to the issues before the Court, the Agreement provides:

5. Husband shall receive all right, title and interest in and to his IRA account and other pension benefits, and Wife shall be divested of any interest therein except that Husband shall designate Wife as the sole and irrevocable beneficiary thereon until Wife's death. Husband shall also designate Wife as the sole and irrevocable beneficiary on all life insurance policies which he currently has in force, and Wife shall remain the same until her death. Said insurance [*3] policies are as follows:

	# 1422361	$ 8,000.00 (Tom)
2. MONY	# 894-48-54	$ 5,000.00 (Tom)
		$ 1,200.00 (Rose)
3. Conn. Mutual Life	# 2.477.990	$ 10,000.00 (Tom)
4. Wal-Mart Life Ins. And		
Stock Purchase Plan		$ 40,000.00
		Life insurance,
		Purchase plan
		unknown)

· First Citizens National Bank, Dyersburg, TN. IRA ACCOUNT

1. # XXXX8826

2. # XXXX8812 total value of $ 20,000.00 for both

Husband agrees that he shall keep said policies and IRA's listed above or equivalent substitutes in full force and effect, and he shall not place any liens or encumbrances on them or place loans on them so long as Wife lives.

The parties stipulated that the insurance policies and financial accounts listed in the agreement are no longer in existence, and the actual assets in controversy, at the time of trial are the insurance proceeds [1] and Wal-Mart pension benefits as of May 9, 2004, as follows:

Profit Sharing -	$ 137,013.23
Company 401-K -	$ 6,434.32
Associate 401-K -	$ 17,944.52
Total Pension Benefits -	$ 161,392.07
Wal-Mart Life Insurance (now America International	
Life Assurance Company of New York)	
Basic (company paid) -	$ 50,000.00
Optional	$ 150,000.00
Total Life Insurance	$ 200,000.00

[*4]

[1] The life insurance benefits in dispute in the trial court require different treatment than the pension benefits, but there is no appeal concerning the award of the insurance proceeds. This appeal involves only the dispute over the retirement benefits.

Robert Thomas Flowers, Sr., died May 9, 2004, and subsequently the Estate of Robert Thomas Flowers, Sr., was substituted as party defendant. Also added as further respondents were Janice F. Flowers, Administrator. CTA, and Janice Flowers, individually, Robert Thomas Flowers, Jr., Laura Beth Taylor, and Rebecca Fossee, the Flowers' children. Wal-Mart Stores, Inc. and American International Life Assurance Company of New York, were also added for purpose of interpleading assets under their control. By amendment, the suit was characterized as a declaratory judgment suit to determine the rights of the various parties.

The parties provided by written stipulation:

9. That Robert Thomas Flowers, Sr.'s first day of employment with Wal-Mart was July 19, 1986.

[*5] 10. That on May 9, 2004, Robert Thomas Flowers, Sr. died.

11. That as of May 9, 2004 Robert Thomas Flowers, Sr. had $ 50,000.00 in company paid group life insurance and $ 150,000.00 in optional life insurance and that such insurance was through American International Life Insurance Company of New York (AI Life). The $ 50,000 policy was obtained as a benefit through his employment with Wal-Mart Stores, Inc. At the time of his death, the beneficiary designation listed his three children being Laura Beth Taylor with 33.33 percent,

Rebecca Fossee with 33.33 percent and Robert Flowers, Jr. with 33.34 percent.

12. That with regard to the company paid group life insurance through Wal-Mart, as of February 5, 1997, Mr. Flowers designated Janice M. Flowers, his then wife, Robert T. Flowers, Laura Beth Taylor, and Rebecca Ann Fossee of the decedent's children as equal beneficiaries (25% each of the policy proceeds).

13. That on February 5, 1997 with regard to the optional life insurance through Wal-Mart (at that time issued by Cigna) decedent's wife, Janice M. Flowers, and three children as designated above were also designated as 25% each beneficiaries of policy proceeds.

14. That on November 18, 1998, Robert [*6] Thomas Flowers, Sr. designated both his company paid and optional life insurance plans through Wal-Mart, Inc. to Janice Flowers, decedent's wife (43.75% of life insurance benefits) with Robert Thomas Flowers, Jr., Beth Flowers Taylor, and Becky Flowers Fossee each to receive 18.75% of the life insurance benefits.

15. That on May 15, 2002, decedent designated both his company paid and optional life insurance plans plus his accident insurance and accidental death insurance to his children, Laura Beth Taylor, Rebecca Fossee, and Robert Flowers, Jr., equally, each daughter designated as a beneficiary of 33.33% death benefits and his son at 33.34% of death benefits.

16. That on November 12, 2002, Mr. Flowers designated both his company paid and optional life insurance plans to his three children, Laura Beth Taylor, Rebecca Fossee, and Robert Flowers, Jr., as beneficiaries with the daughters to each [sic] receive 33.33 percent of the death benefits and the son, Robert Flowers, Jr., to receive 33.34 percent.

17. That as of May 9, 2004, decedent had the following assets through Wal-Mart, Inc.

1. Profit Sharing: $ 137,013.23

2. Company 401(K): $ 6,434.32

3. Associates 401(K) $ 17,944.52

[*7]

That on May 15, 2002 and at the date of death, Mr. Flowers designated his wife, Janice Flowers, as the sole beneficiary of the benefits in his profit-sharing account and his company and associates 401 (K) Plan.

18. The letter of November 2, 2004 from Andy Rowlett of Howell & Fisher to the best of the parties' knowledge, sets out the benefits of the decedent at the time of his death and the change of beneficiary of his life insurance, 401 (K) and retirement which shall be submitted in evidence without further proof to the Court.

Correspondence from L. Robert Grefseng, dated January 4, 2005 and Phillip Robinson dated January 14, 2005 and the responses, including attachments to this correspondence from Any Rowlett on behalf of Wal-Mart dated January 27, 2005 which further explain the nature of Mr. Flowers' benefits shall be admitted into evidence.

19. That International Life Insurance Company of New York (AI Life) has paid into Court the sum of $ 153,045.51 for policy number 10722 under claim number W01094801 and has paid $ 51,015.17 through policy number 10722 under claim number W01094701.

20. That on April 26, 2002, Janice M. Flowers filed a Complaint for Divorce against [*8] Robert Thomas Flowers, Sr., in the Maury County Chancery Court. Thereafter, on April 30, 2002, Janice M. Flowers executed a Marital Dissolution Agreement which incorporated the terms of the Antenuptial Agreement entered into by and between Janice M. Flowers and Robert T. Flowers, Sr. dated December 11, 1996.

21. That on May 16, 2002, Robert T. Flowers, Sr. executed the Marital Dissolution Agreement.

22. That after Janice M. Flowers filed the Divorce Complaint with the Maury County Chancery Court and a Marital Dissolution Agreement was executed by both parties, they learned that Mr. Flowers had been diagnosed with terminal cancer and was given approximately four to six months to live.

23. That on May 29, 2002, an Order dismissing the divorce proceeding in Maury County was signed by the Court and entered on May 31, 2002.

24. That on April 15, 2004, Mr. Flowers executed a holographic will which has been duly admitted to probate in Maury County, Tennessee.

25. All parties waive the personal appearance of Serita Fields, Richard Baud and Betty Hendrix and agree that if called to testify, that their testimony would be in conformity with their discovery depositions, however, all parties [*9] reserve the right to object to portions of the deposition testimony if such testimony fails to conform to the rules of evidence.

Appellee, Janice Flowers (hereinafter referred to as "Second Wife" or "Appellee"), and Mr. Flowers married December 24, 1996. Previously, on December 11, 1996, they entered into an antenuptial agreement, which provides, as pertinent to the issues involved herein:

> 14. PENSION BENEFITS: Each party waives all rights that he or she may have as surviving spouse of the other:
>
> (a) To any qualified joint or survivor annuity;
>
> (b) To any qualified pre-retirement survivor annuity; and
>
> (c) To be the designated beneficiary of the other under any qualified pension or profit sharing plan.
>
> Each party further agrees, subsequent to their marriage, to consent in writing to an election to waive all such rights in form [sic] which complies with all the applicable statements, federal laws and regulations upon the request and waives any rights into the plan of the other except as provided herein:
>
> (a) In the event that Ms. Fann dies while the parties are still legally married, any retirement plan which she has with the State of Tennessee [*10] will go to Mr. Flowers as beneficiary. This, of course, is conditioned upon the parties being legally married and no divorce proceedings pending at that time.
>
> (b) Except as voluntarily designated in any such plan by the spouse.

After an evidentiary hearing, the trial court filed a Memorandum which included findings of fact. The Memorandum provides in pertinent part as follows:

> This matter came before the court on January 27, 2005, pursuant a Petition for Contempt filed by the first wife of Robert Flowers. The petition charges that Robert Flowers failed to comply with the Final Decree's order that he maintain life insurance and certain retirement accounts for the benefit of his first wife unless she predeceases him. In the course of this prosecution, Mr. Flowers passed away leaving over $ 365,000 in assets subject to claims from one former wife, one current wife and three children from the first marriage. The issues involve whether, under the terms of the Property Settlement Agreement (MDA # 1) incorporated within the Final Decree, the first wife is entitled to the proceeds of the later acquired insurance policies and retirement accounts, all of which have other beneficiaries, [*11] and to what extent she is entitled to them. The Court must then determine the disposition of the remaining assets in light of the second wife's (Janice Flowers, hereinafter Wife # 2) Antenuptial Agreement, Marital Dissolution

Agreement, one Holographic Will by Robert Flowers, and the designated beneficiaries of the assets in question. Wife # 2 raises the additional issue of whether the action here is time barred by the six-year statute of limitations for contract enforcement. The assets in question below relate to benefits that Robert Flowers received by virtue of his employment with Wal-Mart beginning July 19, 1986 and continuing up until he passed away.

FACTS AND HISTORY

Robert Flowers married Rose Marie Purcell (hereinafter Wife # 1) in Springfield, Tennessee on November 14, 1957. The parties were divorced in Nashville, Tennessee, over thirty years later, on September 19, 1986. Both Mr. Flowers and Wife # 1 entered into a Property Settlement Agreement (hereinafter MDA # 1) purporting to be a final settlement of all property rights and a discharge from all other claims arising out of their marital relationship. The agreement was approved and incorporated by the Court [*12] in the Final Decree of Divorce and provided for her to be listed as irrevocable beneficiary of Mr. Flowers' then existing life insurance policies and individual retirement accounts until her death.

Specifically identified in MDA # 1, paragraph 5, were the following insurance policies:

1. National Life Insurance Co.	# 1398120	$ 24,500.00
	# 1422361	$ 8,000.00
2. MONY	# 894-48-54	$ 5,000.00
		$ 1,200.00
3. Conn. Mutual Life	# 2.477.990	$ 10,000.00
4. Wal-Mart Life Ins. And		
Stock Purchase Plan		$ 40,000.00
		unspecified

5. Two Individual Retirement Accounts held with First Citizens National Bank Account numbers XXXX8826 and XXXX8812 represented to be worth $ 20,000.00.

The provision further provides that, while Wife # 1 was divested of any interest in the pension accounts, she would be the sole irrevocable beneficiary of the pension accounts until her death. Mr. Flowers was also ordered to designate Wife # 1 as the "sole and irrevocable beneficiary on all life insurance policies which he currently has in force . . . until her death." With respect to the IRAs, the husband was ordered to either keep the two accounts, or keep [*13] equivalent substitutes in full force and effect, free from encumbrances for the duration of the life of Wife # 1. The above insurance and retirement accounts total $ 108,700. The agreement further provided a final settlement of all property rights and a discharge of all further claims arising from the marital relationship, as well as a waiver of present and future claims.

Mr. Flowers began working for Wal-Mart in July 1986 and married Janice Fann (now Janice Flowers, Wife # 2), in December 1996. Prior to the marriage, the parties entered into an Antenuptial Agreement providing for the division of their separate and jointly owned property. Paragraph 15 of the Antenuptial Agreement discusses life insurance and declares that Mr. Flowers "has in effect a policy of life insurance in the face value of $ 300,000" and recites his desire to provide for his prior marital children. With these recitals, the agreement provided that Wife # 2 would receive a "one-fourth beneficiary" or "in essence a beneficiary for $ 75,000 of the face proceeds of the policy." The proof shows that Mr. Flowers had only $ 200,000 of life insurance coverage. Wife # 2 filed for divorce from Robert Flowers on April 26, 2002 in [*14] Maury County, Tennessee executing a Marital Dissolution Agreement that incorporated by reference the earlier antenuptial agreement. Wife # 2 voluntarily dismissed the divorce proceeding after she discovered that Robert Flowers had terminal cancer in May of 2002. Robert Flowers passed away on May 9, 2004.

In January 1988, Wife # 1, by and through counsel, initiated correspondence with Mr. Flowers admonishing him to comply with the provisions of the Final Decree with respect to insurance. The evidence further shows

that in early 2004 Wife # 1 and her attorneys began making inquiries towards First Citizens National Bank and National Life Insurance Company regarding the IRAs and insurance discussed in their Property Settlement Agreement (MDA # 1). These inquires revealed that the items promised were no longer in existence. Thereafter, she filed a Petition for Contempt on April 7, 2004 seeking permanent injunctive relief, court costs and attorneys' fees. The next day, Wife # 1 moved to join Wife # 2 and Wal-Mart as parties. By Agreed Order, Wife # 2 joined the suit as a party. Wal-Mart is the current provider of Mr. Flowers' insurance and retirement benefits and the life insurance. Wife [*15] # 2 is the sole beneficiary of the Profit Sharing and 401 (K) Plans. American International Life Insurance [sic] Company of New York issued the insurance policy on behalf of Wal-Mart and each of Mr. Flowers' three children stand as beneficiary effective November 12, 2002. American International filed a Motion to Intervene and the insurance proceeds were deposited with this court in December 2004. Additionally, on December 6th, 2004, by order of this Court, the estate of Robert Flowers was substituted for Mr. Flowers personally and his three children joined in this action to determine their rights to the insurance proceeds. Finally, Robert Flowers executed a Holographic Will dated April 15, 2004 naming Janice Flowers (Wife # 2) the beneficiary of all insurance and pension proceeds provided under his Wal-Mart employment.

