APPENDIX cont.

PLEADINGS		DATE FILED
19.	TN Court of Appeals Judgment/Opinion/Western Section	12/12/19
20.	Appellant's Application for Permission to Appeal to Supreme Court of TN	02/10/20
21.	Appellee's Answer in Opposition to Appellant's Application for Permission to Appeal, Pursuant to TN Rule of Appellate Procedure 11 to Supreme Court of TN	02/21/20
22.	TN Supreme Court Order Denying Application for Permission to Appeal	06/03/20
23.	Appellant's Petition for Rule 39 Rehearing of Denial of Application for Permission to Appeal to Supreme Court of TN	06/12/20
24.	TN Supreme Court Order Denying Petition to Rehear	06/18/20
25.	Appellee's Motion for Assessment of Attorney's Fees and Costs for Appellant's Frivolous Filing to Supreme Court of TN	06/18/20

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 18, 2019 Session

KELLY COLVARD PARSONS v. RICHARD JEARL PARSONS

Circuit Court for Shelby County
No. CT-004932-13

No. W2018-02008-COA-R3-CV

JUDGMENT

This cause came on to be heard and regularly considered by the Court on the record, the briefs of the parties, and for the reasons stated in the Opinion of this Court filed this date, it is so ORDERED that:

1. The judgment of the Circuit Court is reversed in part, affirmed in part, and the case is remanded for such further proceedings as may be necessary and are consistent with the opinion.

2. Costs of the appeal are assessed against Appellant Kelly Colvard Parsons, for all of which execution may issue if necessary.

KENNY ARMSTRONG, J.
J. STEVEN STAFFORD, P.J., W.S.
CARMA DENNIS MCGEE, J.

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
September 18, 2019 Session

KELLY COLVARD PARSONS v. RICHARD JEARL PARSONS

Appeal from the Circuit Court for Shelby County
No. CT-004932-13 James F. Russell, Judge

No. W2018-02008-COA-R3-CV

Wife/Appellant appeals the trial court's denial of relief on her post-divorce petition for contempt and breach of contract. The parties' MDA awarded Wife 50% of Husband/Appellee's FERS Supplement, which was subsequently terminated due to Husband's yearly earned income being in excess of the FERS cap of $15,120.00. Because the parties' MDA did not preclude Husband from earning income in excess of the cap, and did not include a provision for such occurrence, the trial court properly denied Wife's petition. Although the trial court *sua sponte* modified child support to award an additional amount equal to the lost FERS Supplement, it did so in error. Accordingly, we affirm the trial court's grant of Husband's motion to alter or amend the award of additional child support. Because the MDA allows the prevailing party to recover attorney's fees and expenses, we reverse the trial court's denial of Husband's reasonable fees and expenses, and remand for determination of same, and for entry of judgment thereon. Reversed in part, affirmed in part, and remanded.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Affirmed in Part; and Remanded

KENNY ARMSTRONG, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S. and CARMA DENNIS MCGEE, J., joined.

Mitchell D. Moskovitz, and Kirkland Bible, Memphis, Tennessee, for the appellant, Kelly Colvard Parsons.

Larry Rice, Memphis, Tennessee, for the appellee, Richard Jearl Parsons.

OPINION

I. Background

The procedural history in this case is protracted, and this is the second appeal to this Court. In the interests of judicial economy and consistency, we restate the relevant background information from ***Parsons v. Parsons***, No. W2016-01238-COA-R3-CV, 2017 WL 1192111 (Tenn. Ct. App. Mar. 30, 2017) ("***Parsons I***"):

> On July 10, 2014, Appellant Kelly Parsons, and Appellee Richard Parson[s] filed a marital dissolution agreement (MDA) that was incorporated into a final decree of divorce, which was entered by the [Shelby County Circuit Court ("trial court")] on July 16, 2014. During the parties' marriage, Mr. Parsons was employed by the Federal Aviation Administration (FAA) as an air-traffic controller. In November 2013, seven months prior to the divorce, Mr. Parsons retired from his job pursuant to an FAA mandate, requiring retirement at the age of 56. Mr. Parsons' retirement benefits included a monthly annuity from the Civil Service Retirement System (CSRS) in the amount of $5,325. Additionally, Mr. Parsons was to receive a monthly supplement from the Federal Employees Retirement System (FERS) in the amount of $1,370 until he turned 62 and became eligible for social security. In order to maintain eligibility and continue receiving the FERS [S]upplement, Mr. Parsons' earnings could not exceed $15,120[.00] per year.
>
> The terms of the parties' MDA provided that Ms. Parsons would receive 50% of Mr. Parsons' . . . FERS [S]upplement, to wit:
>
> ***
>
> > 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. 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/or FERS [S]upplement.
>
> ***
>
> In April 2015, pursuant to the parties' parenting plan, Ms. Parsons

received Mr. Parsons' 2014 tax return and discovered that in addition to the federal retirement benefits contemplated in the MDA, Mr. Parsons had earned income in excess of $52,000, which exceeded the FERS cap of $15,120[.00]. Thus, Mr. Parsons was not eligible for the FERS [S]upplement of $1,370 per month.

On June 22, 2015, Ms. Parsons filed a petition for civil and criminal contempt. In her petition, she alleged that Mr. Parsons should be held in willful civil and criminal contempt for failing and refusing to pay her the 50% share of his FERS [S]upplement. Ms. Parsons also alleged, inter alia, that Mr. Parsons owed an arrearage of $4,795 for unpaid FERS benefits. The petition requested that the trial court order Mr. Parsons to pay such arrearages . . . .

On July 27, 2015, Mr. Parsons' attorney sent a letter informing Ms. Parsons that Mr. Parsons' FERS [S]upplement had been reduced to zero beginning August 2015. The letter also indicated that "because fifty percent (50%) of Zero Dollars ($0.00) is Zero Dollars ($0.00), [Ms. Parsons] will not receive a FERS [S]upplement payment beginning August 1, 2015." [Fn. 1. While the FERS [S]upplement ended in July 2015, Ms. Parsons alleges in her petition that Mr. Parsons did not pay her the 50% share of the [S]upplement for the months of December 2014 through June 2015 (the month the petition was filed), even though he was receiving the full FERS [S]upplement directly from the Office of Personnel Management.]. A letter from the Office of Personnel Management indicated that the reason for the elimination of the FERS [S]upplement is because Mr. Parsons' earned income during 2014 exceeded the $15,120[.00] income cap. Ms. Parsons argues that her interest in Mr. Parsons' retirement benefits is a property interest, and as such, is non-modifiable. Ms. Parsons also argues that the entry of the final decree of divorce gave her a vested interest in one-half of Mr. Parsons' FERS [S]upplement, and that Mr. Parsons' failure to compensate her to the extent of her vested interest was an improper unilateral modification of the final decree of divorce. Mr. Parsons argues that Ms. Parsons knew prior to the entry of the MDA and the final decree of divorce that Mr. Parsons' income would exceed the $15,120[.00] cap. Specifically, Mr. Parsons produced a letter from his new employer, Raytheon, dated April 7, 2014 stating that his hourly rate would be $26.50 and that he could not exceed more than 1500 hours per year. However, we note that Mr. Parsons signed the permanent parenting plan on July 10, 2014 swearing and affirming that his gross monthly income was only $4,597.00 per month, which included his federal retirement benefits and his expected earnings from Raytheon.

> The hearing on the contempt petition was held on March 2, 2016. After Ms. Parsons' attorney completed direct examination of Ms. Parsons, Mr. Parsons' attorney made an oral motion to dismiss . . . on the ground that Ms. Parsons failed to elect whether she was seeking civil or criminal contempt. Prior to ruling on the motion, the trial court heard statements from counsel for both parties regarding the status of the proof. The attorneys were in agreement that Ms. Parsons had not completed her proof; however, Mr. Parsons argued that the case was fundamentally flawed because it had proceeded without Ms. Parsons electing whether she was proceeding on either civil or criminal contempt. Mr. Parsons argued that the only remedy was dismissal. In order to expedite the proceeding, Ms. Parsons agreed to dismiss the criminal contempt component and proceed solely on the allegations of civil contempt. Despite statements from both attorneys that Appellant had not closed her proof, the trial court granted the motion to dismiss. . . .

Parsons, 2017 WL 1192111, at *1-2 (footnote in original). In ***Parsons I***, we determined that the trial court applied an incorrect burden of proof and improper procedure; as such, we vacated the trial court's order and remanded the case for further proceedings.

On remand from ***Parsons I***, Ms. Parsons filed an amended petition for contempt on June 23, 2017. In addition to contempt, Ms. Parsons amended her petition to add, in the alternative, a breach of contract claim. Specifically, Ms. Parsons alleged that Mr. Parsons breached the MDA because he failed to pay her 50% of his FERS Supplement from December 2014 through the date of her amended petition. On September 12 and 13, 2017, the trial court heard Ms. Parsons' amended petition. On November 29, 2017, the trial court announced its ruling.[1] In pertinent part, the trial court held that: (1) there was no contempt because Ms. Parsons did not have a vested interest in the FERS Supplement; and (2) there was no order requiring Mr. Parsons to compensate Ms. Parsons should the FERS Supplement terminate. The trial court also denied Ms. Parsons' breach of contract claim on its finding that the MDA was a valid contract, which could not be altered "even under equitable interpretations." Nonetheless, the trial court ostensibly restored Ms. Parsons' share of the FERS Supplement by awarding an upward deviation in child support equal to $685 per month, which amount is equal to 50% of Mr. Parsons' previous FERS Supplement.

On December 20, 2017, Mr. Parsons filed a motion to alter or amend, wherein he sought reversal of the portion of the trial court's order awarding an upward deviation in child support. On August 31, 2018, the trial court heard Mr. Parsons' motion. By order

[1] The trial court incorporated its oral ruling into its written Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract, which was filed on June 6, 2018.

of October 18, 2018, the trial court granted the motion and reversed its prior ruling. Specifically, the trial court found that its award of $685 per month "was an erroneous upward deviation in child support." Ms. Parsons appeals.

II. Issues

Ms. Parsons raises three issues for review, which we restate as follows:

1. Whether the trial court erred in finding that Mr. Parsons was not required to compensate Ms. Parsons for her share of the FERS Supplement after it terminated.

2. Whether the trial court erred in reversing the upward deviation in child support.

3. Whether the trial court erred in denying Ms. Parsons her attorney's fees and expenses under the MDA.

In the posture of Appellee, Mr. Parsons asserts that the trial court erred in denying his attorney's fees and expenses under the MDA.

III. Standard of Review

This case was tried without a jury. Therefore, we review the trial court's findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. Ct. App. 2008).

IV. FERS Benefit

Before addressing the parties' respective arguments, it is helpful to discuss the general nature of the federal FERS supplemental benefits. FERS, the Federal Employee Retirement System, is a retirement plan for Federal civilian employees. *FERS Information*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/retirement-services/fers-information/ (last visited October 31, 2019). The FERS retirement package includes benefits from three sources: (1) Social Security; (2) the Thrift Savings Plan; and (3) the Federal Employees Retirement Basic Benefit ("FERS basic benefit"). *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 1 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. Within the FERS basic benefit plan, which the Office of Personnel Management ("OPM") administers, is a special retirement supplement that is available to select employees. The special retirement supplement was "designed to bridge the gap between when [a qualified employee] retire[s] and age 62 when [the employee] first becomes eligible for a Social Security benefit." Reg Jones,

Understanding the Special Retirement Supplement 2019, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. Air traffic controllers are eligible for the special retirement supplement because air traffic controllers must retire at age 56. Tammy Flanagan, *The FERS Supplement: Q & A*, GOVERNMENT EXECUTIVE (May 16, 2019), https://www.govexec.com/pay-benefits/2019/05/fers-supplement-q/157077/. The supplement is administered by OPM's Civil Service Retirement and Disability Fund, not through the Social Security Office. Reg Jones, *Understanding the Special Retirement Supplement 2019*, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. However, similar to Social Security, the special retirement supplement is subject to an earnings test. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. A qualified employee cannot earn more than the exempt amount of earnings, or risk having his or her special retirement supplement reduced by $1.00 for every $2.00 of earnings over the exempt amount. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. Therefore, it is possible that a qualified employee could have his or her retirement supplement reduced to $0 if he or she earns income over the minimum level of earnings. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. For earnings during 2014, the year Mr. Parsons began working for Raytheon, the exempt amount of earnings was $15,120.00.

From the foregoing discussion, it is clear that Mr. Parsons' FERS Supplement is a specialized retirement asset. Tennessee Code Annotated section 36-4-121(b)(1)(B)(ii) provides that it is also "marital property." Tenn. Code Ann. § 36-4-121(b)(1)(B)(ii) ("'Marital property' includes . . . retirement[] and other fringe benefit rights accrued as a result of employment during the marriage[.]"). Here, the trial court divided the parties' marital property, including the FERS Supplement, according to their MDA.

In Tennessee, MDAs are treated as contracts and are subject to the rules governing construction of contracts. *See* ***Barnes v. Barnes***, 193 S.W.3d 495, 498 (Tenn. 2006); ***Honeycutt v. Honeycutt***, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003). To the extent our analysis requires interpretation or application of the parties' MDA, we note that "interpretation of a contract is a matter of law, [and] our review is *de novo* on the record with no presumption of correctness. . . ." ***Honeycutt***, 152 S.W.3d at 561 (quoting ***Witham v. Witham***, No. W2000-00732-COA-R3-CV, 2001 WL 846067, at *3 (Tenn. Ct. App. July 24, 2001)). In ***Kafozi v. Windward Cove, LLC***, 184 S.W.3d 693, 698 (Tenn. Ct. App. 2005), *perm. app. denied* (Tenn. Jan. 30, 2006), this Court explained that

> [i]n resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. ***Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.***, 78 S.W.3d 885, 889-90 (Tenn. 2002) (citing ***Guiliano v. Cleo, Inc.***, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." ***Planters Gin Co.***, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); ***Doe v. HCA Health Servs. of Tenn., Inc.***, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. ***Planters Gin Co.***, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." ***Id.*** (quoting 17 Am. Jur. 2d, *Contracts*, § 245).
>
> This Court's initial task in construing the [c]ontract at issue is to determine whether the language of the contract is ambiguous. ***Planters Gin Co.***, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. ***Id.*** A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. ***Id.*** (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. ***Id.*** Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. ***Id.***

Kafozi, 184 S.W.3d at 698-99.

Turning to the parties' respective arguments, Ms. Parsons maintains that Mr. Parsons "unilaterally and impermissibly" modified the parties' MDA when he failed to compensate her for her share of the FERS Supplement after the benefit terminated. The MDA provides, in relevant part that

> [the MDA] contains the entire understanding and agreement between 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.