The trial court noted that the case "turns upon the interpretation of the Marital Dissolution Agreement of Wife # 1 and the Antenuptial Agreement and Dissolution Agreement of Wife # 2." Subsequently, on April 11, 2005, the court entered its order making the award, and later amended the order by a consent order entered June 2, 2005. The amended order states as follows: [*16]

> It appearing to the Court as evidenced by the signatures of counsel below that all parties have agreed that amending the April 11, 2005 Order of this Court by substituting two paragraphs in it with the two paragraphs set forth below would simplify administration of this matter, it is therefore **ORDERED** that
>
> (I) the second paragraph on page one of that Order is substituted with the following:
>
> It is therefore **ORDERED, ADJUDGED AND DECREED** that Petitioner, Rose Marie Flowers (Claypool) is hereby awarded (1) $ 88,700 from the American International Life Insurance [sic] proceeds currently held in the Office of the Circuit Court Clerk, (2) 11.58% of the total value of the account of Robert Thomas Flowers, Sr., in the Wal-Mart Profit Sharing and 401 (k) Plan as of the date this order becomes final, and (3) all the shares in the Wal-Mart associate stock purchase plan ("ASPP") administered by EquiServe. Rose Marie Flowers (Claypool) will become the owner of all amounts and shares described in this paragraph, including, for the ASPP, any shares accumulated from dividend reinvestment, if any. Ms. Claypool shall have the right to give instructions to Wal-Mart and EquiServe regarding [*17] what to do with the amounts and shares awarded to her after this order becomes final.
>
> And
>
> (II) the first paragraph on page two of that Order is substituted with the following:
>
> It is further **ORDERED** that Respondent, Janice Flowers, is awarded one-fourth of the American International Life Insurance [sic] proceeds currently held in the Office of the Davidson County Circuit Court Clerk in the amount of approximately $ 51,015.17 and, further, is awarded the number of shares equal to 88.42% of the total value of the account of Robert Thomas Flowers, Sr. under the Wal-Mart Profit Sharing and 401 (k) Plan as of the date this order becomes final. Janice Flowers will become the owner of all amounts and shares described in this paragraph. Ms. Flowers shall have the right to give instructions to Wal-Mart and EquiServe regarding what to do with the amounts and shares awarded to her after this order becomes final.

Appellant, First Wife, has appealed and presents the following issues for review as stated in her brief:

> I. The trial court erred when it awarded appellee 88.42% of the total value of Mr. Flowers' Wal-Mart Profit Sharing Plan and Mr. Flowers' Associate 401 (K) [*18] Plan. The property settlement agreement between Mr. Flowers and the appellant precluded the award of any por-

tion of Mr. Flowers' pension benefits to appellee.

2. The execution of the December 11, 1996 Antenuptial Agreement by Mr. Flowers and appellee and its incorporation in their marital dissolution agreement in May 2002 precluded the award of any portion of Mr. Flowers' pension benefits to appellee.

Appellee has presented the additional issue:

The trial court erred in awarding any relief to the appellant as her claims are barred by the statute of limitations or alternatively by the doctrine of laches.

ANALYSIS

The material facts are not in dispute, and we agree with the trial court that the case at bar turns upon the interpretation of the Marital Dissolution Agreement of First Wife, and the Antenuptial Agreement and Marital Dissolution Agreement of Second Wife.

The issues set out by Appellant in the brief are rephrased and consolidated into the single issue of whether the trial court erred in awarding Appellee a part of the decedent's retirement benefits and not awarding the entire retirement benefits to Appellant.

The interpretation of a written agreement [*19] is a matter of law and not of fact; therefore, our review is *de novo* on the record with no presumption of correctness of the trial court's conclusions of law. ***NSA DBA Benefit Plan v. Connecticut Gen. Life Ins. Co.***, *968 S.W.2d 791, 795 (Tenn. Ct. App. 1997).*

A Marital Dissolution Agreement is essentially a contract between a husband and wife in contemplation of divorce proceedings and is to be construed as other contracts as to its meaning and effect. ***Bruce v. Bruce***, *801 S.W.2d 102, 105 (Tenn. Ct. App. 1990)*(quoting ***Matthews v. Matthews***, *24 Tenn. App. 580, 593, 148 S.W.2d 3, 7-12 (1940).* Upon incorporation of the property settlement agreement into a divorce decree, it becomes the judgment of the court. ***See Hays v. Hays***, *709 S.W.2d 625 (Tenn. Ct. App. 1986).* Court judgments are to be construed like any other written instruments. ***Livingston v. Livingston***, *58 Tenn. App. 271, 429 S.W.2d 452 (1967).*

In ***Gray v. Estate of Charles Henry Gray***, *993 S.W.2d 59 (Tenn. Ct. App. 1998)*, this Court said:

> The cardinal rule for interpretation of contracts [*20] is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. ***Winfree v. Educators Credit Union***, *900 S.W.2d 285, 289 (Tenn.App.1995)*; ***Rainey v. Stansell***, *836 S.W.2d 117, 118 (Tenn.App.1992).* In construing contracts, the words expressing the parties' intentions should be given their usual, natural, and ordinary meaning. ***Taylor v. White Stores, Inc.***, *707 S.W.2d 514, 516 (Tenn.App.1985).* In the absence of fraud or mistake, a contract must be interpreted and enforced as written, even though it contains terms which may seem harsh or unjust. ***Heyer-Jordan & Assocs. v. Jordan***, *801 S.W.2d 814, 821 (Tenn.App.1990).*

Id. at 64.

With the foregoing principles in mind, we will examine the documents in question. Paragraph Five of the Property Settlement Agreement between First Wife and decedent specifically awards husband "all right title and interest in and to his IRA account and other pension benefits," and thereupon divested the wife of any interest therein except, "husband shall designate wife as the sole [*21] and irrevocable beneficiary thereon until wife's death." The agreement listed life insurance in force at the time and also two IRA accounts totaling $ 20,000. The agreement specifically provides that husband will keep the policies and IRAs listed "or equivalent substitutes" in full force and effect as long as wife lives. It is apparent from these provisions that wife was not awarded specific property; however, wife was awarded specifically a contractual requirement that husband name her as a beneficiary of his IRA account and other pension benefits. We construe the obligation of husband, as set out in the agreement, to be an integral part of the agreement for a division of marital property, which is not subject to modification by the court. ***See Towner v. Towner***, *858 S.W.2d 888, 892 (Tenn. 1993).*

By virtue of the Property Settlement Agreement, the Appellant's interest in the retirement benefits and IRAs were vested as of that date and could not be unilaterally altered. ***See Johnson v. Johnson***, *37 S.W.3d 892, 897 (Tenn. 2001).* The question to be answered is what is that vested interest. The agreement set out IRAs valued at $

20,000 and insurance [*22] benefits. The stock purchase plan was listed without any value. The agreement provided that husband's obligation was to keep the policies and IRAs listed in full force and effect or to keep equivalent substitutes in full force and effect. The agreement vested authority in the husband over all of his retirement benefits, and the ongoing investment and re-investment thereof, and also provided that he was obligated to keep in full force and effect the equivalent substitutes of items set out in the Property Settlement Agreement. This provision does not change the specific obligation on the part of the decedent to name the Appellant "as the sole and irrevocable beneficiary thereon."

The Property Settlement Agreement is not a model of clarity; however, it does not appear to be ambiguous. The provision concerning property acquired by the decedent in the future is in keeping with the understanding of the parties and their limited circumstances at the time of the divorce that wife would receive some benefit from property accumulated after the divorce. The agreement specifically provides that while husband receives all right, title and interest to his "IRA account and other pension benefits, [*23] " wife should be divested of any interest except "that husband shall designate wife as the sole and irrevocable beneficiary thereon until wife's death." "[T]hereon" obviously refers to the "IRA account and other pension benefits." The Wal-Mart profit sharing account is a pension benefit and, under the terms of the Property Settlement Agreement, decedent was obligated to name Appellant as the sole and irrevocable beneficiary of this account. No one questions the trial court's award of two of the retirement accounts to Appellant and, as noted, the Property Settlement Agreement required the decedent to make the Appellant the sole beneficiary of his retirement benefits. The trial court erred in awarding the Appellee a part of the retirement benefits.

Appellant also asserts that the 1996 Antenuptial Agreement between decedent and Janice Flowers precluded the award of any portion of the pension benefits to the Appellee. We do not agree. The Antenuptial Agreement provided as to the pension benefits that the parties waived their rights to be designated as beneficiary, except for the husband as beneficiary of wife's retirement benefits. The provision goes on to state that after the marriage, [*24] they agreed to waive certain rights except as provided in the agreement. The agreement then provides for the exception regarding the Appellee's State of Tennessee Retirement Plan. More notably, however, is the next exception: "except as voluntarily designated in any such plan by the spouse." It is uncontroverted that the papers executed by the decedent for the pension plans designated awards to Janice Flowers and, thus, constituted an exception to the waiver of benefits. Moreover, the provision is further tempered with Paragraph Nine of the agreement which allows a voluntary transfer between the spouses. There is no other provision in the agreement that we are aware of that prohibits the decedent from designating Janice Flowers as a beneficiary of any of his benefits. While the agreement between the decedent and Janice Flowers would allow the decedent to designate Janice Flowers as a beneficiary of his pension benefits, the decedent was previously contractually bound to make Appellant the sole and irrevocable beneficiary of this account, and she had a vested interest by virtue of this contractual right that the decedent could not change. Accordingly, the trial court erred by awarding [*25] Janice Flowers a percentage of the Wal-Mart profit sharing account and should have awarded one hundred percent of this account to Appellant.

Appellee has presented the issue of whether Appellant's claim was barred by virtue of the statute of limitations or alternatively by the doctrine of *laches*. The trial court found that there was no evidence to sustain the proposition that the statute of limitations or the doctrine of *laches* barred the action. The Appellee has failed to cite to the record any evidence to support these defenses. An award based on the equitable defense of *laches* must be predicated on the trial court's finding of inexcusable, negligent, or unreasonable delay on the party asserting the claim with resulting prejudice to the defendant. ***Finova Capital Corp. v. Regel, 195 S.W.3d 656, 660 (Tenn. Ct. App. 2006).*** *Laches* is an equitable defense and requires the finder of fact to determine whether it would be inequitable or unjust to enforce a claimant's rights. ***Id.***

In the case at bar, the Appellant's interest established by the Property Settlement Agreement was the right to be designated as a beneficiary of the account in question [*26] and necessarily this designation could be made at any time up to the decedent's death. The evidence does not preponderate against the trial court's findings that neither the statute of limitations nor the doctrine of *laches* is proven to be a bar to the Appellant's claim.

The decree awarding part of Mr. Flowers' pension benefits to Appellee is reversed. The decree is modified to award one hundred percent of all of the decedent's pension benefits to the Appellant. The decree is in all other respects affirmed. Costs of the appeal are assessed against the Appellee, Janice Flowers.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.

DEIDRA KAY MINOR v. MELVIN RICHARD NICHOLS

No. W2012-01720-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT JACKSON

2014 Tenn. App. LEXIS 41

December 12, 2013, Session
January 31, 2014, Filed

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Vacated in Part and Remanded. An Appeal from the Circuit Court for Shelby County. No. CT-005750-08. Robert L. Childers, Judge.

DISPOSITION: Judgment of the Circuit Court is Vacated in Part and Remanded.

COUNSEL: William E. Friedman, Memphis, Tennessee, for the Plaintiff/Appellant, Deidra Kay Minor.

No brief filed on behalf of Defendant/Appellee, Melvin Richard Nichols.

JUDGES: HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and J. STEVEN STAFFORD, J., joined.

OPINION BY: HOLLY M. KIRBY

OPINION

This appeal involves the interpretation of a marital dissolution agreement. In the parties' divorce, the wife was awarded the marital home and the associated debt on the home. In the parties' marital dissolution agreement, the husband was required to pay alimony in an amount that covered half of the wife's monthly mortgage payments. The alimony payments were to be made for fifteen years or until the mortgage on the marital home was "paid off in full." The husband stopped making his alimony payments and the wife filed a contempt petition against him. While the contempt petition was pending, the wife fell behind on her mortgage payments and [*2] the house was sold in foreclosure. The husband then filed a petition to terminate his alimony obligation. After a hearing on both petitions, the trial court held the husband's failure to pay alimony constituted willful contempt of court. Interpreting the marital dissolution agreement, however, the trial court also held that the husband's alimony obligation ended when the marital home was sold in foreclosure, because at that point the mortgage was "paid off in full." The wife now appeals. We decline to interpret the parties' marital dissolution agreement in a manner that would terminate the husband's alimony obligation if the foreclosure resulted from his contemptuous failure to pay alimony to the wife. Accordingly, we vacate the trial court's decision and remand for further proceedings.

MEMORANDUM OPINION[1]

1 *Rule 10.* Memorandum Opinion

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied [*3] on for any reason in any unrelated case.
>
> *Tenn. Ct. App. R. 10.*

FACTS AND PROCEEDINGS BELOW

On March 2, 2009, Plaintiff/Appellant Deidra Kay Minor ("Wife") and Defendant/Appellee Melvin Richard Nichols ("Husband") were divorced by final decree. The final decree incorporated the parties' marital dissolution agreement ("MDA"), signed on January 12, 2009. The MDA reflects that the parties' marital home was the only marital property and the mortgage on the home was the only marital debt.

Under the MDA, Wife received the marital home, along with the mortgage and all of the related obligations. Husband, in turn, was to convey to Wife by quitclaim deed his interest in the house. The MDA provided:

> 20. **REAL ESTATE**. . . . The parties agree that Wife will continue to live in the marital residence and will be responsible for payment of all upkeep of the property, including all bills associated with the residence including, but not limited to, mortgage payments, utilities, phone service, house cleaning service and minor and major repairs.
>
> Husband agrees that he will sign a Quit Claim deed conveying any interest he has in the property to Wife and disclaims any interest he has in the equity of the home. [*4] Wife agrees to hold Husband harmless and indemnify him from any payments thereof. She shall also remove Husband's name from the mortgage within one (1) year from the entry of the Final Decree if it is possible for her to do so.

The MDA included a specific provision linking Husband's alimony obligation to the mortgage on the marital home:

> 21. **ALIMONY**. Husband shall pay the sum of $314.00 per month to Wife as periodic alimony, with said amount being paid to Wife beginning on the fifth day of the first month after the [MDA] is signed, and continuing on the fifth day of each month thereafter for fifteen years, or until the mortgage on the parties' home, as it exists as of the time the [MDA] is signed, is paid off in full. These payments will terminate automatically upon the first to occur of Wife's death or remarriage or Husband's death. . . . This provision is not modifiable by the court. After the amount set out herein has been paid in full, Husband will have no further obligation to Wife for any spousal support, except as set out herein. . .

(Emphasis added). It is undisputed that Husband's alimony was intended to help Wife meet her mortgage obligation of $636 per month.[2]

> 2 The mortgage [*5] amount was taken from Wife's affidavit filed in the trial court.