(emphasis added). The trial court found that "the contract embedded in the *Marital Dissolution Agreement* [was] executed by the parties with clear and open minds." Ms. Parsons does not dispute that she entered into the MDA voluntarily, nor does she allege contract formation errors that would prevent enforcement of the MDA. More importantly, however, it is undisputed that, at the time they entered into the MDA, both parties had full knowledge of the character of the FERS Supplement. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. Likewise, when questioned at oral argument before this Court, Ms. Parsons' counsel stated, in relevant part:

> Q: At the time the MDA was agreed to, wasn't it understood that he could lose the FERS payment either by reaching a certain age or if his income exceeded a certain amount?
>
> A: Yes.
>
> Q: That was understood?
>
> A: Yes.
>
> Q: Yet, the MDA includes no provision in the event that that happens.
>
> A: That's correct.

Indeed, the clause in the MDA concerning the FERS Supplement states only that

> 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. 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/or FERS [S]upplement.

Although the MDA clearly and unambiguously provides that Ms. Parsons is entitled to 50% of the FERS Supplement, the MDA is silent concerning Mr. Parsons' obligation should the FERS Supplement terminate. Furthermore, there is no language in the MDA that precludes Mr. Parsons from seeking employment or earning more than the exempt amount of earnings. Despite her knowledge that the FERS Supplement could terminate if

Mr. Parsons' earnings exceeded the exempt amount of earnings, the parties did not include any contractual terms to insure Ms. Parsons against such contingency. As stated by the trial court in its ruling (incorporated into its final order):

> the parties very easily could have included a contingency clause that would have required [Mr. Parsons] to make up the difference of the loss to [Ms. Parsons] 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 [Mr. Parsons] make up the difference lost by [Ms. Parsons] in terms of the FERS Supplement benefit.

We agree. The language in the MDA is clear and unambiguous, and this Court gives effect to the language as expressed in the contract, and nothing more. *See* ***Kafozi***, 184 S.W.3d at 698-99. Furthermore, we will neither modify a contract, nor impose obligations or rights on the parties, for which they have not bargained. *See* ***Petty v. Sloan***, 277 S.W.2d 355, 359 (Tenn. 1955) (quoting ***Smithart v. John Hancock Mutual Life Ins. Co.***, 71 S.W.2d 1059, 1063 (Tenn. 1934)) ("'A court is not at liberty to make a new contract for parties who have spoken for themselves.'"); ***Marshall v. Jackson & Jones Oils, Inc.***, 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999) (citing ***Atkins v. Kirkpatrick***, 823 S.W.2d 547, 553 (Tenn. Ct. App.1991)) (stating that courts "may not relieve parties of the contractual obligations simply because these obligations later prove to be burdensome or unwise."); *see also* ***Eberbach v. Eberbach***, 535 S.W.3d 467, 478 (Tenn. 2017) ("Indeed, one of the bedrocks of Tennessee law is that our courts are without power to make another and different contract from the one executed by the parties themselves."). Again, in this case, there is nothing in the MDA to preclude Mr. Parsons from action that might terminate the FERS Supplement. Neither is there any provision in the MDA to obligate Mr. Parsons to continue to compensate Ms. Parsons for 50% of the FERS Supplement should his actions result in its termination.

Nonetheless, Ms. Parsons insists that she has a vested, non-modifiable interest in a share of the FERS Supplement. In support of her argument, Ms. Parsons relies on the Tennessee Supreme Court case, ***Johnson v. Johnson***, 37 S.W.3d 892 (Tenn. 2001), wherein the Court held

> that when [a] MDA divides **military retirement benefits**, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. Such an act constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA.

Id. at 897-98 (emphasis added).

Conversely, Mr. Parsons argues that the Tennessee Supreme Court's holding in ***Johnson*** was abrogated by the United States Supreme Court in ***Howell v. Howell***, 137 S. Ct. 1400 (2017). In ***Howell***, the United States Supreme Court held that a state court cannot

> increase, pro rata, the amount the divorced spouse receives each month from the **veteran's retirement pay** in order to indemnify the divorced spouse for the loss caused by the veteran's waiver [of retirement pay to receive service-related disability benefits], [*id.* at 1402, because] [s]tate courts cannot "vest" that which (under governing federal law) they lack the authority to give.

Id. at 1405 (emphasis added). In addressing the parties' arguments, the trial court held:

> 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.

In the first instance, the benefits at issue in ***Johnson*** and ***Howell*** are readily distinguishable from the FERS Supplement at issue here. ***Johnson*** and ***Howell*** concern military retirement benefits, which are not in the nature of a FERS Supplement, *see* discussion *supra*. Here, the parties' respective interests in the FERS Supplement are contractual because this property was divided in the MDA. As discussed above, there is nothing in the MDA to protect Ms. Parsons' interest in the FERS Supplement should Mr. Parsons' actions lead to termination of same, and there is nothing in the MDA to preclude Mr. Parsons from earning above the exempt amount of earnings. Therefore, Ms. Parsons was not contractually entitled to compensation for her 50% of the FERS Supplement after it terminated.[2]

---

[2] Ms. Parsons also argues that Mr. Parsons is guilty of breaching his implied duty of good faith and fair dealing regarding the MDA. "When considering whether the parties have complied with this duty of good faith and fair dealing, the court must ascertain the intention of the parties as determined by a reasonable and fair construction of the language of the contract." ***Woods v. Woods***, No. W1999-00733-COA-R3-CV, 2000 WL 34411144, at *3 (Tenn. Ct. App. Aug. 22, 2000). As discussed, *supra*, the parties intended to enter into the MDA as written. The undisputed facts demonstrate that Mr. Parsons complied with his duty of good faith and fair dealing when he disclosed to Ms. Parsons that the FERS Supplement could terminate. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. As such, we cannot now conclude that

V. Child Support

Concerning child support, in its June 6, 2018 order, the trial court held:

> 17. This [c]ourt is of the considered opinion that the loss of the FERS Supplement Benefit is a material and significant change in circumstances such that the child support order should be modified upward in addition to the recalculation that is already now in place.
>
> ***
>
> 19. This [c]ourt 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. . . .

Mr. Parsons filed a motion to alter or amend the trial court's order, asking the trial court to reverse the portion of its order requiring him to pay an additional $685 per month in child support. By order of October 18, 2018, the trial court reversed its prior ruling finding that the $685 per month "was an erroneous upward deviation in child support." Ms. Parsons now asks this Court to reverse the trial court and reinstate the additional $685 in monthly child support payments. We decline to do so.

The trial court was correct to reverse its prior ruling on the issue of child support. Based on the pleadings, the issue of modification of child support was not properly before the trial court. As noted above, Ms. Parsons' petition was for contempt and breach of contract. At no point in the petition does she ask the trial court to revisit the previous child support order. "The purpose of an action can only be determined from the pleadings," and "[a] trial court has no authority, *sua sponte*, to modify its child support decrees." ***Long v. Long***, No. 01A01-9406-CV-00270, 1995 WL 33741, at *3 (Tenn. Ct. App. Jan. 27, 1995)

Furthermore, at the time it entered the order increasing child support by $685 per month, the trial court had already granted modification of child support based on the termination of the FERS Supplement. On August 27, 2015, Ms. Parsons filed a petition to modify child support alleging, in pertinent part, that her income was reduced by $685 per month because she no longer received half of the FERS Supplement. Based on her

---

he breached this duty because Ms. Parsons chose to enter into the MDA without any provision protecting her should the FERS Supplement terminate.

income reduction, Ms. Parsons asked the trial court to modify Mr. Parsons' child support obligation. On April 6, 2016, the trial court entered an order granting Ms. Parsons' petition to modify child support, wherein it increased Mr. Parsons' child support obligation from zero dollars to five hundred and forty-three dollars ($543.00) based on the material change in circumstances, i.e. Ms. Parsons' decreased income. The trial court also ordered Mr. Parsons to pay two thousand six hundred and ninety-eight dollars ($2,698.00) in child support arrearages. Neither party appealed the April 6, 2016 order. As such, the order increasing Mr. Parsons' child support was "*res judicata* as to all circumstances in existence at the time of the entry of said [order]." ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Hicks v. Hicks***, 176 S.W.2d 371, 375-76 (Tenn. Ct. App. 1943)). The facts surrounding termination of the FERS Supplement were in existence and under consideration at the time the trial court entered the April 6, 2016 order. Under the doctrine of *res judicata*, the trial court could not revisit child support **on the same facts** in the absence of a Rule 60 motion. If Ms. Parsons should request modification of child support based on a material change in circumstances arising from facts **not** in existence at the time of April 6, 2016, she would have to file a petition specifically to that end. *See* ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Jones v. Jones***, 659 S.W.2d 23, 24 (Tenn. Ct. App. 1983) ("In order to obtain an increase in child support [after a final order], the petitioner has the burden of showing there has been a material change of circumstances justifying an increase in child support, and that the change has taken place from and after the entry of the previous [order]."). No such petition was filed in this case. Accordingly, the trial court erred in *sua sponte* granting an upward deviation in child support. However, it corrected this error in granting Mr. Parsons' motion to alter or amend, and we affirm the grant of that motion.

VI. Attorney's Fees

Under the MDA, both parties sought attorney's fees at trial and now seek their respective fees and expenses at the appellate level. In ***Eberbach***, the Tennessee Supreme Court explained that parties may contract for attorney's fees in a MDA, to-wit:

> A [MDA] is a contract entered into by a husband and wife in contemplation of divorce. *See* ***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)). As a contract, a MDA generally is subject to the rules governing construction of contracts. ***Id.*** . . . Thus, a MDA may include enforceable contractual provisions regarding an award of attorney's fees in post-divorce legal proceedings.

Eberbach, 535 S.W.3d at 474-75. Concerning an award of attorney's fees, the parties' MDA provides:

Noncompliance

> 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.

(emphasis in original). The trial court denied the parties' respective requests for attorney's fees stating that neither party was the "prevailing party," and that there were no "winners [or] losers in this case." We disagree. Here, the trial court denied Ms. Parsons' petition for contempt and breach of contract concerning the FERS Supplement. Although Ms. Parsons was initially awarded an increase in child support in the amount of 50% of the FERS Supplement, on grant of Mr. Parsons' motion to alter or amend, the trial court correctly reversed its modification of child support. Accordingly, Mr. Parsons was definitively the prevailing party at trial. Likewise, Mr. Parsons is the prevailing party on appeal. As such, under the plain language of the MDA, he is entitled to his reasonable attorney's fees and expenses at both the trial level and on appeal. Therefore, we remand the case for determination of Mr. Parsons' reasonable attorney's fees and costs and for entry of judgment in his favor on same.

VII. Conclusion

For the foregoing reasons, we reverse the trial court's order denying Mr. Parsons' attorney's fees under the MDA. The trial court's judgment is otherwise affirmed. The case is remanded for determination of Mr. Parsons' reasonable trial and appellate attorney's fees and expenses, for entry of judgment on same, and for such further proceedings as may be necessary and are consistent with this Opinion. Costs of the appeal are assessed to the Appellant Kelly Colvard Parsons, for all of which execution may issue if necessary.

KENNY ARMSTRONG, JUDGE

IN THE SUPREME COURT OF TENNESSEE

KELLY COLVARD PARSONS

Appellant,

vs.

W2018-02008-COA-R3-CV
(Shelby Circuit No. CT-004932-12)

RICHARD JEARL PARSONS,

Appellee.

APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

Mitchell D. Moskovitz (#15576)
Kirkland Bible (#31988)
530 Oak Court Drive, Suite 355
Memphis, Tennessee 38117
(901) 821-0044

Attorneys for Appellant,
Kelly Colvard Parsons

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Table of Authorities ii

Date of Entry of the Order iii

Questions Presented for Review iv

Statement of the Pertinent Facts v

Arguments/Reasons Supporting Review by the Supreme Court of Tennessee 1

Conclusion 32

Certificate of Service 33

Appendix 34

TABLE OF AUTHORITIES

Case **Page Number**

Eberbach v. Eberbach, 535 S.W.3d 467 (Tenn. 2017) iv

Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004) 5, 9, 10, 14, 15, 20, 21, 22

Flowers v. Flowers, 2007 WL 412302 (Tenn. Ct. App. Feb. 6, 2007) 5, 14, 17

Gray v. Estate of Gray, 993 S.W.2d 59 (Tenn. Ct. App. 1998) 9

Hassler v. Hassler, 2018 WL 4697012 (Tenn. Ct. App. Oct. 1, 2018) 20

Howell v. Howell, 137 S. Ct. 1400 (2017) 2, 3, 5, 14

In re Marriage of Gaddis, 957 P.2d 1010 (Ariz. Ct. App. 1997) 12, 13, 14

Johnson v. Johnson,

37 S.W.3d 892 (Tenn. 2001) . . . . iv, 1, 2, 3, 4, 5, 6, 10, 12, 14, 16, 17, 18, 20, 21, 30, 31

Jones v. Jones, 2018 WL 3844335 (Tenn. Ct. App. Aug. 13, 2018) 20

Minor v. Minor, 2014 WL 356508 (Tenn. Ct. App. Jan. 31, 2014) 5, 14, 18, 22, 23

Pruitt v. Pruitt, 293 S.W.3d 537 (Tenn. Ct. App. 2008) 5, 14, 17, 18

Parsons v. Parsons,

2017 WL 1192111 (Tenn. Ct. App. Mar. 30, 2017) . . . . . xx, xxi, xxii, 14, 27, 28

Parsons v. Parsons,

2019 WL 6770520 (Tenn. Ct. App. Dec. 12, 2019) . . . . . xxvi, xxvii, 1, 2, 3, 4, 29, 30

Ramsey v. Reso, 2018 WL 1747991 (Tenn. Ct. App. Apr. 11, 2018) 20

Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) . . . . . iv, 1, 3, 4, 5, 8, 10, 12, 21, 30

Wade v. Wade, 115 S.W.3d 917 (Tenn. Ct. App. 2002) 9

White v. Empire Express, Inc., 395 S.W.3d 696 (Tenn. Ct. App. 2012) . . . . . .iv, 1

DATE OF ENTRY OF ORDER

Pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, Wife herein applies for permission to appeal the opinion attached to the appendix hereto. Said opinion was filed by the Court of Appeals of Tennessee, Western Section at Jackson (hereinafter "Court of Appeals" or "Western Section"), on December 12, 2019. Neither party has filed a petition for rehearing with the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err, as a matter of law, in concluding that Wife DID NOT obtain a vested, nonmodifiable property interest in her share of Husband's marital retirement benefits as of the date of the entry of the entry of the parties' Final Decree of Divorce, and when it declined to hold that Husband's failure to compensate Wife to the extent of her vested interest amounted to an improper unilateral modification of the division of the parties' marital property, in direct conflict with Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001)?

Applicable Standard of Review:

> Questions of law are subject to *de novo* review, with no presumption of correctness. White v. Empire Express, Inc., 395 S.W.3d 696, at 712 (Tenn. Ct. App. 2012) (quoting Kinsler v. Berkline, LLC, 320 S.W.3d 796, 799 (Tenn. 2010)).

2. Did the Court of Appeals err (and thereby compound the error in the first issue) when it reversed the trial court's denial of Husband's request for attorney fees and held that Husband is entitled to his reasonable attorney fees at both the trial and appellate level, which ultimately allowed Husband to reap a windfall from his willful obstruction of the parties' Marital Dissolution Agreement, in spite of the fact that Wife was the prevailing party during the first appeal of the present matter?