Husband quickly fell behind in his alimony payments. On November 19, 2009, Wife filed her first petition for contempt against Husband for failure to make his alimony payments in October and November 2009. On July 8, 2010, the trial court entered an order holding Husband in contempt of court and finding that Husband owed Wife a total of $2,940.85, for alimony for October 2009 through June 2010 plus interest and $2,000 in attorney fees.

The trial court's order apparently did not motivate Husband to stay current on the required alimony payments. On November 1, 2011, over a year after the trial court's first contempt order, Wife filed a second petition for contempt against Husband. This second petition asserted that Husband had failed to pay eight months of alimony in 2011. The missed payments totaled $2,512.00. Wife's contempt petition asserted that Husband "deliberately, willfully and wrongfully failed and refused to comply with" his alimony obligation.

Meanwhile, Wife fell behind on her mortgage payments. On January 6, 2012, Wife's home was sold in a foreclosure sale to the lender. Documents filed in the appellate record [*6] indicate that, at the end of 2011, the county property assessor valued the marital home at about $111,900.[3] At that time, Wife owed about $41,700 on the mortgage, so she had significant equity in the home. In the foreclosure, however, the lender purchased the home for only the amount remaining due on the mortgage. Thus, while the outstanding debt on the house was satisfied or "paid off," Wife lost the substantial equity she had in the home.

> 3 This valuation is taken from the records of the Assessor of Property of Shelby County of Tennessee.

On March 22, 2012, before the trial court held a hearing on Wife's second contempt petition, Husband filed a petition to modify the final decree of divorce to terminate his alimony obligation. In the petition to modify, Husband acknowledged that the MDA stated that the alimony obligation was "not modifiable by the Court." Husband asserted that, nevertheless, he was not repre-

sented by counsel during the divorce proceedings, and that the provision in the MDA making the alimony "not modifiable" was "unconscionable and unenforceable." Husband asked the trial court to relieve him of his alimony obligation because he did not have the ability to pay it, noting [*7] that his only income was $1,342 per month in social security and retirement benefits. At the time he executed the MDA, Husband claimed, he was living with family members and had no rental or mortgage expense. In January 2011, Husband said, he moved into his own residence, thus increasing his expenses substantially. He argued that this was a substantial and material change in circumstances that left him unable to make his alimony payments and warranted the termination of his alimony obligation.

In the alternative, Husband argued, the fact that "the parties' home was sold in a foreclosure sale on January 6, 2012," constituted a substantial and material change in circumstances: "The alimony payments were related to the mortgage payments. [Wife] no longer has this mortgage payment, and the main reason for [Husband] paying alimony has ceased to exist." He claimed that he "has struggled to make his payments since entry of the Final Decree of Divorce and this further shows that he does not have the present ability to pay the alimony." Thus, for this additional reason, Husband asked the trial court to terminate his alimony obligation.

In her response to Husband's petition to modify, Wife agreed [*8] that "the alimony payments were related to the mortgage payments on the parties' home," and that the home was sold at a foreclosure sale in January 2012. But she opposed Husband's request for termination of his alimony obligation because she "lost the house to foreclosure because of [Husband's] failure and refusal to pay her the $314.00 per month." As a result of the foreclosure sale, Wife claimed, she lost about $70,000 of equity in the house. Wife asserted that this loss was a direct result of Husband's willful failure to abide by his obligation to pay her the $314 per month in alimony. Wife asked the trial court to dismiss Husband's petition to modify and to award her a judgment against Husband for the entire arrearage plus the equity she had in the house as of the January 2012 foreclosure sale.

On June 22, 2012, the trial court conducted a hearing on the parties' motions. The trial court apparently issued an oral ruling at the hearing, but the appellate record does not contain a transcript of either the hearing or the oral ruling. On July 2, 2012, the trial court entered a written order outlining its ruling:

> 1. [Husband] was ordered to pay $314.00 per month alimony to [Wife] pursuant [*9] to a Final Decree of Divorce entered on March 2, 2009. The Court found that [Husband] was in arrears $3,454.00 plus $317.45 interest through June, 2012. The arrears and interest total $3,771.45.
>
> 2. The Court also awarded [Wife's] attorney . . . an attorney fee of $1,500.00, making the total amount awarded to [Wife] $5,271.45.
>
> 3. [Husband] made a purge payment of $2,000.00, leaving a balance of $3,271.45. [Husband] shall pay [Wife] $300 per month to satisfy the balance. The payments shall be sent to [Wife's] attorney . . . until paid in full.
>
> 4. The Court ruled that under the circumstances, it was not necessary for the Court to make a ruling on whether or not [Husband] was in willful contempt of the Court's previous Order.
>
> 5. The Court determined that based upon Paragraph 21 of the [MDA], the $314.00 monthly payment that [Husband] was paying to [Wife] was lump sum alimony rather than periodic alimony, and these payments could not be modified by the Court.
>
> ...
>
> 7. The Court ruled that since the alimony payments were to be paid for a specified period of time and for a sum certain, these payments were deemed lump sum alimony pursuant to *T.C.A. § 36-5-121*. Since the payments were to continue for [*10] fifteen years or until the mortgage is paid in full, the Court ruled that the alimony payments terminated in January, 2012, the month the parties' home . . . was sold at a foreclosure sale.
>
> 8. The Court determined that the mortgage was deemed "paid in full" once it was sold in foreclosure. Neither [Wife nor Husband] have any further liability on the mortgage. The alimony payments were terminated upon the payment of the mortgage in full as a result of the foreclosure sale. Therefore, it was not necessary for the Court to rule on the Petition To Modify Final Decree of Divorce.

> 9. The Court ruled that [Husband] was not required to make any alimony payments after January, 2012.

Thus, the trial court deemed Husband's alimony obligation to be lump-sum alimony and nonmodifiable. It also found that Husband had failed to make the required alimony payments through January 2012. The trial court held, however, that the question of whether Husband was in willful contempt of the final decree was moot because Husband's alimony obligation terminated when the house was sold in foreclosure in January 2012. The trial court reasoned that, once the foreclosure occurred, neither party had any further obligation [*11] to pay the mortgage and it was "paid off in full" under the terms of the MDA. In its written order, the trial court did not address Wife's argument that Husband's contemptuous failure to pay alimony caused the foreclosure and caused Wife to lose the entire equity in the house. Wife filed a motion for reconsideration.[4] In her motion, Wife pointed out that no testimony or other evidence was presented at the June 22, 2012 hearing; the trial court based its ruling solely upon the pleadings and statements of counsel. She reiterated her assertion that Husband's contemptuous conduct caused her to lose her home, and she attached to the motion her own affidavit supporting her position. In her affidavit, Wife averred that, other than Husband's required alimony payments, her only income at the time was $872.59 per month in social security benefits. She explained that the $636 monthly mortgage payment consumed most of her monthly income, so she could not make the mortgage payments without the additional $314 from Husband. Wife also attached to her motion the Deed of Trust on the marital home; it indicated that, had the mortgage payments been made as scheduled, the mortgage would have been paid [*12] off in February 2023. Thus, she contended, the trial court's interpretation of the MDA, allowing Husband to benefit from his willful failure to pay, was unjust: "The Court's ruling is entirely unjust, and is most unfair to [Wife], in that [Husband] is rewarded, and [Wife] has sustained the loss of her home, due to [Husband's] failure and refusal to pay to [Wife] the monthly alimony payments of $314.00."

> 4 Wife's motion for reconsideration was filed on June 26, 2012, which was after the trial court issued its oral ruling but before the written order was entered.

On July 13, 2012, the trial court conducted a hearing on Wife's motion to reconsider. The appellate record includes a transcript of that hearing. At the hearing, Wife was prepared to testify that Husband's failure to pay the required alimony caused her to default on the mortgage. The trial court declined to permit Wife to testify, finding her testimony unnecessary because all of the arguments made in Wife's motion to reconsider had been made in the previous hearing. At the conclusion of the hearing, the trial court adhered to its earlier ruling and denied the motion. On July 23, 2012, the trial court entered a written order consistent [*13] with its oral ruling, again holding that the mortgage on the property was "paid off in full" within the meaning of the MDA when the house was sold in foreclosure, so Husband's alimony obligation terminated at that time. From this order, Wife filed a notice of appeal.

On December 19, 2012, in response to a show cause order issued by this Court, the trial court issued an "Addendum to Order Entered July 2, 2012." to resolve all remaining issues. In that Addendum, the trial court held that Husband was, in fact, in willful contempt of the Final Decree by his failure to make alimony payments. Nevertheless, the trial court ordered that "no punishment be levied upon [Husband] for contempt." The trial court also specifically denied Husband's petition to modify the Final Decree. Now that a final order has been entered, we address the issues raised in this appeal. *See Tenn. R. App. P. 3.*

Issue On Appeal And Standard Of Review

On appeal, Wife argues that the trial court erred in concluding that the foreclosure sale of her house satisfied the contingency in the MDA that her mortgage be "paid off in full" so as to terminate Husband's alimony obligation.[5]

> 5 Wife did not appeal the trial court's damage [*14] award based on Husband's arrearage except to the extent that the court terminated Husband's obligation after January 2012.

The resolution of this issue involves the interpretation of the parties' MDA. An MDA is contractual in nature and is binding between the parties; therefore, the interpretation of the MDA is "subject to the rules governing construction of contracts." ***Barnes v. Barnes, 193 S.W.3d 495, 498 (Tenn. 2006)*** (citing ***Johnson v. Johnson, 37 S.W.3d 892, 896 (Tenn. 2001)***; ***Honeycutt v. Honeycutt, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003)).*** This Court has recognized that an MDA is a binding contract on the parties and that the parties' contractual rights vest upon the execution of the MDA:

> An MDA's provisions 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. ***Johnson v. Johnson, 37 S.W.3d at 896***; ***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 an MDA once it has been approved by the trial court. *Johnson v. Johnson, 37 S.W.3d at 895*. In fact, both [*15] 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. *Johnson v. Johnson, 37 S.W.3d at 897*.

Elliott v. Elliott, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004). Because "the interpretation of a contract is a matter of law, our review is *de novo* on the record with no presumption of correctness in the trial court's conclusions of law." *Honeycutt, 152 S.W.3d at 561* (citations omitted).

The "cardinal rule" of contract construction is to ascertain the intent of the parties and effectuate that intent consistent with applicable legal principles. *Frizzell Constr. Co. v. Gatlinburg, LLC, 9 S.W.3d 79, 85 (Tenn. 1999)*. This principle is also applied when interpreting an MDA:

> [O]ur goal is to ascertain and give effect to the parties' intentions. *Ahern v. Ahern, 15 S.W.3d 73, 81 (Tenn. 2000)*. Our search for the parties' intentions must focus on the MDA itself. Each provision of an MDA should be construed in light of the entire MDA, and the language in these provisions should be given its natural and ordinary meaning. We should construe MDAs fairly and reasonably, and we should avoid rewriting these [*16] agreements under the guise of "construing" them. *Duvier v. Duvier, No. 01-A-01-9311-CH-00506, 1995 Tenn. App. LEXIS 494, 1995 WL 422465, at *3 (Tenn. Ct. App. July 19, 1995)* (No *Tenn. R. App. P. 11* application filed).

Elliott, 149 S.W.3d at 84. When the language of the MDA is plain and unambiguous, courts determine the intent of the parties from the four corners of the contract and enforce its plain terms as written. *See Int'l Flight Ctr. v. City of Murfreesboro, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000)*. If, however, the contractual terms are ambiguous and the parties' intent cannot be ascertained from simply reading the language, courts then apply established rules of construction. *Planters Gin Co. v. Federal Compress & Warehouse Co., 78 S.W.3d 885, 890 (Tenn. 2002)*. "A contract [or MDA] is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Johnson, 37 S.W.3d at 896* (quoting *Farmers-Peoples Bank v. Clemmer, 519 S.W.2d 801, 805 (Tenn. 1975)*). An MDA is not ambiguous merely "because the parties may differ as to interpretations of certain of its provisions." *Id. at 896* (quoting *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Sys., Inc., 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994)*).

ANALYSIS

To [*17] address the issue Wife raises on appeal, we examine the trial court's interpretation of the parties' MDA. As set forth above, the relevant provisions of the MDA are paragraphs 20 and 21, which grant Wife a vested interest in the marital home and impose an alimony obligation upon Husband. We must give particular scrutiny to Paragraph 21:

> **21. ALIMONY.** Husband shall pay the sum of $314.00 per month to Wife as periodic alimony, with said amount being paid to Wife beginning on the fifth day of the first month after the [MDA] is signed, and continuing on the fifth day of each month thereafter for fifteen years, or until the mortgage on the parties' home, as it exists as of the time the [MDA] is signed, is **paid off in full**. These payments will terminate automatically upon the first to occur of Wife's death or remarriage or Husband's death. . . . This provision is not modifiable by the court. After the amount set out herein has been paid in full, Husband will have no further obligation to Wife for any spousal support, except as set out herein. . . .

(Emphasis added).

On appeal, Wife argues that the trial court's interpretation of the MDA is erroneous because parties could not have intended for [*18] this provision to be applied in a way that would allow Husband to willfully fail to make alimony payments, cause Wife to lose her house and home equity in foreclosure proceedings, and then be rewarded for his misconduct. Wife argues that such an unfair and unjust result could not have been in the parties' contemplation when they signed the document. Wife maintains that the trial court erred not only in reaching this conclusion in its July 2, 2012 order, but also in denying her motion to reconsider, in view of the fact that Wife submitted proof that the foreclosure was caused by

Husband's failure to make timely alimony payments. Husband did not file a brief on appeal.[6]

> 6 Husband was given an opportunity to submit an appellate brief by this Court, but he chose not to do so. Therefore, the case was submitted for decision on the appellate record, Wife's brief, and the oral argument of counsel for Wife.

The trial court below held, without explanation, that selling the house in foreclosure resulted in the mortgage being "paid off in full" within the meaning of the MDA. We surmise from the trial court's failure to apply the rules of construction to the relevant provisions of the MDA that the [*19] trial court felt that the MDA was clear and unambiguous on this point and that its interpretation was consistent with the parties' intent. We must respectfully disagree. In our view, whether the parties intended for the mortgage to be "paid off in full" by virtue of a foreclosure sale -- rather than "paid off in full" under the terms of the mortgage -- is ambiguous under the circumstances of this case. Wife was granted the marital home in the divorce, and both parties acknowledged in the trial court proceedings that the alimony was intended to provide Wife with the means to pay the mortgage. Had Husband abided by the MDA (and neither party died prematurely and Wife did not remarry), his alimony obligation would have ended in either February 2024, after fifteen years of timely payments to Wife, or in February 2023 after Wife's last scheduled mortgage payment "paid off in full" the mortgage.[7] The MDA does not specifically address the parties' rights and obligations upon a premature sale of the house. Under these circumstances, we find that the alimony provision in the MDA is ambiguous with respect to how a premature sale of the home affects Husband's alimony obligation.

> 7 We are puzzled [*20] by the trial court's holding that the alimony in this case is lump sum alimony or alimony *in solido*, in view of the fact that the total amount of alimony owed by Husband can vary depending on which of these contingencies effectuates the termination of his alimony obligation. We have held under similar circumstances that, when the total amount of alimony ultimately due depends on a future contingency that could alter the total amount to be paid, the award lacks the specificity required to constitute alimony *in solido*. *See McKee v. McKee, 655 S.W.2d 164, 166 (Tenn. Ct. App. 1983)*. *See also Gonsewski v. Gonsewski, 350 S.W.3d 99, 108 (Tenn. 2011)*. However, the trial court's decision to characterize the alimony as *in solido* instead of *in futuro* was not raised as an issue on appeal, so we will not address it.

Furthermore, the MDA grants Wife the marital home in the divorce, and it appears that she intended to continue to live there. It is undisputed that the alimony was intended to provide Wife the means to pay the mortgage so that she would have a place to live. Allowing Husband to deprive Wife of her home by failing to abide by his obligation under the MDA is contrary to the intent to give [*21] Wife a place to live. Thus, an interpretation of the MDA that terminates Husband's alimony obligation upon a foreclosure of the house that was caused by his failure to comply with the MDA is not consonant with the intent of the MDA as a whole.

Most importantly, we agree with Wife that any interpretation of the MDA that would permit Husband to reap a windfall from his willful failure to pay the required alimony would be both unwise policy and contrary to well-settled principles of contract construction. "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and which will not give one of them an unfair or unreasonable advantage over the other." *Securities Inv. Co. v. White, 19 Tenn. App. 540, 91 S.W.2d 581, 583 (Tenn. Ct. App. 1935)* (quoting unreported opinion in the first appeal of the case, which quoted 13 Corpus Juris, 540-541). Accordingly, the "interpretation which evolves the more reasonable and probable contract should be adopted and a construction leading to an absurd result should be avoided." *Id. at 584*; *see also E. O. Bailey & Co. v. Union Planters Title Guar. Co., 33 Tenn. App. 439, 232 S.W.2d 309, 314 (Tenn. Ct. App. 1949)* [*22] ("If the language [of a contract] is susceptible of two interpretations, one of which is reasonable and the other unreasonable when tested by the conduct of ordinarily prudent men similarly situated, that will be adopted which is in accord with the justice of the case."). An interpretation of the MDA that would terminate Husband's alimony obligation upon a foreclosure of the house that was caused by his failure to pay the required alimony would be unreasonable, and it would be inequitable to permit Husband to terminate his alimony by virtue of his own misconduct.

The facts in this case as alleged by Wife may be analogized to the familiar situation in which a parent seeks to avoid his or her support obligation by becoming willfully underemployed or unemployed. *See Anderson v. Anderson, No. 01A01-9603-CV-00118, 1996 Tenn. App. LEXIS 479, 1996 WL 465242 at *1 (Tenn. Ct. App. Aug. 16, 1996)* ("[T]he judicial system should look with the gravest disfavor upon parents who through their fault or design become underemployed in an effort to evade their legal, natural obligation to support their children."). In both situations, the court should not permit a party to

avoid his lawful support obligation by wrongfully causing [*23] the circumstance that might otherwise justify termination of the obligation. ***See Elliott***, *149 S.W.3d at 84* ("neither party may frustrate the other's receipt of his or her vested interest"). Therefore, for all of these reasons, we must respectfully reject an interpretation of this MDA that would permit Husband to benefit from his own contemptuous conduct.

The trial court below did not permit Wife to put on evidence that the foreclosure sale resulted from Husband's failure to pay alimony. Consequently, we cannot determine at this juncture whether the "paid off in full" contingency in the MDA was actually satisfied in this case. We must remand the case to the trial court for a factual finding on the cause of the foreclosure on the marital home. *i.e.*, whether the foreclosure resulted from Husband's failure to pay alimony or for some other reason, such as Wife's neglect or financial mismanagement. Once that determination is made, the trial court will then be in a position to determine whether the "paid off in full" contingency in the MDA was met in a manner that was reasonable and was consistent with the intent of the parties so as to terminate Husband's alimony obligation.

We observe that, [*24] in the proceedings below, the trial court appeared to place the burden on Wife to show that Husband's failure to pay alimony caused the house to go into foreclosure proceedings.[8] The trial court stated at the July 13, 2013 hearing: "I didn't hear any evidence [at the initial June 22, 2012 hearing] to prove to me by a preponderance of the evidence . . . that [Husband's] failure to pay his [alimony] caused the house to go into foreclosure." As the party seeking to terminate his alimony obligation, however, Husband bears the burden of proving the existence of circumstances that would terminate that obligation. ***See Watters v. Watters***, *22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)*. Therefore, on remand, Husband bears the burden of showing that the "paid off in full" contingency was met, and that his wrongdoing -- that is, his willful failure to pay alimony -- *was not* the cause of the circumstances that would otherwise result in the termination of his alimony obligation.

> 8 We do not have a transcript of the initial June 22, 2012 hearing, so we take this from the trial court's remarks at the subsequent hearing.

With these instructions, we vacate in part the decision of the trial court and remand for [*25] further proceedings consistent with this opinion.[9]

> 9 We note that, in light of our ruling herein, the trial court is not precluded from addressing Wife's claim for contempt damages if it is established that Husband's failure to pay alimony was willful and that it caused the foreclosure on Wife's house.

Wife requests that this Court award her attorney fees incurred in this appeal. We must consider several factors in exercising our discretion on this issue:

> [I]t is in the sole discretion of this court whether to award attorneys' fees on appeal. As such, when this Court considers whether to award attorney's fees on appeal, we must be mindful of "the ability of the requesting party to pay the accrued fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered."

*Parris v. Parris, No. M2006-02068-COA-R3-CV, 2007 Tenn. App. LEXIS 591, 2007 WL 2713723, at *13 (Tenn. Ct. App. Sept. 18, 2007)* (quoting ***Dulin v. Dulin***, *No. W2001-02969-COA-R3-CV, 2003 Tenn. App. LEXIS 628, 2003 WL 22071454 (Tenn. Ct. App. Sept. 3, 2003)*) (other internal citations omitted); ***see also Archer v. Archer***, *907 S.W.2d 412, 419 (Tenn. Ct. App. 1995)*. Given the result of [*26] this appeal, the parties' respective financial resources, and the overall equities of the case, we grant Wife's request for attorney fees on appeal. ***See In re Jaiden C.W.***, *No. M2012-01188-COA-R3-JV, 420 S.W.3d 13, 2013 Tenn. App. LEXIS 270, 2013 WL 1501876, at *9 (Tenn. Ct. App. Apr. 11, 2013)*. On remand, the trial court shall determine the reasonable costs and fees to which Mother is entitled.

CONCLUSION

The decision of the trial court is vacated in part and remanded for further proceedings consistent with this Opinion. Costs on appeal are to be taxed to Defendant/Appellee Melvin Richard Nichols and his surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE

IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

KELLY COLVARD PARSONS,
Plaintiff/Counter-Defendant,

v.

Docket No.: CT-004932-13
Division II

RICHARD JEARL PARSONS,
Defendant/Counter-Plaintiff.

HUSBAND'S SUPPLEMENTED RESPONSE TO AMENDED PETITION FOR CIVIL AND CRIMINAL CONTEMPT AND IN THE ALTERNATIVE, BREACH OF CONTRACT

Comes now the Defendant/Counter-Plaintiff, Richard Jearl Parsons ("Ex-Husband"), and responds to Plaintiff/Counter-Defendant, Kelly Colvard Parsons' ("Ex-Wife") *Supplemented Memorandum in Support of Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract*:

INCORPORATION

1. Ex-Husband hereby incorporates all allegations, defenses, arguments, and statements of fact or belief that have been raised in Ex-Husband's *Response to Plaintiff/Counter/Defendant's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract*, filed July 19, 2017, *Response to Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract* filed July 19, 2017, *Response to Petition for Civil and Criminal Contempt* filed November 12, 2015, *Husband's Response to Wife's Pretrial Statement of Alleged Facts*, filed January 4, 2016, and Ex-Husband's *Brief in Support of Response to Petition for Civil and Criminal Contempt*, filed February 25, 2016.

FACTS

2. On July 10, 2014, the parties filed a jointly signed *Marital Dissolution Agreement* ("MDA"), which was incorporated into their *Final Decree of Divorce* entered with this Court on July 16, 2014.

3. The parties agreed that Ex-Wife was entitled to fifty percent (50%) of Ex-Husband's FERS benefit under the Civil Service Retirement System. This was mostly made up of an annuity and to a much lesser extent the Supplement. The **FERS Supplement is the source of this controversy.**

4. Before signing the MDA, Ex-Wife was aware from discovery and other sources that Ex-Husband's FERS supplement would be reduced by $1.00 for every $2.00 over Mr. Parsons' exempt earnings amount.

5. Shortly after the Final Decree of Divorce, Ex-Wife came to Ex-Husband's residence. Her behavior prompted Ex-Husband to call the police.

6. On August 7, 2014, Ex-Wife filed for a Protection Order in Municipal Court in Collierville, Tennessee.

7. A hearing was held on the Protection Order on September 18, 2014, and a full criminal trial ensued. Ex-Husband was found not guilty.

8. Ex-Husband incurred in excess of Twenty Thousand Dollars ($20,000) in attorneys' fees to defend against the unfounded charges. This was an expense Ex-Husband did not anticipate at the time of the divorce.

9. Ex-Husband was under the Protection Order until the trial concluded. Ex-Husband was prohibited from "telephoning, contacting, or otherwise communicating with the alleged victim, either directly or indirectly."[1]

10. Ex-Wife filed her *Petition for Civil and Criminal Contempt* on June 22, 2015 and *Wife's Brief in Support of Petition for Civil and Criminal Contempt* on February 26, 2016.

[1] Amended Order Granting Bail for Abuse Cases, 1.

11. On July 22, 2015, Ex-Husband received notification that the annuity supplement from FERS to Ex-Husband would be reduced from $1370 to $0 beginning August 1, 2015 as his income had exceeded $15,120.

12. Ex-Husband notified Ex-Wife that by operation of the OPM formula for the FERS Supplement, the payments would cease as of August 1, 2015, and that Ex-Husband's remittances to Ex-Wife representing Ex-Wife's 50% interest in the FERS Supplement, would cease simultaneously.

13. The parties were heard on Ex-Wife's *Petition for Civil and Criminal Contempt* on March 2, 2016 and March 3, 2016.

14. During the March 2, 2016 hearing Ex-Wife stated:

> **I was going to be getting that FERS supplement forever** because of his income and it's shown by the fact that **I didn't get any child support for two children**. [Emphasis Added].

15. Ex-Wife was aware from discovery that the FERS Supplement terminated on Ex-Husband's 62nd birthday.

16. Ex-Wife agreed in the Marital Dissolution Agreement that at the time of the signing of the MDA, the parties would waive the nominal child support award.

17. Ex-Husband's income increased because of withdrawals from his retirement savings and returning to work. Ex-Wife filed a *Petition to Modify Child Support* on August 27, 2015. That hearing was held April 6, 2016 concluding with an award to Ex-Wife of $486 each month in Child Support with an arrearage of $2,698. Ex-Wife was also awarded $7,000 in attorneys' fees.

18. Ex-Wife received the benefit of Ex-Husband's increased earnings.

19. This Honorable Court entered an *Order Dismissing Petition for Civil and Criminal Contempt* dismissing Ex-Wife's Petition and finding, *inter alia*:

a. Ms. Parsons' *Petition* makes no allegations that would be consistent with civil contempt;

b. The Court finds that it is impossible for the Court to find that the case for civil contempt is made;

c. The Court finds that the parties find themselves in a dilemma which is not one of their own making;

d. The Court finds that the turn of events was not contemplated by either of the parties at the time of entering the MDA and the Final Decree of Divorce; and

e. The Court finds that Mr. Parsons cannot be held in civil or criminal contempt on these pleadings and on this proof.

20. This Court then went on to give leave to the Petitioner to seek redress under a theory of breach of contract, in place of a contempt theory.

21. Ex-Wife filed her *Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract* on June 23, 2017.

LAW AND ARGUMENT

Howell v. Howell[2] is controlling. At issue in Howell was whether a state court could permissibly declare an interest in a government retirement benefit as marital property, vest that interest in the former spouse, and then order that the value of that interest be reimbursed to the former spouse after the spouse himself lost the retirement benefit. The United States Supreme Court in a unanimous decision[3] held that the state court could not do so. The Howell court relied on two primary lines of reasoning. First, the state court was preempted from ordering "reimbursement or indemnification"[4] because such an order would "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of

[2] Howell v. Howell, 137 U.S. S.Ct. 1400 (2017)
[3] The decision was authored by Justice Breyer. Justice Gorsuch took no part in the case.
[4] Howell, at 1406.

Congress. All such orders are thus preempted."[5] Second, and independent of the preemption matter, the Court reasoned that the former spouse's interest,

> [W]as subject to later reduction. . . . The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of [the former spouse's] share of military retirement pay was possibly worth less—perhaps less than [the former spouse] and others thought—at the time of the divorce.[6]

Each of these two separate rationales for the Court's decision in Howell function independently of each other. Howell cites Johnson v. Johnson as one of several misdirected state court case and overrules it on both issues of "vestment" and preemption.

Howell requires the dismissal of Ex-Wife's *Amended Petition for Civil and Criminal Contempt* because "Wife allege[s] that based upon Johnson v. Johnson 37 S.W.3d 892 (Tenn. 2001) and its progeny, Wife obtained a vested interest [in] [sic] her share of Husband's FERS Supplement, 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."[7]

Howell is controlling precisely because the **parties did not agree** to the division of Ex-Husband's FERS Supplement, **or in the alternative, $685 a month**. The parties contractually agreed that Ex-Wife would receive 50% of Ex-Husband's FERS Supplement **as paid by the Office of Personnel Management** ("OPM"). The four corners of the contract do not account for the event that OPM refused to pay Ex-Wife, or that Ex-Husband would not receive the FERS Supplement and as reimbursement Ex-Husband would pay the value of the FERS Supplement to Ex-Wife. **Because there is no contractual promise to pay to Ex-Wife $685 each month that Ex-Husband does not receive the FERS Supplement, Ex-Wife must rely on the reasoning and holding of Johnson that Ex-Wife had a vested interest in the same.**

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[5] Id.
[6] Id.
[7] *Amended Petition for Civil and Criminal Contempt*, 3.