Applicable Standard of Review:

> With regard to whether Wife was entitled to a grant of attorney's fees under the Marital Dissolution Agreement, the proper standard of review is *de novo* because this issue is a question of law. Eberbach v. Eberbach, 535 S.W.3d 467, 479 (Tenn. 2017). Courts reviewing requests for fees pursuant to a marital dissolution agreement fee provision should first determine whether the parties have a valid and enforceable MDA that governs the award of attorney's fees for the proceeding at bar. Id. If so, courts must look to the actual text of the provision and determine whether the provision is mandatory and applicable. Id. If so, the MDA governs the award of fees, and courts must enforce the parties' contract. Id.

STATEMENT OF THE PERTINENT FACTS

Wife adopts and incorporates the "Background" section of the Court of Appeals' December 12, 2019 opinion by reference, as if copied herein verbatim. However, Wife respectfully submits that it is necessary to convey certain addition facts, which are set forth hereinbelow.

Husband and Wife were married on March 21, 1992. (Tr. Vol. I, p. 2). Two children were born of the parties' marriage, namely Logan Grey Parsons, born on March 8, 1997, and Richard Kelan Parsons, born on May 22, 2001 (PA: 18). (Tr. Vol. I, p. 2).

Prior to the parties' marriage, Wife obtained her Bachelor of Business Administration and her Master of Arts in teaching from the University of Memphis. (Tr. Vol. VIII, p. 39). In 2004, Wife began working at Hutchison School as a Physical Education teacher. (Tr. Vol. VIII, p. 40). At the time of the hearing of Wife's Amended Petition for Civil and Criminal Contempt in September 2017, Wife had been employed at Hutchison as a Physical Education teacher for approximately thirteen (13) years. (Tr. Vol. VIII, p. 40; Tr. Vol. XIII, p. 53). At the time of the parties' divorce, Wife's earned income from Hutchison was approximately $54,000 to $55,000 a year. (Tr. Vol. XVII, p. 24).

Husband graduated from Western Virginia 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. (Tr. Vol. XVIII, p. 6). Husband worked full time for the FAA from 1985 until November of 2013, when he retired from his position as air traffic controller. (Tr. Vol. XVIII, p. 24). During Husband's deposition on April 21, 2014, he 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). (Tr. Vol. XVIII, p. 24).

Wife filed a Complaint for Divorce on November 14, 2013, and Husband filed his Answer and Counter-Complaint for Divorce on January 9, 2014. (Tr. Vol. I, pp. 1, 6). In Husband's First Supplemental Answers to Interrogatories, filed with the trial court on April 3, 2014, Husband detailed that he received payment from the U.S. Office of Personnel Management as follows:

Gross Monthly Benefit:	$5,325.00
Health Insurance Premium	-444.12
Federal Income Tax	-1,034.55
Basic Life Insurance	-54.28
FERS Benefit Supplement	**+1,370.00**
Net Monthly Benefit	$5,162

(Ex. I to Tr. Vol. XVIII) (emphasis added).

As detailed above, at the time of the parties' divorce, Husband was paid once a month by the U.S. Office of Personnel Management and received a Civil Service Annuity totaling $5,325 a month and a FERS Supplement totaling $1,370 a month. (Ex. I to Tr. Vol. XVIII). Accordingly, Husband's gross monthly income from the Office of Personnel Management was $6,695 (5,325 + 1,370 = 6,695), and after Husband's health insurance premium, federal income tax, and basic life insurance premium were deducted, his net monthly post-retirement income was $5,162. (Ex. I to Tr. Vol. XVIII).

During Husband's deposition on April 21, 2014, he was questioned about his FERS Supplement and testified as follows:

> MR. MOSKOVITZ: ... How long are your 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. (Tr. Vol. XVIII, pp. 31, 34).

Husband further testified that similar to Social Security, in order to continue to receive the FERS Supplement, his earnings from employment could not exceed $15,120 a year or he would lose the FERS Supplement. (Tr. Vol. XVIII, pp. 37-38).

During Husband's deposition, Husband testified that he had procured a part-time job with Raytheon Corporation. (Tr. Vol. VII, pp. 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, [Husband], 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.** (Tr. Vol. XVIII, pp. 35-37) (emphasis added).

In sum, on April 21, 2014, Husband testified that he was currently receiving a FERS Supplement of $1,370 from the US Office of Personnel Management, and that 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. (Tr. Vol. XVIII, pp. 35-37).

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, Wife had hoped that Husband would not retire, as the parties have two young children. (Tr. Vol. XVII, pp. 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. (Tr. Vol. VI, pp. 44-45).

Wife further 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. (Tr. Vol. XVII, pp. 73-74).

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. (Tr. Vol. I, pp. 55, 83). 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. (Tr. Vol. I, p. 58).

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. (Tr. Vol. I, pp. 65-66) (emphasis added).

Further, the paragraph titled "Alimony Waived" provides that the parties agreed to waive any claim to alimony of any kind in their divorce. (Tr. Vol. I, p. 69).

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. (Tr. Vol. I, p. 89). 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). (Tr. Vol. I, p. 92).

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." (Tr. Vol. I, p. 90).

As revealed by Husband's Supplemental Answers to Interrogatories, filed with the trial court on April 3, 2014, and Husband's testimony during his deposition on April 21, 2014, Husband's gross monthly FERS Supplement totaled $1,370 at the time of the parties' divorce. (Ex. I to Tr. Vol XVIII; Tr. Vol. XVIII, p. 31). 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. (Tr. Vol. I, pp. 65-66, 83).

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. (Tr. Vol. I, p. 75). Pursuant to the parties' Martial Dissolution Agreement, Husband's income figure included half of Husband's FERS Supplement, or $685 a month, and half of Husband's Civil Service Annuity, or $2,662 a month. (Tr. Vol. I, p. 75; Tr. Ex. 33). This figure also included Husband's wages of $1,250 a month, or $15,000 a year, from his "casual job" with Raytheon Corporation. (Tr. Vol. I, p. 75; Tr. Vol. XVIII, p. 36-37; Tr. Ex. 33).

The inclusion of $15,000 a year for Husband's part-time employment was consistent with Husband's deposition testimony that he "would probably make about $15,000 a year, which would be equal to the [FERS Supplement] cap." (Tr. Vol. XVIII, p. 37). 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**). (Tr. Ex. 33).

Likewise, in the parties' Permanent Parenting Plan, Wife's income was listed at $8,264 a month. (Tr. Vol. I, p. 75). 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 $2,662 a month. (Tr. Vol. I, p. 75; Tr. Ex. 11). It also included Wife's gross monthly income from Hutchison School of $4,917 a month, or $59,004 a year. (Tr. Vol. I, p. 75; Tr. Ex. 11). 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. (Tr. Ex. 8).

In regards to child support, the 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)." (Tr. Vol. I, p. 75). 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. (Tr. Vol. I, pp. 71, 75).

On June 22, 2015, Wife filed her Petition for Civil and Criminal Contempt, in which she alleged that Husband failed and refused to pay Wife fifty percent (50%) of his FERS Supplement from December of 2014 to June of 2015. (Tr. Vol. I, pp. 103-113). In June 2015, when Wife filed her Petition for Civil and Criminal Contempt, Husband was receiving the FERS Supplement directly from the Office of Personnel Management. (Tr. Vol. I, pp. 103-113).

Prior to the filing of Wife's 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." (Tr. Ex. 14). On December 16, 2014, Husband responded to Wife's request with a handwritten note, which stated, "**Contact [your] lawyer.**" (Tr. Ex. 15) (emphasis added).

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 the email from Mr. Bourland to Husband's counsel and requested that Husband pay Wife's fifty percent (50%) share of his gross FERS Supplement directly to Wife. (Tr. Ex. 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. (Tr. Ex. 16).

d. On March 9, 2015, Wife's counsel sent Husband's counsel an unfiled Petition for Civil Contempt, in which she 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. (Tr. Ex. 18).

On March 30, 2015, Husband's counsel sent a letter to Wife's counsel in which she detailed, in pertinent part, as follows:

> [Husband's] FERS Benefit Supplement is currently One Thousand Three Hundred Seventy Dollars ($1,370.00) per month; however, it is likely that the amount will reduce shortly due to the large withdrawal from [Husband's] Thrift Savings account for 2014 tuition and mortgage payments. (Tr. Ex. 28).

Subsequently, on June 18, 2015, Husband's counsel sent Wife's counsel a letter in which she corrected the foregoing assertion made in her letter of March 30, 2015 and detailed, in pertinent part, as follows:

> [Husband] followed up with the United State [sic] Office of Personnel Management and he was mistaken. [Husband's] FERS Supplement will not be reduced because of the withdrawals from his Federal Employee Thrift Savings. (Tr. Ex. 35A).

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, despite the fact that Husband was receiving $1,370 a month from the Office of Personnel Management, Wife filed her Petition for Civil and Criminal Contempt. (Tr. Vol. I, pp. 103-114). 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. (Tr. Vol. I, p. 107).

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. (Tr. Vol. VIII, p. 124). 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. (Tr. Ex. 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 [Wife] 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.** (Tr. Ex. 5) (emphasis added).

The letter from the United States Office of Personnel Management, attached to Husband's correspondence of July 27, 2015, indicated that because Husband's earned income in 2014 exceeded the earnings limit of $15,120, Husband FERS Supplement would be reduced from $1,370 to $0 beginning August 1, 2015. (Tr. Ex. 5).

In April of 2015, Wife received Husband's 2014 federal income tax return, which revealed that Husband's 2014 earned income far exceeded what was contemplated by

the parties' Marital Dissolution Agreement and Permanent Parenting Plan. (Tr. Vol. VIII, p. 87; Tr. Ex. 9). Wife was unaware of Husband's significant 2014 income until Wife received Husband's 2014 income tax return in April of 2015. (Tr. Vol. VIII, p. 87).

In the parties' Permanent Parenting Plan, entered with the trial court on July 16, 2014, Husband's income was comprised of half of Husband's FERS Supplement, or $685 a month, half of Husband's Civil Service Annuity, or $2,662 a month, and wages of $1,250 a month from Husband's "casual job" with Raytheon Corporation. (Tr. Vol. I, p.75; Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 33). The inclusion of $1,250 a month, or $15,000 a year, for Husband's part-time employment was consistent with Husband's deposition testimony that he "would probably make about $15,000 a year, which would be equal to the [FERS Supplement] cap." (Tr. Vol. XVIII, pp. 36-37).

Despite Husband's testimony on April 21, 2014 that he would only earn $15,000 a year from Raytheon Corporation, Husband's income tax return reveals that in 2014, Husband's earned income totaled $52,309. (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 9). Husband's earned income of $52,309 far exceeded the FERS Supplement earnings limit of $15,120 and resulted in the reduction of the FERS Supplement from $1,370 to $0 a month. (Tr. Ex. 5).

Likewise, in 2015 and 2016, Husband's earned income greatly exceeded the FERS Supplement earnings limit of $15,120. (Tr. Ex. 34; Tr. Ex. 36). Specifically, as revealed by Husband's income tax returns, Husband's earned income was $34,553 in 2015 and $37,301 in 2016. (Tr. Ex. 34; Tr. Ex. 36).

On June 22, 2015, Wife filed her Petition for Civil and Criminal Contempt, in which she alleged that Husband failed and refused to pay Wife fifty percent (50%) of his FERS

Supplement under the Civil Service Retirement System from December 2014 through June 2015 in contravention of the parties' Marital Dissolution Agreement and subsequent Orders of the trial court. (Tr. Vol. I, pp. 103-07).

The hearing of Wife's Petition for Civil and Criminal Contempt was conducted before the Honorable James F. Russell, Judge of Division II of the Circuit Court of Shelby County, Tennessee (hereinafter "trial court") on March 2, 2016 and March 3, 2016. (Tr. Vol. VIII; Tr. Vol. IX). On March 2, 2016, Wife's counsel conducted his direct examination of Wife, and at the close of said direct examination, Husband's counsel moved to dismiss Wife's Petition for Civil and Criminal Contempt. (Tr. Vol. VIII, p. 148). Husband's oral Motion to Dismiss was heard on March 3, 2016 before Wife closed her proof and was based solely upon Wife's failure to elect whether she was seeking civil or criminal contempt at the outset of the proceedings. (Tr. Vol. IX, pp. 4-5, 8-10, 29-32, 49-50).

On March 8, 2016, the Honorable James F. Russell issued his oral ruling on Wife's Petition for Civil and Criminal Contempt. (Tr. Vol. X). Specifically, in regards to Husband's oral Motion to Dismiss, the trial court opined,

> The motion itself comes in a bit of an unusual procedural context in that it was made at the end of the direct examination of the Petitioner. It seems to be in the form of a motion for directed verdict at the close of the Plaintiff's proof, which we would recognize more in a jury trial type context, but the Court is treating it in that fashion. (Tr. Vol. X, p. 6).

Ultimately, the trial court granted Husband's Motion to Dismiss. (Tr. Vol. X, p. 24). During the trial court's ruling, the court incorrectly detailed that the requisite burden of proof for civil contempt was "clear and convincing evidence" and opined, in pertinent part, as follows:

> We next turn to an understanding from the bench book of the burden of proof with regard to each. Under a heading of Burden of Proof.
>
> (a) Criminal contempt. Beyond a reasonable doubt...
> (b) **Civil contempt. Clear and convincing evidence**, see Oriel O-R-I-E-L v. Russell, 278 U.S. 358, 49 S. Ct. 173 (1929). See also Wright supra at Section 705, Page 830, and Pevnick supra Section 3-16, Page 136. (Tr. Vol. X, p. 16) (emphasis added).

Accordingly, in dismissing Wife's Petition for Civil and Criminal Contempt, the trial court held,

> **The Court is thus compelled to a conclusion that the petitioner has failed to sustain the requisite burden of proof, that is by clear and convincing evidence, of any, quote, "civil," end quote, contempt...**
>
> [T]he Court observes that the dilemma in which the parties now find themselves is not one of their own making. Moreover, the turn of events was not contemplated by either of these parties, in the way it has unfolded, at the time of entering the Marital Dissolution Agreement and the Final Decree of Divorce.
>
> With that understanding, reasonable minds and common sense would dictate that a party cannot be held in contempt of court, either, quote, "civil," end quote or "criminal," end quote, under the respective burdens of proof as to which based on the facts and circumstances now exist in this case. (Tr. Vol. X, pp. 20, 22-23) (emphasis added).

During the trial court's oral ruling on Wife's Petition for Civil and Criminal Contempt, the court gave Wife leave to amend her Petition, detailing, "[Wife] may seek redress under a breach of contract theory." (Tr. Vol. X, p. 24).

On May 19, 2016, an Order Dismissing Petition for Civil and Criminal Contempt was entered with the trial court. (Tr. Vol. III, p. 426). Said Order provides, in pertinent part, as follows:

> The Court finds that [Wife's] Petition for Civil and Criminal Contempt makes no allegations that would be consistent with "civil" contempt. The Court finds that it is impossible for the Court to find that the case for "civil" contempt is made. The Court finds that both the pleadings and proof in this matter are fatally flawed. The Court finds that [Wife] has failed to sustain the requisite burden of proof of any "civil" contempt. The Court finds that [Wife's] Petition for Civil and Criminal Contempt should be dismissed insofar as it seeks to hold [Husband] in "civil" contempt.
>
> The Court finds that the parties find themselves in a dilemma which is not one of their own making. The Court finds that the turn of events was not contemplated by either of the parties at the time of entering the martial dissolution agreement and final decree of divorce. The Court finds that reasonable minds and common sense would dictate that a party cannot be held in "civil" or "criminal" contempt of court under the respective burdens of proof as to which based on the facts and circumstances as they now exist in this case.
> ...
> The Court finds that [Wife's] Petition for Civil and Criminal Contempt filed on June 22, 2015 should be dismissed. (Tr. Vol. III, p. 426-27).

All remaining court costs were assessed against Wife. (Tr. Vol. III, p. 427). On June 16, 2016, Wife timely filed a Notice of Appeal and Appeal Bond. (Tr. Vol. III, pp. 429-30).

During Wife's first appeal of the present matter, Wife asserted that the trial court erred when it applied an incorrect legal standard and when it dismissed her Petition prior to the completion of her proof. Parsons v. Parsons, 2017 WL 1192111, at *4-5 (Tenn. Ct. App. March 30, 2017). However, the focus of Wife's argument on appeal was upon the trial court's refusal to address the primary issue of Husband's failure to pay Wife her share of his FERS Supplement. Id. at *6.

Specifically, Wife argued that her interest in Husband's retirement benefits is a property interest and as such, is non-modifiable. Id. at *2. Further, Wife asserted that the entry of the parties' Final Decree of Divorce gave her a vested interest in her share of

Husband's retirement benefits, and Husband's failure to compensate Wife to the extent of her vested interest was and improper unilateral modification of the parties' Final Decree of Divorce. Id.

In response, Husband's asserted that Wife knew that that his income would exceed the $15,120 earnings cap prior to the entry of the Final Decree of Divorce. Id. Specifically, Husband produced a letter from Raytheon Corporation dated April 7, 2014, stating that his hourly rate would be $26.50, and that he could not exceed more than 1,500 hours per year. Id. Nevertheless, the Court of Appeals seemingly rejected Husband's argument and detailed,

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

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

In its opinion, the Court of Appeals noted that the trial court's order "focuses solely on the issue of contempt and does not address the primary issue of non-payment of the FERS supplement." Id. at *6. The Court further detailed that during the oral argument of Wife's appeal, Wife urged the Court to make a decision concerning the merits of her claim rather than remanding the matter to the trial court to allow completion of proof and application of the appropriate burden of proof. Id.

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

On June 23, 2017, Wife filed her Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract (hereinafter "Amended Petition for Civil and Criminal Contempt"). (Tr. Vol. V, p. 616). In said Amended Petition, Wife maintained that Husband was in contempt for his failure to pay Wife fifty percent (50%) of his FERS Supplement from December 2014 through June 2017, the month Wife filed her Amended Petition. (Tr. Vol. V, p. 618). Wife further alleged, in the alternative, that Husband was in breach of contract for his failure to pay Wife fifty percent (50%) of his FERS Supplement from December 2014 through June 2017. (Tr. Vol. V, 618-19).

On September 12 and 13, 2017, the trial court heard Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract. (Tr. Vol. XIII; Tr. Vol. XIV). On November 29, 2017, the trial court issued its oral ruling on Wife's Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract. (Tr. Vol. XV). During said ruling, the trial court detailed as follows:

> Under the circumstances, the terms of the Martial Dissolution Agreement as incorporated in the Final Decree are clear. There is no requirement that [Husband] make up the difference lost by [Wife] in terms of the FERS Supplement

benefit. This means there is no, quote, order, end quote, that requires him to do so; rather, what has transpired is a function of the terms and conditions of [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 [Husband] in contempt of court. Similarly, the terms of the contract, parenthesis, meaning the Marital Dissolution Agreement, closed parentheses, are clear, and there is no basis for the Court to find [Husband] to be in, quote, breach of contract, end quote.

...

However, the analysis does not end here. In the course of [Wife's] discovery deposition and even at the full hearing that we held, [Wife] alluded to the fact that the parties had two children to raise.

...

In terms of child support, she agreed to waive the nominal amount of child support in the amount of $6.00 as calculated according to the child support calculator, and, in part, based upon what she would be receiving, including the FERS benefits.

...

[Wife] filed a motion before the divorce referee to modify the child support. That was heard on February 26 of 2016. The referee ruled the child support would increase to $543 per month for the period beginning August 27 of 2015 through December 31 of 2015, and beginning January of 2016 forward would be $486 per month.

...

[T]he Court observes that this turn of events has only minimally alleviated the loss of [Wife's] share of the FERS benefit, which she counted on for raising the family. Moreover, she apparently waived any right to alimony in light of [Husband's] anticipated reduction in income and an increase in alimony would not be an option.

The Court is of the considered opinion that the loss of the FERS benefit is a material and significant change of circumstances such that the child support should be modified upward in addition to the recalculation that is already now in place. **As earlier indicated, it seems patently unfair for this [Husband] to reap the benefit to him brought about by the substantial increase in income with new employment. At the same time, it is equally unfair that**

> **this [Wife] must suffer the pain of the loss of the FERS supplement benefit.**
>
> Under the circumstances, the Court has reached the conclusion that this loss must be restored to [Wife] in the form of an upward deviation in the now modified child support that is equal to the $685 per month that she would otherwise be receiving.
>
> The Court will, therefore, decree that the child support obligation will be modified by an upward deviation in the amount of the $685.00 be made [sic].
>
> This upward deviation, in addition to the current amount, will commence as of the next payment due, as of November 1, 2017, and will continue in place until such time as the FERS supplement may be restored by OPM or the youngest child of the parties reaches 18 years of age or graduates from high school. (Tr. Vol. XV, pp. 29, 31-34) (emphasis added).

In sum, on November 29, 2017, during the trial court's oral ruling on Wife's Amended Petition for Civil and Criminal Contempt, the court ordered Husband to pay Wife $685 a month in the form of an upward deviation in child support to restore her loss of the FERS Supplement that she would otherwise be receiving. (Tr. Vol. XV, pp. 31-34). Following the trial court's ruling in November 2017, Husband wrote "Paid under duress and protest!" on most, if not all, of his checks written to Wife for the upward deviation of child support in the amount of $685 a month. (Tr. Vol. VI, pp. 828-31).

On December 20, 2017, Husband filed his Motion to Alter, Amend, or Set Aside the Judgment, or in the Alternative Stay the Judgment Pending Appeal (hereinafter "Motion to Alter, Amend, or Set Aside the Judgment"), and on March 21, 2018, Wife filed her Response to Husband's Motion to Alter, Amend, or Set Aside the Judgment. (Tr. Vol. VI, pp. 801, 813).

On June 6, 2018, the Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract was entered with the trial court. (Tr. Vol. VI, p. 832). Said Order provides, in pertinent part, as follows:

> This Court finds that there is no "order" of this Court requiring [Husband] to reimburse [Wife] the difference lost by [Wife] in terms of the FERS Supplement Benefit. This Court finds that there is no basis in this record to hold [Husband] in contempt of court.
> ...
> This Court finds that [Wife] did not acquire a "vested interest" in [Husband's] FERS Supplement Benefit, which ceased to exist under the applicable federal regulations. Under the doctrine of Federal Preemption, this Court cannot "vest" that which it lacks the authority to give, even under equitable considerations. This Court finds that there is no basis to find [Husband] in breach of contract for a violation of the Marital Dissolution Agreement.
> ...
> 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. This Court finds that it is patently unfair for [Husband] 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 [Wife] must suffer the pain of the loss of the FERS Supplement Benefit.
>
> This Court has reached the conclusion that the loss of the FERS Supplement Benefit must be restored to [Wife], 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 [Wife] would otherwise be 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 [sic] Management, or until the parties' youngest child reaches the age of eighteen (18) years of age or graduates from high school.
> ...

> In all other respects, the relief sought in [Wife's] *Original Petition* and *Amended Petition* must be denied. (Tr. Vol. VI, pp. 685-86)

On August 31, 2018, Husband's Motion to Alter, Amend, or Set Aside the Judgment was heard before the trial court. At the conclusion of said hearing, the trial court granted Husband's Motion to Alter, Amend, or Set Aside the Judgment and detailed, in pertinent part, as follows:

> I regret to say that the ruling I made was simply overstepping the bounds and should not have been made as it was. I agree with [Husband] in this case that the award of 685 dollars is an upward deviation in child support. It was erroneous. And the motion should be granted, and it will be.
>
> And that brings us to the bit about the paragraph in the Marital Dissolution Agreement that when disputes arise such as this that the prevailing party is entitled to have fees and expenses awarded.
> ...
> Both sides are, in essence, winners and losers, and it would be impossible for the Court to say that one is more a winner than the other and will deny any request to set or award litigation expenses or attorney fees to either party. (Tr. Vol. XVI, pp. 30-31).

On October 18, 2018, the Order on [Husband's] Motion to Alter, Amend or Set Aside the Judgment was entered with the trial court, and on November 6, 2018, Wife timely filed her Notice of Appeal with the Court of Appeals. (Tr. Vol. VI, pp. 843, 846).

On December 12, 2019, the Western Section of the Court of Appeals affirmed the trial court's ruling and held that Husband was not required to compensate Wife for her interest in his retirement benefit after Husband's unilateral actions resulted in the termination of same. Parsons v. Parsons, 2019 WL 6770520, at *5-6 (Tenn. Ct. App. Dec. 12, 2019). Further, the Court held that Husband was "definitively the prevailing party at trial" and on appeal. Id. at *8. Accordingly, the Court held that Husband was entitled

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

ARGUMENTS/REASONS SUPPORTING REVIEW BY THE SUPREME COURT OF TENNESSEE

I. Did the Court of Appeals err, as a matter of law, in concluding that Wife DID NOT obtain a vested, nonmodifiable property interest in her share of Husband's marital retirement benefits as of the date of the entry of the entry of the parties' Final Decree of Divorce, and when it declined to hold that Husband's failure to compensate Wife to the extent of her vested interest amounted to an improper unilateral modification of the division of the parties' marital property, in direct conflict with Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001)?

A. *Standard of Review on Appeal.*

Questions of law are subject to *de novo* review, with no presumption of correctness. White v. Empire Express, Inc., 395 S.W.3d 696, at 712 (Tenn. Ct. App. 2012) (quoting Kinsler v. Berkline, LLC, 320 S.W.3d 796, 799 (Tenn. 2010)).

B. *Wife submits that this Honorable Court should grant Wife's Application for Permission to Appeal to settle an important question of law, to secure uniformity of decision, and to exercise this Honorable Court's supervisory authority, as the Court of Appeals' decision in the present case upsets the well-established principle set forth by this Honorable Court in Towner v. Towner and Johnson v. Johnson, that a nonemployee spouse obtains a vested interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, which is not subject to modification or termination due to a post-decree change in circumstances unilaterally imposed by the employee spouse.*

In affirming the trial court's holding that Husband was not required to compensate Wife for her share of the FERS Supplement after Husband's actions effected a reduction in the whole of Husband's retirement benefits, including a reduction in the half in which Wife had a vested interest, the Court of Appeals held, in pertinent part, as follows:

> [I]t is clear that [Husband's] FERS Supplement is a specialized retirement asset. Tennessee Code Annotated section 36-4-121(b)(1)(B)(ii) provides that it is also "marital property." Here, the trial court divided the parties' marital property, including the FERS Supplement, according to their MDA.
> ...

[I]t is undisputed that, at the time they entered into the MDA, both parties had full knowledge of the character of the FERS Supplement. Specifically, [Wife] testified that she was aware that the Supplement could terminate should [Husband] earn more than $15,120.00.

...

Nonetheless, [Wife] insists that she has a vested, non-modifiable interest in a share of the FERS Supplement. In support of her argument, [Wife] relies on the Tennessee Supreme Court case, Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001), wherein the Court held

> that when [a] MDA divides **military retirement benefits**, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. Such an act constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA. Id. at 897-98 (emphasis added).

Conversely, [Husband] argues that the Tennessee Supreme Court's holding in Johnson was abrogated by the United States Supreme Court in Howell v. Howell, 137 S. Ct. 1400 (2017). In Howell, the United States Supreme Court held that a state court cannot

> increase, pro rata, the amount the divorced spouse receives each month from the **veteran's retirement pay** in order to indemnify the divorced spouse for the loss caused by the veteran's waiver [of retirement pay to receive service-related disability benefits], [***id.*** at 1402, because] [s]tate courts cannot "vest" that which (under governing federal law) they lack the authority to give. Id. at 1405 (emphasis added).

...

In the first instance, the benefits at issue in Johnson and Howell are readily distinguishable from the FERS Supplement at issue here. Johnson and Howell concern military retirement benefits, which are not in the nature of a FERS Supplement. Here, the parties' respective interests are contractual because this property was divided in the MDA. As discussed above, there is nothing in the MDA to protect

> [Wife's] interest in the FERS Supplement should [Husband's] actions lead to termination of same, and there is nothing in the MDA to preclude [Husband] from earning above the exempt amount of earnings. Therefore, [Wife] was not contractually entitled to compensation for her 50% of the FERS Supplement after it terminated. Parsons v. Parsons, 2019 WL 6770520, at *3-6 (Tenn. Ct. App. Dec. 12, 2019) (emphasis added).

Wife respectfully submits that the Court of Appeals' above-detailed holding is erroneous and in direct conflict with prior opinions of this Honorable Court and the Court of Appeals. As described in greater detail below, in accordance with this Court's holding in Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) (abrogated on other grounds by Howell v. Howell, 137 S. Ct. 1400 (2017)), Wife obtained a vested, non-modifiable interest in her share of Husband's FERS Supplement, on July 16, 2014, the date of the entry of the parties' Final Decree of Divorce, which was not subject to modification or termination.

Wife submits that although the Court of Appeals correctly noted that Husband's FERS Supplement is a "specialized retirement asset" and also "marital property" in accordance with Tennessee Code Annotated § 36-4-121(b)(1)(B)(ii), the Court failed to recognize that the parties' division of Husband's marital retirement benefits is nonmodifiable in accordance with Towner. Id. at *3. (*See* Towner, 858 S.W.2d at 892).

Further, the Court of Appeals held that Husband and Wife's "interests in the FERS Supplement are contractual because this property was divided in the MDA," and that the Martial Dissolution Agreement "is silent concerning [Husband's] obligation should the FERS Supplement terminate." Id. at *3-4. Accordingly, the Court held that Wife was not contractually entitled to compensation for her share of Husband's retirement benefits after Husband unilaterally defeated her interest in same. Id. at *6.