In light of Ex-Wife's reliance upon Johnson and the United States Supreme Court's decision in Howell overturning the same, this Court should not grant Ex-Wife's prayer that this Court find Ex-Husband in civil or criminal contempt, or in breach of contract, for Ex-Husband's failure to reimburse Ex-Wife for the value of an interest which zeroed-out when Ex-Husband returned to work. This Court should not grant Ex-Wife's prayer because her interest could have been no greater than Ex-Husband's; Ex-Husband's (and therefore, Ex-Wife's) was subject to a condition subsequent, for which Ex-Wife failed to contract; the interest was itself never divisible as the parties' originally believed and contracted, and is therefore now not subject to reimbursement; and, the parties did not contemplate the situation in which they currently find themselves, nor was this situation part of the bargain incorporated into the Marital Dissolution Agreement.

A. Howell v. Howell is controlling in this case because the dilemma in which the parties find themselves was not contemplated by either of the parties at the time of entering into the Marital Dissolution Agreement and was similarly not provided for therein.

The parties failed to contract for this situation in the MDA, consequently Ex-Wife **must** rely on the holding of Johnson to find that Ex-Wife had a vested property interest in Ex-Husband's FERS Supplement. Ex-Wife argues with reliance upon Johnson for the proposition in her *Amended Petition*, "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."[8] This Court has already found Ex-Wife's position here untenable. Because there was no provision of the MDA that Ex-Husband breached, Ex-Husband may not be found to have violated the duty of good faith and fair dealing because it only protects the **reasonable expectations** of the parties and does not extend beyond the agreed upon **terms of the contract**. As this Honorable Court has already noted, the parties find themselves "in a dilemma which is not one of their own making" nor "contemplated by either of the parties at the time of entering" into the MDA and the Final Decree of Divorce.[9] Ex-Husband did not make this dilemma by unilaterally modifying the MDA, nor did he violate a duty of good faith and fair dealing because Ex-Wife's expectations, reasonable or unreasonable, were not codified in the

[8] Citing Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993).
[9] See Order Dismissing Petition for Civil and Criminal Contempt, ¶ 7-8.

contract. Therefore, for Ex-Wife to prevail, this Court must find that Ex-Wife had a "vested" interest in Ex-Husband's FERS Supplement. That is only possible under Johnson and under Howell, Johnson does not stand.

B. Howell v. Howell is controlling of the case *sub judice* irrespective of the distinction in the underlying retirement benefit.

Ex-Wife argues that Howell is not controlling of the case at bar because Ex-Wife believes it deals solely with military retirement and military disability, but this is too narrow of a reading. Were Ex-Wife's reading true, the Court could have stopped at declaring that the Arizona family court's decision was preempted by federal law. But the Howell court continued. In overturning In re Marriage of Howell[10], the United States Supreme Court addressed the concept of "vesting" of a contingent interest and preemption. Both concepts are applicable to the case at bar. Howell makes clear that where an court-action regarding an interest is preempted, a state court may not "vest" that interest in anyone if that action is contrary to federal law.

a. The Court-ordered division of the Federal Employee Retirement System (FERS) Supplement is pre-empted because compliance with both federal and state law is in effect physically impossible.

This Court cannot now order the reimbursement of Ex-Husband's FERS Supplement to Ex-Wife because the authority to divide the benefit is preempted. The Tennessee Supreme Court described preemption:

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, **where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation** . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[11]

[10] In re Marriage of Howell, 2015 Ariz. Lexis 359.
[11] Letellier v. Letellier, 40 S.W.3d 490, 497 (Tenn. 2001).

Ex-Husband asserts that there are at least two reasons that this Court is preempted from dividing Ex-Husband's FERS Supplement: first, the Office of Personnel Management refused to divide the FERS Supplement as ordered by this Court, and second, Congress intended to make the FERS Supplement a hypothetical Social Security benefit.

i. The Office of Personnel Management (OPM), a federal agency, refused to divide the FERS Supplement, thus preempting this Court from so doing.

It has been submitted to this Court that there is ample federal law directing the division of federal retirement annuities and benefits, but of them the FERS Supplement is not one. Mr. Bourland[12] stated to the parties in a January 15, 2015 email that **OPM advised him that "the FERS Supplement is not divisible."**

The Office of Personnel Management is directed under Title 5 United States Code § 8461(a) that it "shall pay all benefits that are payable" including the annuity supplement. There is no discretion for OPM to not pay per a Court Order, if the Court order is otherwise divisible by law, according to 5 USC § 8467. Ex-Wife's argument that "the division of Husband's FERS Supplement is expressly authorized by Section 8467 of title 5 of the United States Code"[13] is inapposite: it is in fact not "expressly authorized," it is implied by reference, and Ex-Wife has inferred that the FERS Supplement may be divisible. Nowhere in § 8467 does the term "FERS Supplement" appear.

Because the very provision of the United States Code to which Ex-Wife cites is the authority upon which OPM relies in the division of FERS benefits, and on such **authority OPM refused to divide Ex-Husband's FERS Supplement**, the federal government has preempted this Court from dividing said Supplement. This Court is preempted because it is physically impossible for Ex-Husband to compel OPM to abide by the Court's order.

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[12] Mr. Bourland was contracted by the parties to draft the *Court Order Assigning Benefits Under the Federal Employees retirement System*, entered August 22, 2014.

[13] *Supplemental Memorandum In Support of Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract*, 14. On the other hand, if Ex-Wife is correct regarding the division of the FERS Supplement, then her matter should be before a United States District Court naming the Office of Personnel Management, not Ex-Husband.

ii. The FERS Supplement creates a hypothetical Social Security benefit and the federal government has made it clear that Social Security benefits are intended for the recipient and are not divisible.

Social Security benefits are not divisible as marital property.[14] Title 42 of United States Code § 407(a) states:

> The right of any person to future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.[15]

The FERS Supplement operates in lieu of Social Security benefits because the recipient of the benefit is forced into retirement before he is eligible for Social Security benefits. The FERS Act of 1986 created a new supplement for certain retirees "equal to a portion of a hypothetical social security retirement benefit."[16] Moreover, calculation of the supplement was designed to be similar to Social Security recipients.[17] This hypothetical social security retirement benefit is payable in place of, and until, the recipient is eligible for Social Security benefits. Benefits paid by the FERS Supplement, like Social Security, are subject to change by Congress, and not underpinned by any contractual relationship.[18]

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[14] Frazier v. Frazier, 1991 Tenn. App. LEXIS 153 *2 ("Without a doubt, [42 U.S.C.A. § 407(a) (West 1983)] precludes state courts from awarding one spouse's social security benefits to the other as marital property. Swan v. Swan, 720 P.d2 747 (1986))." The Tennessee Supreme Court in Tennessee Dep't of Human Services ex rel. Young v. Young, 802 S.W.2d 594, 600 (Tenn. 1990) held that Supplement Social Security Income was not assignable, even to a father's "impoverished" child, and it further noted "We take no pleasure in reaching the conclusion that a father need not share at least some part of his income, however meager, with his minor child, especially one whose current level of public assistance is even more impoverished than her father's. As the highest court in the land has noted, 'family support obligations are deeply rooted moral responsibilities', Rose v. Rose, 481 U.S. 619, 633, 636 (1987) . . . and thus [the father's] obligation to support his daughter amounts to a 'moral imperative.' Id. at 634. But in the same opinion, the United States Supreme Court also noted that waivers of federal sovereign immunity must be strictly construed, Id. at 635, presumably against the party claiming the waiver."

[15] 42 U.S.C.A. § 407(a) (1998).

[16] 52 FR 4478

[17] Id.

[18] See 5 U.S.C.S. § 8401 et seq (2017). See also Flemming v. Nestor, 36 U.S. 603, 610 (1960) stating "It is apparent that the noncontractual interest of an employee covered by [the Social Security Act] cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments."

The United States Supreme Court held in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) that the Railroad Retirement System ("RRS"), due to its similarity to Social Security, did not allow for divisibility of the RRS benefit.[19] The Court reasoned that of the two tiers of benefits under the RRS, the lower tier "corresponds exactly to those an employee would expect to receive were he covered by the Social Security Act."[20] The holding of Hisquierdo however was later overturned when **Congress amended the RRS allowing for division of the "supplemental annuity."**[21] **However FERS still has no similar provision** expressly providing for the assignation and divisibility of the FERS Supplement, which is a hypothetical social security benefit.

As recently as 2016, the reasoning of the Hisquierdo court was relied on by a Maryland intermediate court in Jackson v. Sollie, in determining whether an imbedded social security benefit could be divided in a Civil Service Retirement System benefit: "We hold that, under the doctrine of federal preemption, **a trial judge may not offset the value of hypothetical Social Security benefits against the marital share of a CSRS pension when dividing marital assets in a divorce proceeding.**"[22] The Jackson court continued "Although the Supreme Court in Hisquierdo did not expressly decide whether a court could indirectly divide Social Security benefits by way of an offset, it held that the structure of the RRA, which it likened to the structure of the SSA, prohibited the indirect offset of RRA benefits."[23] Finally, in contradistinction to Ex-Wife's argument that fifty percent of Ex-Husband's FERS Supplement is $685, the Jackson court keenly noted "that **any valuation of hypothetical Social Security benefits** located with the CSRS pension **would be speculative**. Congress reserves '[t]he right to alter, amend, or repeal any provision' of the SSA."[24] The same is true of the FERS Supplement: it can be altered, amended, waived, or lost at any time. Many other states have concurred with

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[19] Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979).
[20] Id. at 575.
[21] 45 U.S.C.S § 231m (2017) states "This section shall not operate to prohibit the characterization or treatment of . . . any portion of a supplemental annuity under this Act . . ." to be divisible by court order in a divorce matter.
[22] Jackson v. Sollie, 449 Md. 165, 184 (2016)
[23] Id. at 185.
[24] Id. at 186.

Maryland, in line with Hisquierdo, that a state court judge may not divide a hypothetical social security benefit.[25]

Ex-Wife continually states she is entitled to "50% of Husband's FERS Supplement or $685 a month." However, the amount owed under the benefit to Ex-Husband is not all-or-nothing: for each $2 Ex-Husband earns in excess of $15,120 (or this year's equivalent cap), the supplement is reduced by $1. This could mean that Ex-Husband could theoretically earn enough to receive $1 each month in FERS Supplement, and Ex-Wife would receive $0.50. This shows the folly of Ex-Wife's argument, and evidences the speculative nature of the FERS Supplement such that a Court Order assigning Ex-Wife $685 a month may not be, in fact, 50% of the FERS Supplement. This is one of many reasons why the court in United States Supreme Court in Hisquierdo and state courts from around the Country have decided that a hypothetical social security benefit cannot be divided. This Court should follow suit.

b. Ex-Wife's interest in Ex-Husband's FERS Supplement, whether vested or unvested, is subject to a condition subsequent which this Court does not have the legal power to extinguish.

The reasoning underlying the holding in Howell extends beyond military retirement benefits. The United States Supreme Court made a clear analogy to property law. The Court's reasoning makes clear that in the case at bar, Ex-Wife is not truly vested, or even if she was arguably vested, the interest in which that vestment lies is subject to a condition subsequent which neither Ex-Wife, nor this Court, can extinguish.

Ex-Wife states in her *Amended Petition* "Wife obtained a vested interest in her share of Ex-Husband's FERS Supplement, or $685 a month . . . ."[26] In light of Howell, and generally accepted principles of property law, Ex-Wife is simply wrong: Ex-Wife has at most a **vested**

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[25] See Johnson v. Johnson, 734 N.W.2d 801, 807-08 (S.D. 2007) ("several state courts look to [Hisquierdo] as instructing them that Social Security is not subject to an indirect adjustment through an offset"); Forrester v. Forrester, 943 A.2d 175, 181 (Del. 2008) ("Nine jurisdictions have determined that retirement plans that substitute for federal Social Security are subject to division as a marital asset. Four jurisdictions do not treat such plans as marital assets"); Olson v. Olson, 445 N.W.2d 1, 11 (N.D. 1989) holding Social Security benefits may not be distributed or "used as an offset in division of marital property." See also In re Marriage of Crook, 813 N.E.2d 198, 204 (Ill. 2004), ("Hisquierdo establishes two important points: Social Security benefits may not be divided directly or used as a basis for an offset during state dissolution proceedings."

[26] Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract, 6.

future interest[27] in **Ex-Husband's interest** in the FERS Supplement. Ex-Husband could not have conveyed a greater interest than he had.[28] Ex-Husband's interest while vested, had not matured and was still **subject to a condition subsequent.**[29] It was, and remains a fee simple defeasible interest. Therefore **according to Howell Ex-Wife's interest was at most only a fee simple defeasible**. The contemporary term "fee simple defeasible" embraces the concept of the fee simple subject to condition subsequent.[30] Both the historical category and the contemporary fee simple defeasible hold that the interest "is a present interest that terminates upon the happening of a stated event that might or might not occur."[31] In the present matter, neither party disputes that Ex-Husband had an interest to the FERS Supplement, which upon the happening of a stated event—Ex-Husband earning more than $15,120 in one year— the interest would be reduced or terminated. Upon the defeasance of Ex-Husband's interest, Ex-Wife's interest is simultaneously terminated. In the alternative, In re Marriage of Howell provides a fuller look at property rights:

> A property right becomes vested when every event has occurred which needs to occur to make the implementation of the right a certainty. The right is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust. By contrast, a right is expectant when it depends on the continued existence of present circumstances until the happening of some future event. A contingent right is one that comes into existence only if a specified event or condition occurs. [Internal citations omitted].[32]

Under the reasoning provided by In re Marriage of Howell, the matter at bar would appear to also be classifiable as an expectant right: the receipt of the FERS Supplement

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[27] See Restat 3d Property: Wills and Other Donative Transfers, § 25.3 (3rd 2003) which states "a future interest is either contingent or vested. . . . A future interest is vested if it is certain to take effect in possession or enjoyment. A contingent or vested future interest may additionally be classified according to the present interest into which the future interest will ripen once and if it takes effect in possession or enjoyment – as a . . . **fee simple defeasible**. . . ."

[28] See Sloan v. Sloan, 184 S.W.2d 391, 392 (Tenn. 1945).

[29] See Foster v. Foster, 2017 Tenn. App. LEXIS 477 (2017) for a discussion on vested and unvested interests and the role of maturation of the same.

[30] Restat 3d Property: Wills and Other Donative Transfers, § 24.3 (3rd 2003).

[31] Id.

[32] In re Marriage of Howell, 361 P.3d 936, 940 (2015).

depended upon the continued existence of Ex-Husband's maintenance of an income below $15,120; in addition it depends on upon the continued existence of the program generally.[33] If the right were expectant and not vested, then Johnson certainly would not apply, and Ex-Wife would still not be entitled to a reimbursement of the FERS Supplement.