Wife alleges that the Court of Appeals' above-detailed decision upsets the well-established principle set forth by this Honorable Court in Towner, Johnson, and their progeny, that a nonemployee spouse obtains a fixed, vested property interest in his or her spouse's retirement benefits upon the entry of a divorce decree, which cannot be terminated or modified as a result of a post-decree change in circumstances unilaterally imposed by an employee spouse. *See* Towner, 858 S.W.2d at 892; Johnson, 37 S.W.3d at 897.

In accordance with this Court's holding in Towner and Johnson, a martial dissolution agreement need not contain contractual terms precluding an employee spouse from defeating his or her spouse's interest in marital retirement benefits. Id. Rather, pursuant to Towner and Johnson, a nonemployee spouse obtains a fixed, vested interest in his or her spouse's marital retirement benefits upon the entry of a final decree of divorce, and the employee spouse is prohibited from defeating the nonemployee spouse's interest in said benefits by invoking a condition wholly within his or her control. Id. Such an act constitutes an impermissible modification of a division of marital property and a violation of the parties' final decree of divorce incorporating their marital dissolution agreement. Johnson, 37 S.W.3d at 897-98.

Furthermore, as described in greater detail below, Wife submits that Court of Appeals erroneously held that this Honorable Court's decision in Johnson is "readily distinguishable for the FERS Supplement at issue" in the present case due to the fact that both Johnson and Howell concern "military retirement benefits, which are not in the nature of a FERS Supplement." Parsons, 2019 WL 6770520, at *6.

Wife submits that unlike Howell, in which the United States Supreme Court held that a state court cannot order a veteran to indemnify or reimburse his former spouse for the loss of her share of his military retirement pay caused by the receipt of disability benefits, as pursuant to 10 U.S.C. § 1408, federal law preempts state courts from dividing military retirement pay that a veteran has waived in order to receive disability benefits, this Honorable Court's holding in Johnson is not limited solely to the context of military retirement benefits. Howell, 137 S. Ct. at 1403-06.

Rather, Tennessee courts have routinely cited Johnson in cases that do not involve military retirement benefits for the proposition that parties obtain a vested interest in the property allocated to them in their marital dissolution agreement, and neither party may frustrate the other's receipt of his or her vested interest. *See* Minor v. Minor, 2014 WL 356508 (Tenn. Ct. App. Jan. 31, 2014); Pruitt v. Pruitt, 293 S.W.3d 537 (Tenn. Ct. App. 2008); Flowers v. Flowers, 2007 WL 412302 (Tenn. Ct. App. Feb. 6, 2007); Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004) (abrogated on other grounds by Eberbach v. Eberbach, 535 S.W.3d 467 (Tenn. 2017)).

As set forth in greater detail below, Wife submits that this Honorable Court should grant Wife's Application for Permission to Appeal to settle an important question of law, to secure uniformity of decision, and to exercise this Honorable Court's supervisory authority, as the Court of Appeals' decision in the present case upsets the well-established principle set forth by this Honorable Court in Towner and Johnson, that a nonemployee spouse obtains a vested interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, and that said vested interest cannot

thereafter be unilaterally diminished by an act of the employee spouse. Johnson, 37 S.W.3d at 897-98.

In the present case, prior to the parties' divorce, upon Husband's retirement from the Federal Aviation Administration in November of 2013, Husband began receiving retirement income in the form of an FERS Supplement in the amount of $1,370 a month. (Tr. Vol XVIII, pp. 30-31; Exhibit I to Tr. Vol. XVIII). 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. (Tr. Vol. XVIII, pp. 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, [Husband], 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. (Tr. Vol. XVIII, pp. 31, 37).

Husband further testified that he procured a part-time job with Raytheon Corporation, and when Husband was questioned about the hours that he would be working and the income that he would be receiving from Raytheon, Husband testified, "**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." (Tr. Vol. XVIII, pp. 35-37) (emphasis added).

On July 10, 2014, the parties signed their Marital Dissolution Agreement, which provides, "Wife is entitled to fifty percent (50%) of Husband's FERS Supplement under the Civil Service Retirement System." (Tr. Vol. I, pp. 65-66). Per the parties' Marital Dissolution Agreement, the United States Office of Personnel Management was directed to pay Wife's share of the FERS Supplement directly to Wife. (Tr. Vol. I, p. 66). 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. (Tr. Vol. I, p. 66).

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. (Tr. Vol. XVIII, pp. 30-31; Exhibit I to Tr. Vol. XVIII). In anticipation of receiving fifty percent (50%) of Husband's FERS Supplement, or $685 a month, until Husband turned sixty-two (62) and fifty percent (50%) of Husband's Civil Service Annuity, or $2,662 a month, Wife waived her claim to alimony of any kind. (Tr. Vol. I, p. 69).

In the parties' Permanent Parenting Plan, entered with the trial court on July 16, 2014, Husband swore and affirmed, under the penalty of perjury, that his gross monthly income was $4,597. (Tr. Vol. I, pp. 75, 80). 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. (Tr. Ex. 33). 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." (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 33). 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**). (Tr. Ex. 33).

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 at 890.

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, the Office of Personnel Management did not pay Wife's share of Husband's FERS Supplement, totaling $685 a month, directly to Wife. (Tr. Vol. VIII, pp. 108, 115-16). Instead, OPM continued to pay the full amount of the FERS Supplement, or $1,370 per month, directly to Husband. (Tr. Vol. VIII, pp. 113, 116).

Although Husband received one hundred percent (100%) of the FERS Supplement each month from December 2014 through June 2015, when Wife filed her Petition for Civil and Criminal Contempt, Husband failed and refused to pay Wife any percentage of his FERS Supplement. (Tr. Vol. VIII, pp. 110-32). **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. (Tr. Vol. 4, 124; Tr. Ex. 20).

Subsequently, on July 27, 2015, Husband's counsel sent Wife's counsel a letter in which she advised that Husband's FERS Supplement would be reduced from $1,370 a month to $0 a month beginning August 1, 2015. (Tr. Ex. 5). Said letter further detailed, "Please be advised that because Fifty Percent (50%) of Zero Dollars ($0.00) is Zero Dollars, [Wife] will not receive a FERS Annuity Supplement payment beginning August 1, 2015." (Tr. Ex. 5). Husband's counsel attached a letter from the Office of Personnel Management to her letter of July 27, 2015, which provided that Husband's FERS Supplement was reduced from $1,370 to $0 a month because his 2014 earned income exceeding the $15,120 earnings limit. (Tr. Ex. 5).

Despite Husband's testimony on April 21, 2014 that he would only make $15,000 a year in earned income from Raytheon Corporation, Husband's income tax return reveals that in 2014, Husband earned $52,309 in income. (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 9). Husband's earned income of $52,309 exceeded the FERS Supplement earnings limit of $15,120 by $37,189 and resulted in the reduction of the FERS Supplement from $1,370 to $0 a month. (Tr. Ex. 9).

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

the trial court. Elliott, 149 S.W.3d at 84. In fact, both parties obtain a vested interest in the property allocated to them in the martial dissolution agreement, and neither party may frustrate the other's receipt of his or her vested interest. Id.

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

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

Several years later, in an opinion authored by Justice Janice Holder, this Honorable Court held that a non-employee spouse's interest in his or her spouse's retirement benefits vests as of the date of the entry of the final decree of divorce and cannot be unilaterally altered. Johnson, 37 S.W.3d at 897 (abrogated on other grounds by Howell, 137 S. Ct. at 1405). In Johnson v. Johnson, the parties' marital dissolution agreement provided that wife would receive one-half of all of husband's military retirement benefits each month upon husband's receipt of the same. Johnson, 37 S.W.3d at 894. Subsequent to the entry of the marital dissolution agreement, husband began receiving $2,892 a month in retirement, and wife was paid one-half of this amount in monthly

installments. Id. Wife continued to receive $1,446 of husband's retirement benefit each month for nearly a year. Id.

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

Ultimately, this Honorable Court held that under the parties' marital dissolution agreement,

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

The Court opined that wife's characterization of her petition as one seeking "modification" was incorrect, as wife primarily alleged that the parties agreed to a course of action, the trial court ordered that action, and husband failed to perform as ordered. Id. at 896. Therefore, the Court determined that Wife sought no more than what she originally received at the time of husband's retirement, which was one half of the retirement pay that he was entitled to receive at the time of his retirement. Id. at 896-97.

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

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

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

In issuing the above opinion, this Honorable Court relied heavily on the Arizona Court of Appeals decision in In re Marriage of Gaddis, 957 P.2d 1010 (Ariz. Ct. App. 1997). *See* Johnson, 37. S.W.3d at 897. In Gaddis, the trial court's final decree, entered in November 1994, awarded wife one-half of husband's retirement benefits as of February 1995. Id. at 897 (citing Gaddis, 957 P.2d at 468). In February 1995, in accordance with the parties' final decree of divorce, wife began receiving one-half of husband's retirement

benefits, which ranged from $750 to $785 a month. Gaddis, 957 P.2d at 468. However, in October of 1995, Husband obtained civil service employment with the federal government, and as a result, his retirement pay was reduced by $848.22 a month. Id.

Wife then filed a petition for order to show cause, claiming that her share of husband's retirement pay should not be reduced due to husband's civil service employment. Id. The trial court agreed with wife, holding, "[T]he original, actual value of the retirement plan to which [wife] is entitled to one-half... is $1,500 per month." Id. The court thus ordered husband to pay wife $750 a month. Id.

In affirming the trial court, the Arizona Court of Appeals held that the value of wife's one-half interest in husband's retirement pay could not be reduced by virtue of husband's obtaining employment, and that wife was entitled to one-half of the original, actual value of husband's retirement plan. Id. at 469-71. The Court opined,

> When [husband] subsequently [obtained civil service employment], the decree had already established wife's fixed interest in the military retirement benefits. Husband deliberately frustrated the decree by voluntarily waiving retirement benefits which the court had vested in wife. He could not reduce that vested interest by unilaterally obtaining civil service employment post-decree. Id. at 470.

Citing a prior decision by the Arizona Court of Appeals, the Gaddis Court detailed, "An employee spouse cannot defeat the nonemployee spouse's interest in retirement benefits by invoking a condition wholly within his or her control." Id. at 469 (quoting Crawford v. Crawford, 884 P.2d 210 (Ariz. Ct. App. 1994)). Thus, the Gaddis court held that wife obtained a vested interest in husband's retirement benefits on the date of the parties' divorce, and husband could not take any action to frustrate her receipt of this vested

interest, as this frustration would result in husband's unilateral modification of the final decree. Id. at 470.

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

However, unlike Howell, this Honorable 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. Minor v. Minor, 2014 WL 356508, at *5; Pruitt v. Pruitt, 293 S.W.3d at 544; Flowers, 2007 WL 412302, at *8; Elliott v. Elliott, 149 S.W.3d at 84.

By way of illustration, 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) (emphasis added).

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 WL 412302, at *1, 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 *4. 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 *5.

The trial court awarded ex-wife 11.58% of husband's pension benefits and awarded husband's current wife the remainder of those benefits. Id. at *6. 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 *9.

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 *8 (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 *7.

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 WL 356508, at *5, 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 *1-2. Husband failed to fulfil his alimony obligation to wife and as a result, wife fell behind on her mortgage payments. Id. at *2.

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 *2-3. 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. at *3-4.

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 *6. 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 *7.

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 child 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 *8 (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 *8.

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

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. Although Husband certainly had the legal right to earn income of $52,309 a year, his doing so effected a reduction of the whole of his retirement benefits, including a reduction in the half in which Wife had a vested interest.

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.

Wife submits that similar to Elliott, when the parties discovered the Office of Personnel Management's refusal to divide Husband's FERS Supplement and subsequently, when Husband's FERS Supplement was reduced from $1,370 to $0 a month, 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 is 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. Id. at 85-86.

Husband's failure to compensate Wife to the extent of her vested interest in his FERS Supplement constitutes 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. Id. at 86. Accordingly, akin to Elliott, this Honorable 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 WL 356508, at *7. In Minor, the Court refused to interpret the parties' marital dissolution agreement in a way that would permit

husband to benefit from his own contemptuous conduct. Id. at *8. The Court detailed that the words of a contract should be given a reasonable construction, rather than an unreasonable one, and a court should endeavor to give a construction most equitable to the parties that will not give one party an unfair or unreasonable advantage over the other. Id. at *7.

Notably, in the present case, during the trial court's ruling of November 29, 2017, the court echoed the sentiment of the Minor Court, holding,

> [I]t seems patently unfair for this [Husband] to reap the benefit to him brought about by the substantial increase in income with new employment. At the same time, it is equally unfair that this [Wife] must suffer the pain of the loss of the FERS supplement benefit.
> ...
> The Court is mindful of the fact that the outcome here results in a windfall advantage to [Husband] in the sense that he reaps the benefit of substantial increase in earnings by virtue of his re-employment. At the same time, the Court is cognizant of the pain resulting to [Wife] by virtue of losing the benefit of the FERS Supplement. (Tr. Vol. XV, pp. 33-35).

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

Akin to Minor, it would be inequitable to allow Husband to impede the division of the parties' estate by virtue of his own misconduct. Minor, 2014 WL 356508, at *7. 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 *7.

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

Therefore, just as a parent should not be allowed to avoid his support obligation by becoming willfully underemployed, Husband should not be permitted to benefit from his receipt of earned income so far in excess of what was contemplated by the parties' Agreement that Wife's rights to receive the benefit of the Marital Dissolution Agreement were destroyed. Id. at *7-8. Allowing Husband to benefit from this conduct would be contrary to policy and the well-settled principles of contract construction. Id. at *7.

Based on all of the foregoing, Wife submits that this Honorable Court should grant Wife's Application for Permission to Appeal to settle an important question of law, to secure uniformity of decision, and to exercise this Honorable Court's supervisory authority, as the Court of Appeals' decision in the present case upsets the well-established principle set forth by this Honorable Court in Towner and Johnson, that a nonemployee spouse obtains a vested property interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, which is not subject to modification or termination due to a post-decree change in circumstances unilaterally imposed by the employee spouse.

II. Did the Court of Appeals err (and thereby compound the error in the first issue) when it reversed the trial court's denial of Husband's request for attorney fees and held that Husband is entitled to his reasonable attorney fees at both the trial and appellate level, which ultimately allowed Husband to reap a windfall from his willful obstruction of the parties' Marital Dissolution Agreement, in spite of the fact that Wife was the prevailing party during the first appeal of the present matter?

A. Standard of Review on Appeal:

With regard to whether Wife was entitled to a grant of attorney's fees under the Marital Dissolution Agreement, the proper standard of review is *de novo* because this issue is a question of law. Eberbach v. Eberbach, 535 S.W.3d 467, 479 (Tenn. 2017). Courts reviewing requests for fees pursuant to a marital dissolution agreement fee provision should first determine whether the parties have a valid and enforceable MDA that governs the award of attorney's fees for the proceeding at bar. Id. If so, courts must look to the actual text of the provision and determine whether the provision is mandatory and applicable. Id. If so, the MDA governs the award of fees, and courts must enforce the parties' contract. Id.