However, regardless of the classification the interest of Ex-Wife was still a defeasible interest. Howell makes very clear that when the defeasance happens is irrelevant:

> Nonetheless, the temporal difference highlights only that [spouse's] military retirement pay at the time it came to [the former spouse] was subject to a later reduction. . . . The state court did not extinguish (and most likely would not have had the legal power to extinguish) that future contingency. The existence of that contingency meant that the value of Sandra's share of military retirement pay was possibly worth less—perhaps less than Sandra and other's thought—at the time of the divorce. **So too is an ownership interest in property . . . worth less if it is subject to defeasance or termination upon the occurrence of a later event** . . .[34]

Applying the well-tread theories of property law, as the Howell decision instructs us to do, it is clear that Ex-Wife's interest in Ex-Husband's FERS Supplement was not "vested" in any such way that she could reasonably expect this Court to order her reimbursed for the loss of that interest. Neither may Ex-Wife rely on the claim that she reasonably expected that her interest in the FERS Supplement would last "forever."[35] Ex-Wife's interest is only one that is subject to defeasance by a condition subsequent. Her interest now having been subjected to that condition subsequent, Howell makes clear that she has no recourse to the $685 each month as Ex-Wife requests, absent a contract for the same.

C. Ex-Wife failed to properly contract in the Marital Dissolution Agreement for the condition that Ex-Husband may earn more than the FERS cap, despite Ex-Wife's actual knowledge of the effect of those earnings, and as a result Ex-Husband could not have

[33] As discussed above, the FERS Supplement program, like FERS generally, is subject to Congressional approval and can be decreased, increased, or dismantled at any time.
[34] Howell, at 1405. (Emphasis added).
[35] Transcript of Proceedings, March 2, 2016, 85:25 (stated Wife: "I was going to be getting that FERS supplement forever because of his income and it's shown by the fact that I didn't get any child support for two children").

unilaterally modified the division of property because the Marital Dissolution Agreement did not account for this scenario.

The Tennessee Court of Appeals held in Selitsch v. Selitsch, 492 S.W.3d 667 (Tenn. Ct. App. 2015) that parties may contract to divide assets in an MDA that governing state or federal statutes may not enforce.[36] Ex-Wife relies on this holding to conclude "the parties contractually agreed in their Marital Dissolution Agreement to equally divide Husband's gross FERS Supplement."[37] Ex-Wife's claim is mistaken in fact and law. The parties never agreed that Ex-Husband would not earn more than the FERS income cap; and the parties never agreed that Ex-Husband would pay to Ex-Wife the absolute most she could receive under the FERS Supplement, **or $685 a month**.

The parties never agreed to divide Ex-Husband's **gross** FERS Supplement. The MDA states clearly that Ex-Wife will receive "fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System. [OPM] is directed to pay Ex-Wife's share directly to Ex-Wife."[38] The *Court Order Assigning Benefits Under the Federal Employees Retirement System* reads "**Former Spouse shall be responsible for all local, state, and federal taxes** that are payable in connection with all amounts assigned to Former Spouse under this Court Order." Ex-Wife's repeated claims to opposite are themselves divorced from the facts.[39]

Ex-Wife is also mistaken as to law. In Selitsch, the parties **agreed** in the Final Decree of Divorce that:

> In the event that Husband increases his VA disability rating, Wife is awarded one-half of any increase in his VA disability payments. **The parties acknowledge that [the Defense Finance and Accounting Service] will not honor a division of a VA disability under such circumstances, but Husband will immediately**

[36] Selitsch "carefully reviews" Mansell v. Mansell noting that the Supreme Court "did not preclude spouses from contractually agreeing to divide non-disposable [military retirement] pay." Selitsch, at 686.
[37] *Supplemental Memorandum in Support of Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract*, 38
[38] Marital Dissolution Agreement, 12.
[39] Court Order Assigning Benefits Under the Federal Employees Retirement System, 5.

pay to Wife said amount until such time that he can set up an allotment paying said amount to Wife.[40]

The court went on state that it "is abundantly clear from the record that the parties agreed to share equally Husband's military retirement and that Husband would receive 100% of his VA disability benefit."[41] The husband in Seltisch never contested the claim that he agreed to pay his former spouse out of pocket for the amount of his military disability benefit fully knowing that the responsible government agency would refuse to so divide.[42]

In contradistinction to both Ex-Wife's claim and Seltisch, this Court has already found in the case at bar that Ex-Husband did not agree to pay Ex-Wife "fifty percent (50%) of Husband's FERS Supplement, or $685 a month," in the event that OPM refused to remit the same. The Court's previous *Order Dismissing Petition for Civil and Criminal Contempt*, entered May 19, 2016, found then that Ex-Husband complied with the terms of the MDA to the best of his ability, and refused to find him in contempt for having failed to pay Ex-Wife any amount. **Ex-Wife failed to properly contract as was done in Selitsch.**

Ex-Wife has insinuated that Ex-Husband misled her into believing that Ex-Husband would never earn more than the FERS Supplement income cap of $15,320 dollars, or alternately that he would remain retired. Ex-Wife argues that Ex-Husband's failure to abide by either or both of these contingencies constitutes a unilateral modification of the MDA. However, these contingencies are not in the MDA, nor are they incorporated by reference in to the MDA, and neither can Ex-Husband be found in breach of the contract for unilaterally altering the same.

To establish a claim for breach of contract, Ex-Wife must show that there was a meeting of the minds, mutual assent to the contractual terms, consideration, and that the contractual terms were sufficiently definite.[43] There can be no breach of contract on an issue for which there was not a meeting of the minds and mutual assent.[44] Ex-Wife relies on Elliot v. Elliot[45] and Lopez v.

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[40] Selitsch, at 680-81.
[41] Id. at 687.
[42] See Seltisch, at 682, discussing that Husband argued lack of capacity and mistake of law, but not mistake of fact.
[43] Ace Design Grp., Inc. v. Greater Christ Temple Church, Inc., 2016 Tenn. App. Lexis 939 *19-20 (Tenn. Ct. App. 2016).
[44] Id.
[45] 149 S.W.3d 77 (Tenn. Ct. App. 2004).

Lopez[46] for the claim that marital dissolution agreements have an implied covenant of good faith and fair dealing which protects the parties' reasonable expectations as well as their right to receive the benefits of their agreement. It is this benefit of the agreement which may not be unilaterally modified. Ex-Husband submits that Ex-Wife misses the mark. The duty of good faith and fair dealing, protecting the reasonable expectations of the parties, "does not extend beyond the agreed upon terms of the contract and the 'reasonable contractual expectations of the parties.'"[47] "Thus, the courts' goal is to ascertain and to give effect to the parties' intentions . . . ."[48]

In the matter at hand, this Court as already determined that the parties find themselves "in a dilemma which is not one of their own making" nor "contemplated by either of the parties at the time of entering" into the MDA and the Final Decree of Divorce.[49] Ex-Husband submits that neither party contemplated, contracted, nor intended to contract for this exact circumstance. Ex-Husband did not intend to contract that after the "necessary paperwork" for the FERS Supplement had been completed, OPM would refuse to remit the same to Ex-Wife, and the then attendant circumstances would reduce his FERS Supplement entitlement to $0 and Ex-Husband would pay Ex-Wife $683 each month. **Ex-Husband never represented to Ex-Wife within the MDA that he would never work again, or that he would never earn more than the FERS Supplement cap.** Any representations to the contrary fall outside the agreement of the MDA.

> **Entire Agreement.** This Agreement contains the entire understanding and agreement to the parties. **There are no representations, warranties, covenants, or undertakings other than those expressly set forth herein**, and each party enters into this contract voluntarily, advisedly, and with full knowledge of the financial condition, nature, character, and value of both parties' separate and marital property, estate, and income. The law of the state of Tennessee shall govern this Agreement in all respects.[50]

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[46] 195 S.W.3d 627 (Tenn. Ct. App. 2005).
[47] Jackson v. CitiMortgage, Inc., 2017 Tenn. App. LEXIS 369, *27 (Tenn. Ct. App. 2017).
[48] Long v. McAllister-Long, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2006) citing Elliot v. Elliot, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004).
[49] See Order Dismissing Petition for Civil and Criminal Contempt, ¶ 7-8.
[50] Marital Dissolution Agreement, 3.

Because this was not a circumstance bargained for by the parties, and not explicitly covered in the parties' MDA, there was no meeting of the minds or mutual assent of the parties. Without a meeting of the minds as to this issue, Ex-Husband owes no duty to "pay Wife fifty percent (50%) of his FERS Supplement under the Civil Service Retirement System from December 2014 to the present."

a. Ex-Wife has unclean hands because she is the architect of her own dilemma.

Ex-Husband alleges the *Amended Petition* should be dismissed as Ex-Wife comes before this Court with unclean hands. In the initial instance, Ex-Wife filed this contempt petition and then provided a copy of some bills, receipts, or proof of payment to Ex-Husband. Ex-Wife has failed to send the bills for the children's uncovered reasonable and necessary medical expenses within 10 days as provided in the parties' *Permanent Parenting Plan*. Further, pursuant to the parties' *Marital Dissolution Agreement,* Ex-Wife has failed to reimburse Ex-Husband for her portion of the parties' homeowner's insurance.

In the immediate instance, Ex-Wife alleges that Ex-Husband unilaterally modified the contract and breached the duty of good faith and fair dealing. Ex-Husband alleges that at the time the parties entered in to the contract, Ex-Husband did not foresee: Ex-Wife failing to reimburse Ex-Husband for her portion of the parties' homeowner's insurance; Ex-Wife failing to work with Ex-Husband in selling the house, for which he is now financially liable; Ex-Wife making specious and unfounded criminal allegations which required Ex-Husband to pay significant sums to a defense attorney to defend in court; and Ex-Wife unnecessarily continuing to litigate matters of the divorce.

Ex-Wife is the architect of her own dilemma. Ex-Husband contends that were it not for the specious litigation by Ex-Wife, Ex-Husband would not have had to return to work and earn income in excess of the FERS Supplement cap.

CONCLUSION

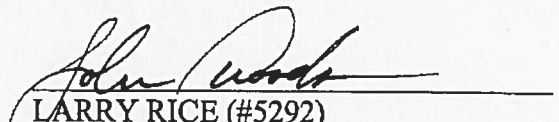
Ex-Husband respectfully submits to this Honorable Court that the parties' Marital Dissolution Agreement does not provide for this precise scenario, and does not explicitly or impliedly require Ex-Husband to pay to Ex-Wife "fifty-percent (50%) of Husband's FERS

Supplement, or $685 a month." Because there is no contractual language within the four corners of the contract requiring such action, Ex-Wife is not due the $17,976 for which she prays, as matter of contract law. Because there is no contract for Ex-Wife to receive "fifty-percent (50%) of Husband's FERS Supplement, or $685 a month," this Court cannot find Ex-Husband in breach of contract for the same, nor can it find him in contempt for failing to abide by the contractual terms. Ex-Wife's contractual argument having failed, Ex-Wife can only attempt to find recourse in establishing a "vested" property interest in the FERS Supplement under Johnson.

Ex-Husband submits that Ex-Wife's vesting argument has failed as well. Ex-Wife overlooks the practical application of Howell's vesting reasoning to other preempted federal benefit programs. Johnson's "vestment" reasoning was overturned by the United States Supreme Court in Howell when the Court stated that a state court "did not" and "most likely could not" extinguish a future contingency by ordering a "reimbursement" of the value of the interest subject to a condition subsequent, moreover one federally preempted. The case at bar concerns a hypothetical Social Security benefit, which the Supreme Court has already determined cannot be divided by state courts. Ex-Wife's arguments that division of the FERS Supplement is not preempted fails on the simple fact that the federal government, through OPM has already spoken, and refused to allow this Court to act as Ex-Wife prays. If the Court were to order Ex-Wife's requested relief, it would by physically impossible for OPM and Ex-Husband to comply.

Ex-Husband respectfully submits that this Court, for the foregoing reasons, may not grant Ex-Wife's prayers to divide his FERS Supplement, or order Ex-Husband to reimburse Ex-Wife $685 a month, nor should this Court find he is in contempt or breach of contract for failure to do the same.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon Mitch Moskovitz and Kirkland Bible, Attorneys for Wife, by facsimile and U.S. Mail to 530 Oak Court Drive, Suite 355, Memphis, Tennessee 38117, (901) 821-0057, on this, the 7 th day of August, 2017.

LARRY RICE/JOHN WOODS

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IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

KELLY COLVARD PARSONS,
Plaintiff/Counter-Defendant,

v.

Docket No.: CT-004932-13
Division II

RICHARD JEARL PARSONS,
Defendant/Counter-Plaintiff.

ORDER DISMISSING AMENDED PETITION FOR CIVIL AND CRIMINAL CONTEMPT AND IN THE ALTERNATIVE FOR BREACH OF CONTRACT

This cause came to be heard on September 12, and September 13, 2017 before the Honorable James F. Russell, Judge of Circuit Court Division II of Shelby County, Tennessee, upon Plaintiff/Counter-Defendant's, Kelly Colvard Parsons ("Ms. Parsons"), *Petition for Civil and Criminal Contempt* ("*Original Petition*"), filed on June 22, 2015, and her *Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract* ("*Amended Petition*"), filed on June 23, 2017, and upon Defendant/Counter-Plaintiff's, Richard Jearl Parsons ("Mr. Parsons"), *Response to Petition for Civil and Criminal Contempt* ("*Original Response*"), filed on November 12, 2015, his *Response to Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract* ("*Amended Response*"), filed on July 19, 2017, and *Husband's Supplemented Response to Amended Petition for Civil and Criminal Contempt, and in the Alternative, Breach of Contract*, filed on August 7, 2017, the testimony of Mr. and Ms. Parsons, exhibits entered into evidence at trial, statements of Counsel for the parties, and the entire record as a whole, from all of which it appears to the Court, and the Court finds as follows:

1. The transcript of the ruling in this cause is filed separately, is incorporated herein by reference, and made a part of this *Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract*, as if copied in full herein.

2. Ms. Parsons withdrew, by stipulation, any allegation of "criminal" contempt.

3. The parties also stipulated that the allegations related to failure to reimburse Ms. Parsons for Mr. Parsons' share of children's school expenses and health care expenses are no

longer a contested issue.

4. This Court finds there is no "order" of this Court requiring Mr. Parsons to reimburse to Ms. Parsons the difference lost by Ms. Parsons in terms of the FERS Supplement Benefit.

5. This Court finds there is no basis in this record to hold Mr. Parsons in contempt of court.

6. This Court finds that the terms of the *Marital Dissolution Agreement* ("*MDA*") are unambiguous, and the fact that the plain language of the *MDA* addressed the entitlement to benefits in the gross monthly annuity and the FERS benefit in separate sentences, indicates a clear understanding that the entitlement to each came under separate federal guidelines and regulations.

7. This Court finds that Ms. Parsons did not acquire a "vested interest" in Mr. Parsons' FERS Supplement Benefit, which ceased to exist under the applicable federal regulations.

8. Under the doctrine of Federal Preemption, this Court cannot "vest" that which it lacks the authority to give, even under equitable considerations.

9. This Court finds that there is no basis for the Court to find Mr. Parsons in breach of contract for a violation of the *Marital Dissolution Agreement*.

10. This Court is compelled to the conclusion that the contract embedded in the *Marital Dissolution Agreement* executed by the parties with clear and open minds cannot be altered even under equitable interpretations.

11. The Court finds that Ms. Parsons alluded to the fact that the parties had two (2) children to raise in both her discovery deposition and during the hearing on this matter.

12. In that regard, she indicated that while she understood Mr. Parsons could take the employment he had been offered at Raytheon, and he could potentially earn so much that the FERS Supplement Benefit could be lost, Ms. Parsons did not believe Mr. Parsons would allow his income to reach that point.

13. In the parties' original *Permanent Parenting Plan Order* ("*Original PPP*"),

entered by this Court on July 16, 2014, Ms. Parsons agreed to waive the nominal amount of child support, in the amount of Six Dollars ($6) each month, calculated according to the child support calculator. Ms. Parsons agreed to waive said nominal child support based, in part, on the amounts that she would be receiving, pursuant to the parties' *MDA*, including half of Husband's FERS Supplement Benefit, in the amount of Six Hundred Eighty Five Dollars ($685) each month. Moreover, it appears to the Court, that Ms. Parsons waived any right to alimony in the parties' *MDA*, in anticipation of Mr. Parsons' reduced income.

14. In July 2015, the parties lost the FERS Supplement Benefit, due to Mr. Parsons' income exceeding the amount he was permitted to earn, while receiving the FERS Supplement Benefit.

15. On January 8, 2016, Ms. Parsons filed a *Motion Pendente Lite* requesting a modification of the amount of child support Mr. Parsons was ordered to pay in the parties' *Original PPP*.

16. On April 6, 2016, the *Order Granting Wife's Petition to Modify Child Support* was entered by this Court. Said Order provided that for the period beginning August 7, 2015 and ending December 31, 2015, Mr. Parsons' monthly child support obligation would be modified from Zero Dollars ($0) to Five Hundred Forty Three Dollars ($543) each month. Thereafter, beginning January 1, 2016, and continuing each month thereafter, Mr. Parsons' monthly child support obligation would be modified from Five Hundred Forty Three Dollars ($543) each month to Four Hundred Eighty Six Dollars ($486) each month.

17. This Court is of the considered opinion that the loss of the FERS Supplement Benefit is a material and significant change of circumstances such that the child support order should be modified upward in addition to the recalculation that is already now in place.

18. This Court finds that it is patently unfair for Mr. Parsons to reap the benefit to him brought about by the substantial increase in income with his new employment. At the same time, it is equally unfair that Ms. Parsons must suffer the pain of the loss of the FERS Supplement Benefit.

19. This Court has reached the conclusion that the loss of the FERS Supplement Benefit must be restored to Ms. Parsons, in the form of an upward deviation in the now modified

child support order, that is equal to the Six Hundred Eighty Five Dollars ($685) each month that Ms. Parsons would be otherwise receiving. The increase in child support should begin on November 1, 2017, and continue until such time as the FERS Supplement Benefit may be restored by the Office of Personal Management, or until the parties' youngest child reaches eighteen (18) years of age or graduates from high school.

20. Given, the above stated findings, it cannot be said that either party is a "prevailing party" in the defense or enforcement of the *MDA*, as laid out in the **Noncompliance** paragraph on page four (4) of *MDA*, which would require the Court to award reasonable attorney's fees to said prevailing party, therefore, this Court will decline to make an award of attorney's fees to either party.

21. In all other respects, the relief sought in Ms. Parsons' *Original Petition* and *Amended Petition* must be denied.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. All relief sought in Ms. Parsons' *Original Petition* and *Amended Petition* is hereby denied;

2. The Court orders an upward deviation from the current child support order, entered April 6, 2016, in the amount of Six Hundred Eighty Five Dollars ($685) each month, which modifies and increases the current child support order from Four Hundred Eighty Six Dollars ($486), each month, to One Thousand One Hundred Seventy One Dollars ($1,171), each month. Payment of the increased child support amount shall begin on November 1, 2017.

3. The parties shall enter a separate order modifying the child support award to reflect an additional Six Hundred Eighty Five Dollars ($685) to be paid monthly.

4. Court Costs shall be assessed to Ms. Parsons. However, Mr. Parsons shall be ordered to reimburse Ms. Parsons for fifty percent (50%) of the total court costs.

5. Neither party shall be awarded attorneys' fees.

James F. Russell
JUDGE JAMES F. RUSSELL
June 5, 2018
DATE

A TRUE COPY ATTEST
JIMMY MOORE, Clerk
By Jennifer Stanecophe, D.C.

APPROVED AS TO FORM BY:

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on April 11, 2018 a true and correct copy of the foregoing was served upon Mitchell D. Moskovitz and Kirkland Bible, Attorneys for Ms. Parsons, via U.S. Mail at 530 Oak Court Drive, Suite 355, Memphis, Tennessee 38117 and via facsimile at (901) 821-0057.

LARRY RICE/ERIN O'DEA

W2018-02008-COA-R3-CV

PARSONS

vs

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TRIAL TRANSCRIPT - VOLUME I

September 12, 2017

ORIGINAL

VOL. 12

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we're supposed to be doing. I look forward to the veil being lifted from what other proof he's going to put on. He -- you know, there's the statement from the record that he thinks he put on what he -- all the proof he had. But we were banded because I think we didn't get the magic words from him: I conclude my proof. 10:05:42 10:05:48 10:05:52 10:05:56 10:05:58 10:06:02 10:06:08

Now, I think once, if we'd have had that, we would have gotten a different result from the Court of Appeals. And any doubt I have about that has been removed by the Howell case. Their whole case was built on the Johnson case from East Tennessee. And I can't even argue to you that the case was wrong. The United States Supreme Court actually listed it, with about two or three others, that they were wrong. And so there is no higher authority for us than our conscience and United States Supreme Court. 10:06:08 10:06:11 10:06:14 10:06:17 10:06:21 10:06:26 10:06:32 10:06:34 10:06:40 10:06:45

So the laws, what they built their case on is gone. You read the memorandum. They twist, they turn. They're trying now to dam the case that their whole case depends on, with some other things. 10:06:49 10:06:55 10:06:59 10:07:03

You've read our brief. I think all we need to do is to say at this point: Mr. Moskovitz, the Court has got 21 pages of notes. The Court has read 21 pages of notes. What else have you got? Because 10:07:06 10:07:09 10:07:14 10:07:19

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And there again, I don't want to cut anyone short. And I want to be sure that we have a full, complete hearing from this point forward. So with all that said, I'll be quiet and let you-all present your case in the way that you feel it needs to be presented. 10:20:49 10:20:53 10:20:57 10:21:02 10:21:07 10:21:10

MR. MOSKOVITZ: Your Honor, thank you. And I don't think it necessarily deems a response or requires a response, but I think it clear that certainly we'll want to flesh out a few issues, given what the Court's remarks are or were. That the baiting, which I appreciated, using your terminology, certainly the fundamental issue is this Court's interpretation of Howell and a series of Tennessee cases that started with Johnson. And Howell, I know I may have responded slightly or significantly differently to the questions without trying to include within my responses an argument. 10:21:10 10:21:11 10:21:16 10:21:22 10:21:30 10:21:33 10:21:37 10:21:41 10:21:46 10:21:51 10:21:55 10:21:59

But certainly the Court is aware of what our argument is, that they're -- in the Howell case, there's a specific statute. The Howell case dealt with the military. The Howell case dealt with a disability election that we believe preempted the trial court or a State court from usurping Federal law. You're aware that our position is in this case, 10:22:02 10:22:05 10:22:09 10:22:12 10:22:18 10:22:21 10:22:24

those are not the facts. That the proposition in Johnson not only is good law but remains good law as we've cited in our brief by a number of Tennessee opinions. 10:22:29 10:22:33 10:22:38 10:22:41

I am compelled though, because given a remark from Mr. Rice, I, through of course Ms. Bible, did some research and wanted to see, is there a case out there, Tennessee or otherwise, that is analogous to this where the Office of Personnel Management didn't recognize -- if those are the right terms, and I may stand corrected -- an order. And a trial court required an individual that had the benefit of receiving compensation through a plan like the FERS, and can that individual have been found to have breached a contract and agreement or court order or be found in contempt. And what is a trial court's rights in that respect? 10:22:41 10:22:45 10:22:52 10:22:56 10:23:02 10:23:05 10:23:08 10:23:11 10:23:17 10:23:22 10:23:26 10:23:30 10:23:33

Interestingly, there's not anything like that that I was able to see, fact-specific, in our state. But there was a reported opinion in Alabama. It's the Harmon case. And I have that, and it addresses the trial court's authority which is frankly consistent. I've got a copy for you, Judge, as well. I want you just to have it. And should the Courts choose to read it, so be it. 10:23:34 10:23:37 10:23:41 10:23:44 10:23:48 10:23:52 10:23:55 10:23:59

But it does address this issue that's raised in part if not by Mr. Parsons, and that theory was expressly rejected by this Alabama appellate court. I only bring that recognizing were it Tennessee court, but I wanted the Court to be aware that under that circumstance, the trial court, consistent with we're arguing, said, "No, you owe the money." 10:24:00 10:24:04 10:24:10 10:24:14 10:24:17 10:24:21 10:24:24

Having said that, you're aware and I recognize this is some argument, that irrespective of that Howell opinion, it's our position that Tennessee courts outside of there being a Federal statute that preempts a trial court or State law that have relied on Johnson and said, once she has or that -- I'm going to use the term "alternate payee", not "participant" in the broadest sense -- that there's a benefit and someone does something to cause that benefit to lessen or to cease, that's a vested benefit. And that obligation continues. The theory being, I submit, that there's no harm and Mr. -- bear with me so this record is clear. 10:24:28 10:24:30 10:24:33 10:24:37 10:24:42 10:24:48 10:24:53 10:24:57 10:25:01 10:25:03 10:25:09 10:25:16 10:25:18

Mr. Parsons could earn $100,000 a year of earned income. He could earn $15,200. He could earn whatever he wants. But it's certainly our position and theory, as Your Honor is aware, whether the Court accepts it, I don't mean to be presumptuous, that 10:25:21 10:25:25 10:25:29 10:25:33 10:25:34

irrespective of what he earns, there's no harm to him. 10:25:38 10:25:43

He supplants that 685 approximate dollars by earning whatever he chooses to earn. She can't supplant that. And the suggestion that yes, she can by child support, I submit should respectfully fall on, for lack of any better terms, deaf ears. Having said that, I'm prepared to put on Mrs. Parsons. I'd like to mark, if we can, that order that I provided you as the next numbered exhibit. If I could get a copy of that, please. 10:25:43 10:25:48 10:25:52 10:25:55 10:26:00 10:26:03 10:26:07 10:26:12 10:26:16

THE COURT: Here, just mark the one that you handed me. 10:26:17 10:26:19

MR. MOSKOVITZ: Judge, thank you. And likewise you asked, which we have relied on, the last numbered -- we may need a little guidance. The last numbered exhibit I had was 29. I know that the last time we were here in July, we marked certain additional exhibits that I want to say were D. 10:26:19 10:26:20 10:26:33 10:26:36 10:26:39 10:26:41

THE COURT: Well, they were marked -- 10:26:48

MR. MOSKOVITZ: I have D1 through D6 also, I wanted you to be aware of. So with your guidance, what should we mark this as the next exhibit, please? 10:26:50 10:26:52 10:26:58 10:27:00

THE COURT: I would have to go get my 10:27:00

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was mentioned in the testimony. But then I have a Post-it Note on another, what appears to be exhibit, which is captioned Wife's Chart of Children's Expenses Listed in Wife's Petition For Civil and Criminal Contempt. And that, according to my Post-it Note, would have been Exhibit 29. 10:31:15 10:31:23 10:31:32 10:31:35 10:31:39 10:31:43

MR. MOSKOVITZ: Correct. 10:31:44

THE COURT: So if we're -- and I believe that would be the last numbered exhibit presented by the petitioner, exclusive of the six exhibits presented by the respondent. So if we're to number this -- 10:31:44 10:31:48 10:31:51 10:31:58 10:32:03

MR. MOSKOVITZ: The court reporter has it now. 10:32:05 10:32:07

THE COURT: -- order, as well as I can determine, it would be Exhibit 7 or Exhibit 30, whichever you want it to be. 10:32:08 10:32:10 10:32:13

MR. MOSKOVITZ: I'll choose 30 if that's acceptable. 10:32:14 10:32:15

(WHEREUPON, the above-mentioned document was marked as Exhibit Number 30.) 10:32:31

MR. MOSKOVITZ: Thank you. And Your Honor, may I? The only other question and perhaps remark I have at this point is, you also inquired, which we briefed when we were here the last time: 10:32:31 10:32:32 10:32:34 10:32:37

Mr. Moskovitz, if there is a Federal statute that you're relying upon or that says that this FER supplement can be divided and there's no preemption issue -- and I'm paraphrasing, I want you to know. Because at that point, I think you handed us a piece of paper about Howell and said, "Maybe y'all aren't familiar." I think it was from the Tennessee Attorney Memo or one of the similar publications. 10:32:43 10:32:47 10:32:50 10:32:54 10:32:57 10:32:59 10:33:02 10:33:03

MR. RICE: I've got -- 10:33:06

THE COURT: Let him finish. 10:33:06

MR. RICE: I've got a problem. My problem is him finishing. I thought he finished in the brief. Now he's dumped on us a 2005 Alabama Court of Appeals opinion that, according to what he's given me, existed well before his brief was handed in. And now he's supposedly finally found the key statute or regulation that I -- would be interesting to know if that existed prior to his brief being completed. And if so, why has he been holding on to these after he completed his brief and not filed as a supplement to his brief? This is basically ambush. 10:33:07 10:33:08 10:33:12 10:33:18 10:33:23 10:33:27 10:33:31 10:33:37 10:33:39 10:33:43 10:33:48

If we are to believe he is a careful and thorough lawyer, he completed his brief and then held these two out because, "Well, this is only going to be useful if I spring this at the last minute on 10:33:57 10:33:59 10:34:03 10:34:06

IN THE CIRCUIT COURT OF SHELBY COUNTY,
TENNESSEE FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

KELLY COLVARD PARSONS,

Plaintiff,

V. Docket No. CT-004932-13
Division II

RICHARD JEARL PARSONS,

Defendant.