B. *Wife submits that this Honorable Court should grant Wife's Application for Permission to Appeal to settle an important question of law, to secure uniformity of decision, and to exercise this Honorable Court's supervisory authority.*

On July 10, 2014, the parties signed a Marital Dissolution Agreement, which was incorporated into their Final Decree of Divorce, entered with the trial court on July 16, 2014. (Tr. Vol. I, pp. 55, 83).

Said Agreement contained a paragraph titled "Noncompliance," which provides,

> 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. (Tr. Vol. I, p. 58).

Additionally, the paragraph of the parties' Agreement 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.

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, the Office of Personnel Management did not pay Wife's share of Husband's FERS Supplement, totaling $685 a month, directly to Wife. (Tr. Vol. VIII, pp. 108, 115-16). Instead, OPM continued to pay the full amount of the FERS Supplement, or $1,370 per month, directly to Husband. (Tr. Vol. VIII, pp. 113, 116).

Although Husband received one hundred percent (100%) of the FERS Supplement each month from December 2014 through June 2015, when Wife filed her Petition for Civil and Criminal Contempt, Husband failed and refused to pay Wife any percentage of his FERS Supplement. (Tr. Vol. VIII, pp. 110-32).

Subsequently, on July 27, 2015, Husband's counsel sent Wife's counsel a letter in which she advised that Husband's FERS Supplement would be reduced from $1,370 a month to $0 a month beginning August 1, 2015. (Tr. Ex. 5). Said letter further detailed,

"Please be advised that because Fifty Percent (50%) of Zero Dollars ($0.00) is Zero Dollars, [Wife] will not receive a FERS Annuity Supplement payment beginning August 1, 2015." (Tr. Ex. 5). Husband's counsel attached a letter from the Office of Personnel Management to her letter of July 27, 2015, which provided that Husband's FERS Supplement was reduced from $1,370 to $0 a month because his 2014 earned income exceeding the $15,120 earnings limit. (Tr. Ex. 5).

Despite Husband's testimony on April 21, 2014 that he would only make $15,000 a year in earned income from Raytheon Corporation, Husband's income tax return reveals that in 2014, Husband earned $52,309 in income. (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 9). Husband's earned income of $52,309 exceeded the FERS Supplement earnings limit of $15,120 by $37,189 and resulted in the reduction of the FERS Supplement from $1,370 to $0 a month. (Tr. Ex. 9).

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, despite the fact that Husband was receiving $1,370 a month from the Office of Personnel Management, Wife filed her Petition for Civil and Criminal Contempt. (Tr. Vol. I, pp. 103-114). In said Petition, Wife sought no more than that which she was entitled to receive upon the entry of the parties' Final Decree of Divorce: one half of the marital retirement benefits that Husband was entitled to receive at the time of his retirement.

During the first appeal of the present matter, Wife asserted that the trial court erred when it applied an incorrect legal standard and when it dismissed her Petition prior to the completion of her proof. Parsons v. Parsons, 2017 WL 1192111, at *4-5 (Tenn. Ct. App.

March 30, 2017). However, Wife's argument on appeal focused upon the trial court's failure and refusal to address the primary issue of the non-payment of the FERS Supplement. Id. at *6.

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

In response, Husband's asserted that Wife knew that that his income would exceed the $15,120 earnings cap prior to the entry of the Final Decree of Divorce. Id. Specifically, Husband produced a letter from Raytheon Corporation dated April 7, 2014, stating that his hourly rate would be $26.50, and that he could not exceed more than 1,500 hours per year. Id. Nevertheless, the Court of Appeals seemingly rejected Husband's argument and detailed,

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

Further, the Court detailed that before Husband defeated Wife's interest in his FERS Supplement by earning income far in excess of the $15,120 earnings cap, Husband failed and refused to pay Wife her share of the FERS Supplement for the months of December 2014 through June 2015, even though Husband was receiving the full FERS Supplement directly from the Office of Personnel Management. Id. at *2.

In its opinion on Wife's first appeal, the Court of Appeals noted that the trial court's order "focuses solely on the issue of contempt and does not address the primary issue of non-payment of the FERS supplement." Id. at *6. The Court further detailed that during the oral argument of Wife's appeal, Wife urged the Court to make a decision concerning the merits of her claim rather than remanding the matter to the trial court to allow completion of proof and application of the appropriate burden of proof. Id.

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

During the second appeal of the present matter, the Court of Appeals disregarded the fact that Husband swore and affirmed in the parties' Parenting Plan that his income totaled $4,597 a month, which included his expected earnings from Raytheon. (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 33). Further, the Court ignored Husband's deposition testimony, prior to the parties' divorce, that he "would probably make about $15,000 a year, which would be equal to the [FERS Supplement] cap." (Tr. Vol. XVIII, pp. 36-37; Tr. Ex. 33). Rather, the Court of Appeals focused solely on the parties' failure to include any contractual terms that would require Husband to compensate Wife in the event that he

defeated her marital property interest in his retirement benefits by earning income in excess of $15,000 a year. Parsons, 2019 WL 6770520, at *4.

As detailed above, Wife submits that the Court of Appeals' decision upsets the well-established principle set forth by this Honorable Court in Towner, Johnson, and their progeny, that a nonemployee spouse obtains a fixed, vested interest in his or her spouse's retirement benefits upon the entry of a divorce decree, which is not subject to modification or termination. *See* Towner, 858 S.W.2d at 892; Johnson, 37 S.W.3d at 897.

In accordance with this Court's holding in Towner and Johnson, a martial dissolution agreement need not contain contractual terms precluding an employee spouse from defeating his or her spouse's interest in marital retirement benefits. Id. Rather, pursuant to Towner and Johnson, a nonemployee spouse obtains a fixed, vested interest in his or her spouse's marital retirement benefits upon the entry of a final decree of divorce, and the employee spouse is prohibited from defeating the nonemployee spouse's interest in said benefits by invoking a condition wholly within his or her control. Id. Such an act constitutes an impermissible modification of a division of marital property and a violation of the parties' final decree of divorce incorporating their marital dissolution agreement. Johnson, 37 S.W.3d at 897-98.

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. (Tr. Vol. XVIII, pp. 30-31; Exhibit I to Tr. Vol. XVIII). When Husband subsequently earned in excess of $15,120 a year, the parties' Final Decree of Divorce already had established Wife's fixed interest in her one-half share of Husband's martial retirement benefits. Although Husband certainly had the legal right

to earn income of $52,309 a year, his doing so effected a reduction of the whole of his retirement benefits, including a reduction in the half in which Wife had a vested interest.

Wife submits that Husband deliberately frustrated the Final Decree by voluntarily waiving retirement benefits that the trial court had vested in Wife. Husband's failure to compensate Wife to the extent of her vested interest constituted a unilateral modification of the parties' Martial Dissolution Agreement and Final Decree of Divorce, in violation of Towner. Johnson, 37 S.W.3d at 897.

Wife submits that the Court of Appeals' judgment of December 12, 2019 was in direct conflict with prior opinions of this Honorable Court, as it allowed Husband to unilaterally defeat Wife's property interest in Husband marital retirement benefits and permitted Husband to reap a windfall brought about by the substantial increase in his income. The Court of Appeals further rewarded Husband for his willful obstruction of the parties' Martial Dissolution Agreement when it reversed the trial court's order denying Husband's request for attorney fees and held that Husband was entitled to attorney's fees and expenses at both the trial and appellate level.

As set forth hereinabove, Wife desires no more than what she was entitled to at the time of the entry of the parties' Final Decree of Divorce: one-half of Husband's marital retirement benefits, or $685 a month. Accordingly, Wife alleges that her request for enforcement of the parties' Marital Dissolution Agreement falls squarely within the bounds of the "Noncompliance" provision of the Agreement, under which "the Court **SHALL** award reasonable attorney fees and suit expenses to the party seeking to enforce this Agreement." (Tr. Vol. I, p. 58). As such, Wife respectfully submits that the Court of Appeals erred when it reversed the trial court's order denying Husband's request for

attorney fees and held that Husband was entitled to attorney's fees and expenses at both the trial and appellate level.

CONCLUSION

Based on all of the foregoing, Wife respectfully requests that this Honorable Court grant her Application for Permission to Appeal from the Court of Appeals' December 12, 2019 opinion. Granting Wife's appeal would settle an important question of law and would secure uniformity of decision. Moreover, Wife submits that this Honorable Court should exercise its supervisory authority over this case.

If this Honorable Court grants Wife's Application, Wife respectfully submits that this Honorable Court should enforce the parties' Final Decree of Divorce and order Husband to pay Wife one-half of the original value of Husband's FERS Supplement, totaling $685 a month, plus any arrearages that accumulated due to Husband's failure to pay this amount. Further, Wife respectfully submits that Husband should be responsible for all of Wife's attorney fees and suit expenses at both the trial level and on appeal.

Respectfully Submitted,

Mitchell D. Moskovitz (#15576)

Kirkland Bible (#031988)
Attorneys for Appellant
530 Oak Court Drive, Suite 355
Memphis, Tennessee 38117
(901) 821-0044

CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing document has been forwarded to Tennessee Court of Appeals, Nancy Acred, Chief Deputy Clerk, Supreme Court of Tennessee, Supreme Court Building, P. O. Box 909, Jackson, TN 38302-0909, via prepaid FedEx overnight; and to Larry Rice and Erin O'Dea, Attorneys for Appellee, 275 Jefferson Avenue, Memphis, Tennessee 38103, via regular U.S. Mail, postage prepaid, this the 10th day of February, 2020.

Kirkland Bible

APPENDIX

Case **Page Number**

**Parsons v. Parsons, 2019 WL 6770520 (Tenn. Ct. App. Dec. 12, 2019)

**Court of Appeals' opinion in the present case

2019 WL 6770520
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Kelly Colvard PARSONS
v.
Richard Jearl PARSONS

No. W2018-02008-COA-R3-CV
|
September 18, 2019 Session
|
FILED 12/12/2019

Appeal from the Circuit Court for Shelby County, No. CT-004932-13, James F. Russell, Judge

Attorneys and Law Firms

Mitchell D. Moskovitz, and Kirkland Bible, Memphis, Tennessee, for the appellant, Kelly Colvard Parsons.

Larry Rice, Memphis, Tennessee, for the appellee, Richard Jearl Parsons.

Kenny Armstrong, J., delivered the opinion of the court, in which J. Steven Stafford, P.J., W.S. and Carma Dennis McGee, J., joined.

OPINION

Kenny Armstrong, J.

Wife/Appellant appeals the trial court's denial of relief on her post-divorce petition for contempt and breach of contract. The parties' MDA awarded Wife 50% of Husband/Appellee's FERS Supplement, which was subsequently terminated due to Husband's yearly earned income being in excess of the FERS cap of $15,120.00. Because the parties' MDA did not preclude Husband from earning income in excess of the cap, and did not include a provision for such occurrence, the trial court properly denied Wife's petition. Although the trial court *sua sponte* modified child support to award an additional amount equal to the lost FERS Supplement, it did so in error. Accordingly, we affirm the trial court's grant of Husband's motion to alter or amend the award of additional child support. Because the MDA allows the prevailing party to recover attorney's fees and expenses, we reverse the trial court's denial of Husband's reasonable fees and expenses, and remand for determination of same, and for entry of judgment thereon. Reversed in part, affirmed in part, and remanded.

I. Background

*1 The procedural history in this case is protracted, and this is the second appeal to this Court. In the interests of judicial economy and consistency, we restate the relevant background information from ***Parsons v. Parsons***, No. W2016-01238-COA-R3-CV, 2017 WL 1192111 (Tenn. Ct. App. Mar. 30, 2017) ("***Parsons I***"):

> On July 10, 2014, Appellant Kelly Parsons, and Appellee Richard Parson[s] filed a marital dissolution agreement (MDA) that was incorporated into a final decree of divorce, which was entered by the [Shelby County Circuit Court ("trial court")] on July 16, 2014. During the parties' marriage, Mr. Parsons was employed by the Federal Aviation Administration (FAA) as an air-traffic controller. In November 2013, seven months prior to the divorce, Mr. Parsons retired from his job pursuant to an FAA mandate, requiring retirement at the age of 56. Mr. Parsons' retirement benefits included a monthly annuity from the Civil Service Retirement System (CSRS) in the amount of $5,325. Additionally, Mr. Parsons was to receive a monthly supplement from the Federal Employees Retirement System (FERS) in the amount of $1,370 until he turned 62 and became eligible for social security. In order to maintain eligibility and continue receiving the FERS [S]upplement, Mr. Parsons' earnings could not exceed $15,120[.00] per year.
>
> The terms of the parties' MDA provided that Ms. Parsons would receive 50% of Mr. Parsons' ... FERS [S]upplement, to wit:
>
> * * *
>
> 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. 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/or FERS [S]upplement.

* * *

In April 2015, pursuant to the parties' parenting plan, Ms. Parsons received Mr. Parsons' 2014 tax return and discovered that in addition to the federal retirement benefits contemplated in the MDA, Mr. Parsons had earned income in excess of $52,000, which exceeded the FERS cap of $15,120[.00]. Thus, Mr. Parsons was not eligible for the FERS [S]upplement of $1,370 per month.

On June 22, 2015, Ms. Parsons filed a petition for civil and criminal contempt. In her petition, she alleged that Mr. Parsons should be held in willful civil and criminal contempt for failing and refusing to pay her the 50% share of his FERS [S]upplement. Ms. Parsons also alleged, inter alia, that Mr. Parsons owed an arrearage of $4,795 for unpaid FERS benefits. The petition requested that the trial court order Mr. Parsons to pay such arrearages ....

On July 27, 2015, Mr. Parsons' attorney sent a letter informing Ms. Parsons that Mr. Parsons' FERS [S]upplement had been reduced to zero beginning August 2015. The letter also indicated that "because fifty percent (50%) of Zero Dollars ($0.00) is Zero Dollars ($0.00), [Ms. Parsons] will not receive a FERS [S]upplement payment beginning August 1, 2015." [Fn. 1. While the FERS [S]upplement ended in July 2015, Ms. Parsons alleges in her petition that Mr. Parsons did not pay her the 50% share of the [S]upplement for the months of December 2014 through June 2015 (the month the petition was filed), even though he was receiving the full FERS [S]upplement directly from the Office of Personnel Management.]. A letter from the Office of Personnel Management indicated that the reason for the elimination of the FERS [S]upplement is because Mr. Parsons' earned income during 2014 exceeded the $15,120[.00] income cap. Ms. Parsons argues that her interest in Mr. Parsons' retirement benefits is a property interest, and as such, is non-modifiable. Ms. Parsons also argues that the entry of the final decree of divorce gave her a vested interest in one-half of Mr. Parsons' FERS [S]upplement, and that Mr. Parsons' failure to compensate her to the extent of her vested interest was an improper unilateral modification of the final decree of divorce. Mr. Parsons argues that Ms. Parsons knew prior to the entry of the MDA and the final decree of divorce that Mr. Parsons' income would exceed the $15,120[.00] cap. Specifically, Mr. Parsons produced a letter from his new employer, Raytheon, dated April 7, 2014 stating that his hourly rate would be $26.50 and that he could not exceed more than 1500 hours per year. However, we note that Mr. Parsons signed the permanent parenting plan on July 10, 2014 swearing and affirming that his gross monthly income was only $4,597.00 per month, which included his federal retirement benefits and his expected earnings from Raytheon.

*2 The hearing on the contempt petition was held on March 2, 2016. After Ms. Parsons' attorney completed direct examination of Ms. Parsons, Mr. Parsons' attorney made an oral motion to dismiss ... on the ground that Ms. Parsons failed to elect whether she was seeking civil or criminal contempt. Prior to ruling on the motion, the trial court heard statements from counsel for both parties regarding the status of the proof. The attorneys were in agreement that Ms. Parsons had not completed her proof; however, Mr. Parsons argued that the case was fundamentally flawed because it had proceeded without Ms. Parsons electing whether she was proceeding on either civil or criminal contempt. Mr. Parsons argued that the only remedy was dismissal. In order to expedite the proceeding, Ms. Parsons agreed to dismiss the criminal contempt component and proceed solely on the allegations of civil contempt. Despite statements from both attorneys that Appellant had not closed her proof, the trial court granted the motion to dismiss....

Parsons, 2017 WL 1192111, at *1-2 (footnote in original). In ***Parsons I***, we determined that the trial court applied an incorrect burden of proof and improper procedure; as such, we vacated the trial court's order and remanded the case for further proceedings.

On remand from ***Parsons I***, Ms. Parsons filed an amended petition for contempt on June 23, 2017. In addition to contempt, Ms. Parsons amended her petition to add, in the alternative, a breach of contract claim. Specifically, Ms. Parsons alleged that Mr. Parsons breached the MDA because he failed to pay her 50% of his FERS Supplement from December 2014 through the date of her amended petition. On September 12 and 13, 2017, the trial court heard Ms. Parsons' amended petition. On November 29, 2017, the trial court announced its ruling. [1] In pertinent part, the trial court held that: (1) there was no contempt because Ms. Parsons did not have a vested interest in the FERS Supplement; and (2) there was no order requiring Mr. Parsons to compensate Ms. Parsons should the FERS Supplement terminate. The trial

court also denied Ms. Parsons' breach of contract claim on its finding that the MDA was a valid contract, which could not be altered "even under equitable interpretations." Nonetheless, the trial court ostensibly restored Ms. Parsons' share of the FERS Supplement by awarding an upward deviation in child support equal to $685 per month, which amount is equal to 50% of Mr. Parsons' previous FERS Supplement.

On December 20, 2017, Mr. Parsons filed a motion to alter or amend, wherein he sought reversal of the portion of the trial court's order awarding an upward deviation in child support. On August 31, 2018, the trial court heard Mr. Parsons' motion. By order of October 18, 2018, the trial court granted the motion and reversed its prior ruling. Specifically, the trial court found that its award of $685 per month "was an erroneous upward deviation in child support." Ms. Parsons appeals.

II. Issues

Ms. Parsons raises three issues for review, which we restate as follows:

1. Whether the trial court erred in finding that Mr. Parsons was not required to compensate Ms. Parsons for her share of the FERS Supplement after it terminated.

2. Whether the trial court erred in reversing the upward deviation in child support.

3. Whether the trial court erred in denying Ms. Parsons her attorney's fees and expenses under the MDA.

In the posture of Appellee, Mr. Parsons asserts that the trial court erred in denying his attorney's fees and expenses under the MDA.

III. Standard of Review

This case was tried without a jury. Therefore, we review the trial court's findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. Ct. App. 2008).

IV. FERS Benefit

*3 Before addressing the parties' respective arguments, it is helpful to discuss the general nature of the federal FERS supplemental benefits. FERS, the Federal Employee Retirement System, is a retirement plan for Federal civilian employees. *FERS Information*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/retirement-services/fers-information/ (last visited October 31, 2019). The FERS retirement package includes benefits from three sources: (1) Social Security; (2) the Thrift Savings Plan; and (3) the Federal Employees Retirement Basic Benefit ("FERS basic benefit"). *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 1 (May 2012), https://www.opm.gov/retirementservices/publications-forms/pamphlets/ri90-8.pdf. Within the FERS basic benefit plan, which the Office of Personnel Management ("OPM") administers, is a special retirement supplement that is available to select employees. The special retirement supplement was "designed to bridge the gap between when [a qualified employee] retire[s] and age 62 when [the employee] first becomes eligible for a Social Security benefit." Reg Jones, *Understanding the Special Retirement Supplement 2019*, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. Air traffic controllers are eligible for the special retirement supplement because air traffic controllers must retire at age 56. Tammy Flanagan, *The FERS Supplement: Q & A*, GOVERNMENT EXECUTIVE (May 16, 2019), https://www.govexec.com/pay-benefits/2019/05/fers-supplement-q/157077/. The supplement is administered by OPM's Civil Service Retirement and Disability Fund, not through the Social Security Office. Reg Jones, *Understanding the Special Retirement Supplement 2019*, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. However, similar to Social Security, the special retirement supplement is subject to an earnings test. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. A qualified employee cannot earn more than the exempt amount of earnings, or risk having his or her special retirement supplement reduced by $1.00 for every $2.00 of earnings over the exempt

amount. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. Therefore, it is possible that a qualified employee could have his or her retirement supplement reduced to $0 if he or she earns income over the minimum level of earnings. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. For earnings during 2014, the year Mr. Parsons began working for Raytheon, the exempt amount of earnings was $15,120.00.

From the foregoing discussion, it is clear that Mr. Parsons' FERS Supplement is a specialized retirement asset. Tennessee Code Annotated section 36-4-121(b)(1)(B)(ii) provides that it is also "marital property." Tenn. Code Ann. § 36-4-121(b)(1)(B)(ii) (" 'Marital property' includes ... retirement[ ] and other fringe benefit rights accrued as a result of employment during the marriage[.]"). Here, the trial court divided the parties' marital property, including the FERS Supplement, according to their MDA.

In Tennessee, MDAs are treated as contracts and are subject to the rules governing construction of contracts. *See* ***Barnes v. Barnes***, 193 S.W.3d 495, 498 (Tenn. 2006); ***Honeycutt v. Honeycutt***, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003). To the extent our analysis requires interpretation or application of the parties' MDA, we note that "interpretation of a contract is a matter of law, [and] our review is *de novo* on the record with no presumption of correctness...." ***Honeycutt***, 152 S.W.3d at 561 (quoting ***Witham v. Witham***, No. W2000-00732-COA-R3-CV, 2001 WL 846067, at *3 (Tenn. Ct. App. July 24, 2001)). In ***Kafozi v. Windward Cove, LLC***, 184 S.W.3d 693, 698 (Tenn. Ct. App. 2005), *perm. app. denied* (Tenn. Jan. 30, 2006), this Court explained that

> [i]n resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. ***Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.***, 78 S.W.3d 885, 889-90 (Tenn. 2002) (citing ***Guiliano v. Cleo, Inc.***, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." ***Planters Gin Co.***, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); ***Doe v. HCA Health Servs. of Tenn., Inc.***, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. ***Planters Gin Co.***, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." ***Id.*** (quoting 17 Am. Jur. 2d, *Contracts*, § 245).
>
> *4 This Court's initial task in construing the [c]ontract at issue is to determine whether the language of the contract is ambiguous. ***Planters Gin Co.***, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. ***Id.*** A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. ***Id.*** (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. ***Id.*** Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. ***Id.***

Kafozi, 184 S.W.3d at 698-99.

Turning to the parties' respective arguments, Ms. Parsons maintains that Mr. Parsons "unilaterally and impermissibly" modified the parties' MDA when he failed to compensate her for her share of the FERS Supplement after the benefit terminated. The MDA provides, in relevant part that

> [the MDA] contains the entire understanding and agreement between 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.

(emphasis added). The trial court found that "the contract embedded in the *Marital Dissolution Agreement* [was] executed by the parties with clear and open minds." Ms. Parsons does not dispute that she entered into the MDA voluntarily, nor does she allege contract formation errors that would prevent enforcement of the MDA. More importantly, however, it is undisputed that, at the time they entered into the MDA, both parties had full knowledge of the character of the FERS Supplement. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. Likewise, when questioned at oral argument before this Court, Ms. Parsons' counsel stated, in relevant part:

> Q: At the time the MDA was agreed to, wasn't it understood that he could lose the FERS payment either by reaching a certain age or if his income exceeded a certain amount?
>
> A: Yes.
>
> Q: That was understood?
>
> A: Yes.
>
> Q: Yet, the MDA includes no provision in the event that that happens.
>
> A: That's correct.

Indeed, the clause in the MDA concerning the FERS Supplement states only that

> 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. 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/or FERS [S]upplement.

Although the MDA clearly and unambiguously provides that Ms. Parsons is entitled to 50% of the FERS Supplement, the MDA is silent concerning Mr. Parsons' obligation should the FERS Supplement terminate. Furthermore, there is no language in the MDA that precludes Mr. Parsons from seeking employment or earning more than the exempt amount of earnings. Despite her knowledge that the FERS Supplement could terminate if Mr. Parsons' earnings exceeded the exempt amount of earnings, the parties did not include any contractual terms to insure Ms. Parsons against such contingency. As stated by the trial court in its ruling (incorporated into its final order):

> *5 the parties very easily could have included a contingency clause that would have required [Mr. Parsons] to make up the difference of the loss to [Ms. Parsons] 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 [Mr. Parsons] make up the difference lost by [Ms. Parsons] in terms of the FERS Supplement benefit.

We agree. The language in the MDA is clear and unambiguous, and this Court gives effect to the language as expressed in the contract, and nothing more. *See* ***Kafozi***, 184 S.W.3d at 698-99. Furthermore, we will neither modify a contract, nor impose obligations or rights on the parties, for which they have not bargained. *See* ***Petty v. Sloan***, 277 S.W.2d 355, 359 (Tenn. 1955) (quoting ***Smithart v. John Hancock Mutual Life Ins. Co.***, 71 S.W.2d 1059, 1063 (Tenn. 1934)) (" 'A court is not at liberty to make a new contract for parties who have spoken for themselves.' "); ***Marshall v. Jackson & Jones Oils, Inc.***, 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999) (citing ***Atkins v. Kirkpatrick***, 823 S.W.2d 547, 553 (Tenn. Ct. App.1991)) (stating that courts "may not relieve parties of the contractual obligations simply because these obligations later prove to be burdensome or unwise."); *see also* ***Eberbach v. Eberbach***, 535 S.W.3d 467, 478 (Tenn. 2017) ("Indeed, one of the bedrocks of Tennessee law is that our courts are without power to make another and different contract from the one executed by the parties themselves."). Again, in this case, there is nothing in the MDA to preclude Mr. Parsons from action that might terminate the FERS

Supplement. Neither is there any provision in the MDA to obligate Mr. Parsons to continue to compensate Ms. Parsons for 50% of the FERS Supplement should his actions result in its termination.

Nonetheless, Ms. Parsons insists that she has a vested, non-modifiable interest in a share of the FERS Supplement. In support of her argument, Ms. Parsons relies on the Tennessee Supreme Court case, ***Johnson v. Johnson***, 37 S.W.3d 892 (Tenn. 2001), wherein the Court held

> that when [a] MDA divides **military retirement benefits**, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. Such an act constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA.

Id. at 897-98 (emphasis added).

Conversely, Mr. Parsons argues that the Tennessee Supreme Court's holding in ***Johnson*** was abrogated by the United States Supreme Court in ***Howell v. Howell***, 137 S. Ct. 1400 (2017). In ***Howell***, the United States Supreme Court held that a state court cannot

> increase, pro rata, the amount the divorced spouse receives each month from the **veteran's retirement pay** in order to indemnify the divorced spouse for the loss caused by the veteran's waiver [of retirement pay to receive service-related disability benefits], [***id.*** at 1402, because] [s]tate courts cannot "vest" that which (under governing federal law) they lack the authority to give.

*6 ***Id.*** at 1405 (emphasis added). In addressing the parties' arguments, the trial court held:

> 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.

In the first instance, the benefits at issue in ***Johnson*** and ***Howell*** are readily distinguishable from the FERS Supplement at issue here. ***Johnson*** and ***Howell*** concern military retirement benefits, which are not in the nature of a FERS Supplement, *see* discussion *supra*. Here, the parties' respective interests in the FERS Supplement are contractual because this property was divided in the MDA. As discussed above, there is nothing in the MDA to protect Ms. Parsons' interest in the FERS Supplement should Mr. Parsons' actions lead to termination of same, and there is nothing in the MDA to preclude Mr. Parsons from earning above the exempt amount of earnings. Therefore, Ms. Parsons was not contractually entitled to compensation for her 50% of the FERS Supplement after it terminated. [2]

V. Child Support

Concerning child support, in its June 6, 2018 order, the trial court held:

> 17. This [c]ourt is of the considered opinion that the loss of the FERS Supplement Benefit is a material and significant change in circumstances such that the child support order should be modified upward in addition to the recalculation that is already now in place.
>
> * * *
>
> 19. This [c]ourt 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....

Mr. Parsons filed a motion to alter or amend the trial court's order, asking the trial court to reverse the portion of its order requiring him to pay an additional $685 per month in child support. By order of October 18, 2018, the trial court reversed its prior ruling finding that the $685 per month "was an erroneous upward deviation in child support." Ms. Parsons now asks this Court to reverse the trial court and reinstate the additional $685 in monthly child support payments. We decline to do so.

*7 The trial court was correct to reverse its prior ruling on the issue of child support. Based on the pleadings, the issue of modification of child support was not properly before the trial court. As noted above, Ms. Parsons' petition was for contempt and breach of contract. At no point in the petition does she ask the trial court to revisit the previous child support order. "The purpose of an action can only be determined from the pleadings," and "[a] trial court has no authority, *sua sponte*, to modify its child support decrees." ***Long v. Long***, No. 01A01-9406-CV-00270, 1995 WL 33741, at *3 (Tenn. Ct. App. Jan. 27, 1995)

Furthermore, at the time it entered the order increasing child support by $685 per month, the trial court had already granted modification of child support based on the termination of the FERS Supplement. On August 27, 2015, Ms. Parsons filed a petition to modify child support alleging, in pertinent part, that her income was reduced by $685 per month because she no longer received half of the FERS Supplement. Based on her income reduction, Ms. Parsons asked the trial court to modify Mr. Parsons' child support obligation. On April 6, 2016, the trial court entered an order granting Ms. Parsons' petition to modify child support, wherein it increased Mr. Parsons' child support obligation from zero dollars to five hundred and forty-three dollars ($543.00) based on the material change in circumstances, i.e. Ms. Parsons' decreased income. The trial court also ordered Mr. Parsons to pay two thousand six hundred and ninety-eight dollars ($2,698.00) in child support arrearages. Neither party appealed the April 6, 2016 order. As such, the order increasing Mr. Parsons' child support was "*res judicata* as to all circumstances in existence at the time of the entry of said [order]." ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Hicks v. Hicks***, 176 S.W.2d 371, 375-76 (Tenn. Ct. App. 1943)). The facts surrounding termination of the FERS Supplement were in existence and under consideration at the time the trial court entered the April 6, 2016 order. Under the doctrine of *res judicata*, the trial court could not revisit child support **on the same facts** in the absence of a Rule 60 motion. If Ms. Parsons should request modification of child support based on a material change in circumstances arising from facts **not** in existence at the time of April 6, 2016, she would have to file a petition specifically to that end. *See* ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Jones v. Jones***, 659 S.W.2d 23, 24 (Tenn. Ct. App. 1983) ("In order to obtain an increase in child support [after a final order], the petitioner has the burden of showing there has been a material change of circumstances justifying an increase in child support, and that the change has taken place from and after the entry of the previous [order]."). No such petition was filed in this case. Accordingly, the trial court erred in *sua sponte* granting an upward deviation in child support. However, it corrected this error in granting Mr. Parsons' motion to alter or amend, and we affirm the grant of that motion.