BE IT REMEMBERED that the above-captioned **RULING** came on for Hearing on this, the 29th day of November, 2017, in the above Court, before the Honorable, James F. Russell, Judge presiding, when and where the following proceedings were had, to wit:

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P.O. Box 11613
Memphis, Tennessee, 38111

difference.

On March 8th of 2016 this Court held a hearing with respect to the wife's original petition. In the course of that hearing, at the close of the wife's testimony, the husband moved for a dismissal at the close even of the wife's direct examination.

That then prompted an appeal to the Court of Appeals, and on March 30th of 2017, the Court of Appeals entered its opinion reversing the ruling of this Court and remanding the case for further proceedings consistent with that opinion.

Since that time a new issue has emerged, and as much as shortly after the remand and before a rehearing could be set, the United States Supreme Court issued a ruling in the case of Howell versus Howell, underline that, parentheses, five twenty seventeen, closed parentheses, in which the Supreme Court of the United States, quote, abrogates, end quote, these very proceedings.

Pursuant to the case of Johnson versus Johnson found at 37 SW 3d 892, a Supreme Court opinion from the year of 2001 upon which the petitioner, mother, heavily relies in these

proceedings.

If, in fact, that be so, and it is specifically stated in the U.S. Supreme Court opinion, the Johnson case is, quote, abrogated, end quote, the issue arises as to whether this petitioner may maintain a cause of action for breach of contract under the circumstances.

Since then the parties have engaged in significant pleadings back and forth. On June 23 of 2017, the wife, slash, petitioner filed her Amended Petition for Civil and/or Criminal Contempt or, and in the alternative for breach of contract. Along with that, she filed a fairly extensive supporting Memorandum of Points and Authorities.

Then on July 1927 (sic), the respondent, husband, filed his Response to the Amended Petition along with his fairly thorough Memorandum of Points and Authorities, and on July 31 of 2017, the petitioner, ex-wife and mother, filed her Supplemental Memorandum.

And on August 7 of 2017, the husband filed his rebuttal, if you will, in the form of a Supplemental Response and Memorandum of Points and Authorities.

IN THE CIRCUIT COURT OF SHELBY COUNTY,
TENNESSEE FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS

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MR. RICE: I'm fine, Your Honor. It's too interesting to take a break.

THE COURT: Well, I want to be sensitive to everyone's needs. We turn next to a heading of Law and Argument. As indicated earlier, the parties on each side have submitted very thorough and enlightening briefs on the subject at hand.

In that regard, the Court wishes to extend extreme praise to the lawyers on both sides of this case. The work that has been done is nothing short of brilliant I must say. You all have done a marvelous job on behalf of your clients.

Another quick footnote would be appropriate here, to the credit, to their credit, the parties have engaged in serious discussion to resolve the current issue without Court intervention, but to no avail, end of that footnote.

The focus now is centered around the case of Howell versus Howell, underline that, decided by the United States Supreme Court with their published opinion under date of May 15, 2017, and that opinion is published at 137 S.Ct. 1400.

And in that regard, the Court is faced

with what impact the Howell opinion has upon several court cases, which were, quote, abrogated, end quote, specifically by the ruling of the Supreme Court, and specifically including the Tennessee Supreme Court decision of Johnson versus Johnson, a 2001 decision of the Tennessee Supreme Court found at 37 SW 3d 892. In Howell, underline it, the Court held that:

(Reading) A military veteran cannot be required to indemnify a former spouse who receives a reduced amount of the veteran's retirement pay resulting from the veteran's election to waive a portion of his military retirement pay in order to receive non-taxable disability benefits from the federal government in lieu of military retirement pay.

In the Johnson case, underline Johnson, the Tennessee Supreme Court, speaking through this Court's predecessor, now retired Justice Janice Holder held that:

(Reading) A Marital Dissolution Agreement gave to the former wife a, quote, vested interest, end quote, in one-half of the former husband's military retirement benefits, and the former

husband's failure to compensate his former wife to the extent of her vested interest was an improper unilateral modification of the divorce decree incorporating the Marital Dissolution Agreement.

On their facts, both cases are strikingly similar to the case now before us. In Howell, underline it, the ex-husband was an Air Force veteran. In Johnson, underline it, the ex-husband was a Marine Corps veteran.

Here, the respondent, the ex-husband is a civil service employee as a retired air traffic controller and has no military background. It is worthy of note here that another significant difference is in the pleadings, which raised the issue in the first place.

In the Howell case, the issue came as a result of a, quote, motion, end quote, filed by the ex-wife to, quote, enforce, end quote, the division of military retirement pay.

In Johnson the issue arose in the context of a post-divorce, quote, petition, end quote, by the ex-wife to, quote, modify, end quote, the Final Decree.

In contrast, here the issue arises in the

context of a, quote, contempt, end quote, proceeding. In that regard, there is a fundamental difference between the case before us as compared to either the Johnson or Howell case. Underline those names. We will come back to this point later.

Here the respondent argues strongly that the Howell case puts an end to the question. That is to say based upon the holding in Howell, this respondent cannot be required to indemnify this petitioner who has now lost her claimed portion of the FERS supplement, which Respondent is no longer able to receive due to the level of post-retirement income received by him from the Raytheon Corporation, his current employer.

Stated differently, as in Howell, under the Doctrine of Federal Preemption this State Court cannot, quote, vest, end quote, that which under governing federal law it lacks the authority to give.

On the other side, our petitioner argues, just as strongly, that the Howell case is not applicable here because in Howell the subject of the dispute was a, quote, military, end quote,

retirement issue; whereas here, we're dealing with a, quote, civil service, end quote, retirement issue.

The petitioner argues further that the reasoning behind the Johnson holding is still good law; thus, the petitioner has a vested interest, quote, vested interest, end quote, in her portion of these FERS supplement benefits and the same cannot thereafter be unilaterally diminished by the singular act of the ex-husband taking the employment with Raytheon, and thereby earning at a level that would lead to elimination of the FERS supplement benefit.

Taking the entire picture as a whole, the Court is compelled to a conclusion that the argument both ways amounts to the proverbial distinction without a difference.

In that regard, whether applicable or not, the Johnson opinion is somewhat enlightening and instructive here. Bear with me as I turn to the text of that opinion and quote somewhat extensively from it. Everybody doing okay still?

MR. RICE: Your Honor, I'm only supposed to sit for 30 minutes before I get up. It's so

interesting, I don't want to take a break, but I'm already, I'm creeping towards 45 minutes. I think I can go an hour, but at an hour I think I'm going to need to get up for a few minutes.

THE COURT: Well, I want to be sensitive to that.

MR. RICE: And while I'm talking I want to apologize to everybody, including the opposing counsel about my injury delaying Your Honor's ruling in the case because I know it's hard on lawyers, but it's even harder on the parties to wait, and I appreciate the Court and opposing counsel indulging me.

THE COURT: Well, again, bear with me as I quote from the Johnson versus Johnson opinion found at 37 SW 3d 892, a 2001 decision of the Tennessee Supreme Court, and I'm on Page 896 of that opinion. Bear with me as I quote:

(Reading) Ms. Johnson petitions this Court to enforce the parties agreement to divide equally, quote, all military retirement benefits, end quote, as used in the MDA.

The parties, however, offer differing definitions for that term. Ms. Johnson contends

that, quote, retirement benefits, end quote, was intended to encompass both, quote, retired pay, end quote, and, quote, disability benefits, end quote.

Mr. Johnson's terse brief offers no particular construction, but at oral argument counsel indicated that, quote, retirement benefits, end quote, should be limited to retired pay exclusive of disability benefits. A MDA is a contract, and, as such, generally is subject to the rules governing construction of contracts.

I'm omitting the citation to authorities.

(Reading) We, therefore, turn to the provisions of the MDA and rules of construction in order to resolve the meaning of, quote, retirement benefits as intended by the parties.

Quote, when resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language, end quote. Citing Guiliano versus Cleo, Incorporated, 995 SW 2d 88, parentheses, Tennessee 1999, closed parentheses.

Such interpretation is not possible when material contract terms are ambiguous. Ambiguity,

however, quote, does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions, end quote, citing Cookeville Gynecology & Obstetrics, PC v. Southeastern Data Systems, Inc., 884 SW 2d 458, comma, 462, parentheses, Tennessee Court of Appeals, 1994, closed parentheses.

Quote, a contract is ambiguous only when it is uncertain of meaning -- only when it is of uncertain meaning and may fairly be understood in more ways then one, end quote. Citing Farmers-Peoples Bank v. Clemmer, C-L-E-M-M-E-R, 519 SW 2d 801, comma, 805, parentheses, Tennessee 1975, closed parentheses.

The MDA in this case is not a model of clarity. Quote, all military retirement benefits, end quote, is neither defined in the MDA nor a term of art with an established definition.

Irrespective of the differing definitions offered by the parties; however, we find that, quote, all military retirement benefits, quote (sic), is unambiguous as it is used in the MDA.

We find that, quote, retirement benefits, end quote, has a usual, natural, and ordinary

meaning in the absence of expressed 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, end of quote.

With that rather lengthy passage in mind, we turn then to a careful examination of the Marital Dissolution Agreement in this case. Bear with me as I quote from the Marital Dissolution Agreement, which is not marked as an exhibit, but would be found among the records in this case. It might have been made an exhibit at the hearing, but I do not have the exhibit number.

(Off the record.)

(Back on the record.)

THE COURT: Are you saying Exhibit 3?

MS. BIBLE: Yes, Your Honor.

THE COURT: It is Trial Exhibit 3. Thank you. If we turn to Page 11 of that Marital Dissolution Agreement toward the bottom of the page is a heading, quote, Federal Retirement Benefit, end quote.

And I quote further from the bottom of Page 11 of the MDA continuing on over onto page -- excuse me -- this must be Page 10 of the MDA, continuing over onto Page 12 of the MDA, and the pages appear to be misnumbered. I quote from the MDA:

(Reading) Husband is eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government.

Wife is entitled to 50 percent of Husband's gross monthly annuity under the Civil Service Retirement System. Wife is entitled to 50 percent of Husband's FERS supplement under the Civil Service Retirement System.

The United States Office of Personnel Management is directed to pay Wife's share directly to Wife. Wife shall be treated as the surviving spouse to the extent necessary to ensure Wife's receipt of her portion of the pension and FERS benefits in the event of Husband's death. Wife will receive a proportionate share of any cost of living increases made by the annuity and, slash, or FERS supplement.

Paragraph:

(Reading) The parties shall retain Attorney Blake Bourland to prepare any necessary documents required for the division of this gross monthly annuity and FERS supplement and the parties shall equally divide the cost of same.

Paragraph:

(Reading) Prior to Wife's receipt of 50 percent of the annuity and FERS supplement, Husband shall pay to Wife 50 percent of said benefits to compensate Wife while the necessary documents are being processed in the amount of $2,608.00, in parentheses, the figure, monthly due on the 1st of July 2014 and the first business day of the month -- each month thereafter until Wife's receipt of the pension and FERS benefit, period, end of quote.

How are we doing? Are you doing okay? Do you want to take a break?

MR. RICE: Are you at a good stopping point?

THE COURT: I'm at a good stopping point.

MR. RICE: Then I think it might be a good idea for me to get up and walk around for a few

minutes.

THE COURT: Okay.

(Off the record.)

(A short recess was taken.)

(Back on the record.)

THE COURT: Well, to pick up where we left off, in light of the passage earlier quoted from the Johnson case opinion, certain important points are to be taken from the carefully worded text just quoted from the Marital Dissolution Agreement in this case.

First, the entitlement to benefits in the case now before us is broken down into separate elements rather than collectively; that is, the wife's entitlement to 50 percent of the husband's, quote, gross monthly annuity, end quote, is articulated in one sentence.

The wife's entitlement to 50 percent of the husband's, quote, FERS supplement, end quote is articulated in a separate sentence, and draw a line under the word separate for emphasis.

Next, there is a provision that while Blake Bourland was processing the necessary paperwork to start these payments, the husband

would pay 50 percent of both the annuity and the FERS supplement to the wife on a monthly basis until completed, and she started receiving payments from OPM. Again, the benefits are referred to separately by category.

Last, it should be kept in mind that this agreement comes close on the heels of the occasion where the FERS supplement was fully discussed at Rick Parsons' deposition.

Reasonable minds could only conclude that the distinct possibility existed that Mr. Parsons would get -- would get to the point with Raytheon -- or excuse me. Strike that. Reasonable minds could only conclude that the distinct possibility existed that Mr. Parsons would get the position with Raytheon.

Further, reasonable minds could only conclude or could easily conclude that he quite likely would earn up to the range of in the neighborhood of $39,000.00 more or less, which would be more than double the cap limit where the FERS supplement would be terminated by OPM.

That being so, the parties very easily could have included a contingency clause that would

have required the husband to make up the difference of the loss to Wife in the event her portion of the FERS supplement should be terminated.

This, the parties did not do. Under the circumstances, the terms of the Marital Dissolution Agreement as incorporated in the Final Decree are clear. There is no requirement that the husband make up the difference lost by the wife in terms of the FERS supplement benefit.

This means there is no, quote, order, end quote, of this Court that requires him to do so; rather, what has transpired is a function of the terms and conditions of the husband's retirement benefits, which is part of the federal regulations and beyond his control.

More particular to the point, there is no basis in this record to hold this respondent in contempt of court. Similarly, the terms of the contract, parentheses, meaning the Marital Dissolution Agreement, closed parentheses, are clear, and there is no basis for the Court to find this respondent to be in, quote, breach of contract, end quote.

On the positive side, it is equally clear

that the respondent must report to OPM on an annual basis. There is always the possibility that the earnings may drop below the cap limit at some point in time whereupon the FERS supplement benefit would be restored.

It should be gleaned from the foregoing analysis that we are not here dealing with a difference between a, quote, military, end quote, retiree as opposed to a, quote, civil service, end quote, retiree; rather, we are dealing with a dispute concerning contract interpretation. As pointed out in the Johnson opinion, quote:

(Reading) When resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language, end quote.

There is no ambiguity here. Given the fact that the plain language of the Marital Dissolution Agreement addressed the entitlement to benefits in the gross monthly annuity and the FERS benefit in separate sentences indicates a clear understanding that the entitlement to each came under separate federal guidelines and regulations.