VI. Attorney's Fees

Under the MDA, both parties sought attorney's fees at trial and now seek their respective fees and expenses at the appellate level. In ***Eberbach***, the Tennessee Supreme Court explained that parties may contract for attorney's fees in a MDA, to-wit:

> A [MDA] is a contract entered into by a husband and wife in contemplation of divorce. *See* ***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)). As a contract, a MDA generally is subject to the rules governing construction of contracts. ***Id.*** ... Thus, a MDA may include enforceable contractual provisions regarding an award of attorney's fees in post-divorce legal proceedings.

*8 ***Eberbach***, 535 S.W.3d at 474-75. Concerning an award of attorney's fees, the parties' MDA provides:

Noncompliance

> 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.

(emphasis in original). The trial court denied the parties' respective requests for attorney's fees stating that neither party was the "prevailing party," and that there were no "winners [or] losers in this case." We disagree. Here, the trial court denied Ms. Parsons' petition for contempt and breach of contract concerning the FERS Supplement. Although Ms. Parsons was initially awarded an increase in child support in the amount of 50% of the FERS Supplement, on grant of Mr. Parsons' motion to alter or amend, the trial court correctly reversed its modification of child support. Accordingly, Mr. Parsons was definitively the prevailing party at trial. Likewise, Mr. Parsons is the prevailing party on appeal. As such, under the plain language of the MDA, he is entitled to his reasonable attorney's fees and expenses at both the trial level and on appeal. Therefore, we remand the case for determination of Mr. Parsons' reasonable attorney's fees and costs and for entry of judgment in his favor on same.

VII. Conclusion

For the foregoing reasons, we reverse the trial court's order denying Mr. Parsons' attorney's fees under the MDA. The trial court's judgment is otherwise affirmed. The case is remanded for determination of Mr. Parsons' reasonable trial and appellate attorney's fees and expenses, for entry of judgment on same, and for such further proceedings as may be necessary and are consistent with this Opinion. Costs of the appeal are assessed to the Appellant Kelly Colvard Parsons, for all of which execution may issue if necessary.

All Citations

Slip Copy, 2019 WL 6770520

Footnotes

1 The trial court incorporated its oral ruling into its written Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract, which was filed on June 6, 2018.

2 Ms. Parsons also argues that Mr. Parsons is guilty of breaching his implied duty of good faith and fair dealing regarding the MDA. "When considering whether the parties have complied with this duty of good faith and fair dealing, the court must ascertain the intention of the parties as determined by a reasonable and fair construction of the language of the contract." ***Woods v. Woods***, No. W1999-00733-COA-R3-CV, 2000 WL 34411144, at *3 (Tenn. Ct. App. Aug. 22, 2000). As discussed, *supra*, the parties intended to enter into the MDA as written. The undisputed facts demonstrate that Mr. Parsons complied with his duty of good faith and fair dealing when he disclosed to Ms. Parsons that the FERS Supplement could terminate. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. As such, we cannot now conclude that he breached this duty because Ms. Parsons chose to enter into the MDA without any provision protecting her should the FERS Supplement terminate.

End of Document

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

KELLY COLVARD PARSONS, Plaintiff/Appellant,	)	COURT OF APPEALS OF TENNESSEE AT JACKSON W2018-02008-COA-R3-CV
v.	)	Court of Shelby County CT-004932-12
RICHARD JEARL PARSONS, Defendant/Appellee.	)	

APPELLEE'S ANSWER IN OPPOSITION TO APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL, PURSUANT TO TENNESSEE RULE OF APPELLATE PROCEDURE 11

LARRY RICE (#5292)
Attorney for Appellee
Rice, Amundsen & Caperton, PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
(901) 526-6701

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

FACTS RELEVANT TO APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL.....5

ARGUMENT.....12

CONCLUSION.....19

CERTIFICATE OF SERVICE.....20

TABLE OF AUTHORITIES

Cases: **Page Number:**

Atkins v. Kirkpatrick, 823 S.W.2d 547 (Tenn. Ct. App. 1991).....14

Barger v. Brock, 535 S.W.2d 337 (Tenn. 1976).....18

Barnes v. Barnes, 193 S.W.3d 495 (Tenn. 2006).....14

Chapman Drug Co. v. Chapman, 341 S.W.2d 392 (Tenn. 1960).....14

Dungan v. Dungan, 579 S.W.2d 183 (Tenn. 1979).....18

Duvier v. Duvier, 1995 Tenn. App. LEXIS 494 (Tenn. Ct. App. 1995).....15

Eberbach v. Eberbach, 535 S.W.3d 467 (Tenn. 2017).....14, 17

Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004).....15

Evans v. Wilson, 776 S.W.2d 939 (Tenn. 1989).....19

Frizzell Constr. Co. v. Gatlinburg, LLC, 9 S.W.3d 79 (Tenn. 1999).....14

Honeycutt v. Honeycutt, 152 S.W.3d 556 (Tenn. Ct. App. 2003).....14

Howell v. Howell, 137 S. Ct. 1400 (2017).....8, 9, 11, 13, 15, 16, 17, 19

Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001).....8, 11, 13, 15, 16

Kafozi v. Windward Cove, LLC, 184 S.W.3d 693 (Tenn. Ct. App. 2005).....14

Marshall v. Jackson & Jones Oils, Inc., 20 S.W.3d 678 (Tenn. Ct. App. 1999).....14

Matthews v. Matthews, 148 S.W.2d 3 (Tenn. Ct. App. 1940).....14

Moore-Pennoyer v. State, 515 S.W.3d 271 (Tenn. 2017).....18

Petty v. Sloan, 277 S.W.2d 355 (Tenn. 1955).....14

Scobey v. Scobey, 2017 Tenn. App. LEXIS 612 (Tenn. Ct. App. 2017).....17

Smithart v. John Hancock Mutual Life Ins. Co., 71 S.W.2d 1059 (Tenn. 1934).....14

State v. Brown, 644 S.W.2d 418 (Tenn. Crim. Ct. App. 1982).....19

State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).....18

State v. West, 884 S.W.2d 144 (Tenn. 1992).....12

Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993).....16, 17

Statutes:

Tennessee Code Annotated § 16-3-501 et. seq. 19

Tennessee Constitution Article II, §2.....18

FACTS RELEVANT TO APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

Mr. Parsons and Ms. Parsons entered into a Marital Dissolution Agreement ("MDA") and Permanent Parenting Plan. The parties were divorced by entry of a Final Decree of Divorce ("FDD") on July 16, 2014. The MDA was incorporated by reference into the FDD.

Mr. Parsons was forced to retire at the age of 56 from the Federal Aviation Administration ("FAA"), prior to the parties' divorce, due to Federal mandates requiring early retirement for air traffic controllers. The parties' MDA referenced retirement benefits that Mr. Parsons received through his employment. Specifically, a paragraph titled "Federal Retirement Benefit" referred to two (2) such benefits, providing 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 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 of July, 2014, and the first business day of the month each month thereafter until Wife's receipt of the pension and FERS benefit.

The parties retained Blake Bourland ("Mr. Bourland"), who prepared several orders, in particular the *Court Order Assigning Benefits Under the Federal Employees Retirement System* ("*Order Assigning Benefits*") that was ultimately approved and executed by the parties' and their counsel. The *Order Assigning Benefits* addressed the two (2) aforementioned retirement benefits, notably a "gross monthly annuity, as defined in 5 CFR §838.103" ("gross monthly annuity") and "any annuity supplement under FERS" ("FERS Supplement"), to which Mr. Parsons would be entitled. The *Order Assigning Benefits* collectively referred to both benefits as Mr. Parsons' "Monthly Annuity."

Pursuant to the *Order Assigning Benefits*, Ms. Parsons was to receive fifty percent (50%) of Mr. Parsons' "Monthly Annuity," which included the FERS Supplement. The *Order Assigning Benefits* directed the Office of Personnel Management ("OPM") to pay Ms. Parsons her share of both benefits directly. Under the *Order Assigning Benefits*, Ms. Parsons was "responsible for all local, state, and federal taxes that are payable in connection with all amounts assigned" to her. (T.R. Vol I, p. 93).

Mr. Bourland entered the *Order Assigning Benefits* with the Trial Court on August 22, 2014. He then submitted the same to OPM. (T.R. Vol I, pp. 96-102). OPM directly paid to Ms. Parsons her half of the gross monthly annuity, but not the FERS Supplement. OPM ultimately refused to fully comply with the *Order Assigning Benefits* as it pertained to paying Ms. Parsons a portion of the FERS Supplement directly. (T.R. Vol. I, p. 116).

As evidenced by correspondence leading up to the present litigation, the parties were unable to agree on the amount Ms. Parsons was entitled to for her share of the FERS Supplement. Ms. Parsons insisted on receiving fifty percent (50%) of the **gross** FERS Supplement, despite the terms of the *Order Assigning Benefits* and the MDA making Ms. Parsons responsible for all taxes associated with her share of both benefits. The *Order Assigning Benefits* explicitly stated Ms. Parsons was "responsible for all local, state, and federal taxes that are payable in connection with all amounts assigned." (T.R. Vol I, p. 93). The MDA gave Ms. Parsons "fifty percent (50%) of Mr. Parsons' **gross** monthly annuity. . ." (emphasis added), but only gave her "fifty percent (50%) of Husband (sic) FERS Supplement," expressly leaving out the word **gross** in relation to the FERS Supplement. There was no provision in any order or agreement for Ms. Parsons to get fifty percent (50%) of the **gross** FERS Supplement. Mr. Parsons consulted a tax advisor to calculate an after-tax value for Ms. Parsons' share of the FERS Supplement by way of compromise. (T.R. Vol. I, p. 106).

Ms. Parsons refused to accept anything less than half of the **gross** amount of the FERS Supplement. (T.R. Vol I, pp. 103-184). Agreeing to Ms. Parsons' demands for half of the gross amount would have forced Mr. Parsons to pay Ms. Parsons' portion of the taxes on income Ms. Parsons received. (Id.). On June 22, 2015, Ms. Parsons filed her *Petition for Civil and Criminal*

Contempt. Ms. Parsons alleged that Mr. Parsons failed to pay her half of the gross amount of the FERS Supplement, claiming Mr. Parsons was in both civil and criminal contempt for this failure. By her own admission, Mr. Parsons paid to Ms. Parsons the total sum of Three Thousand Nine Hundred Forty-Four Dollars ($3,944), within days of Ms. Parsons filing her *Petition*. This amount was the post-tax value of Ms. Parsons' share of the FERS Supplement for the months leading up to July 2015.

Although the parties were divorced in July 2014, the litigation did not cease, including, but not limited to, Ms. Parsons pressing forward on an unfounded criminal prosecution against Mr. Parsons, for which Mr. Parsons was acquitted by a jury of his peers in 2015. Mr. Parsons, burdened with the cost of protracted litigation, was forced to work more hours than he originally anticipated in order to pay his legal fees. (T.R. Vol. II, p. 192). Mr. Parsons ended up earning income in excess of the earnings limit that would allow him to continue receiving the FERS Supplement. In August 2015, the FERS Supplement was reduced to zero (0). Mr. Parsons advised Ms. Parsons of the reduction on July 22, 2015. Mr. Parsons' earning of income in excess of the earnings limit was not prohibited by the terms of the MDA. (T.R. Vol. II, p. 191). Ms. Parsons also failed to contract for receipt of a sum of money in the event Mr. Parsons earned income in excess of the FERS Supplement earnings cap, so both parties lost the FERS Supplement. (Id.).

The trial on Ms. Parsons' *Petition for Civil and Criminal Contempt* began on March 2, 2016. Counsel for Ms. Parsons presented the affidavit of Mr. Bourland as the first exhibit, which both Counsels stipulated be admitted into evidence. (T.R. Vol. II, pp. 142-146; Transc. Vol. VIII, pp. 34-35). Counsel for Ms. Parsons then called his last witness, Ms. Parsons, to the stand. During her testimony, Ms. Parsons 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." (Transc. Vol. VIII, pp. 85-86, emphasis added). Ms. Parsons continued to testify throughout the day, and upon the completion of her testimony, Counsel for Ms. Parsons stated, "I have no further questions of this witness at this time." Immediately thereafter, Counsel for Mr. Parsons made an *ore tenus* motion to dismiss. The Trial Court adjourned until the following morning to address the motion.

The Trial Court issued its oral ruling on March 8, 2016. In its ruling, the Trial Court noted that Ms. Parsons failed to differentiate between which form of contempt she was pursuing in her case-in-chief, and concluded that, as a result of said failure, Ms. Parsons' pleadings were "fatally flawed." Mr. Parsons' *ore tenus* motion to dismiss was granted, and Ms. Parsons' *Petition for Civil and Criminal Contempt* was dismissed. Ms. Parsons appealed the Trial Court's ruling on June 16, 2016, wherein The Court of Appeals vacated and remanded the Trial Court's order, finding that the Trial Court used the incorrect legal standard in reference to civil contempt, and did not allow Ms. Parsons to complete her proof prior to ruling on Mr. Parsons' *ore tenus* motion to dismiss.

On June 23, 2017, Ms. Parsons filed her *Amended Petition for Civil and Criminal Contempt and in the Alternative, for Breach of Contract* ("*Amended Petition*"), which incorporated all the allegations contained in Ms. Parsons' original *Petition for Civil and Criminal Contempt*, previously filed on June 22, 2015. In her *Amended Petition*, Ms. Parsons relied on Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) for the proposition that Ms. Parsons had obtained a vested interest in half of the gross amount of Mr. Parsons' FERS Supplement, which she claimed was Six Hundred Eight Five Dollars ($685) per month, as of July 16, 2014, the date of the entry of the parties' FDD. (T.R. Vol. V, pp. 616-621). Ms. Parsons also claimed Mr. Parsons was prohibited from taking any action to frustrate her **expectation** of receiving half of the gross FERS Supplement. (T.R. Vol. V, p. 618).

Mr. Parsons's *Response* to Ms. Parsons' *Amended Petition* revealed that the cornerstone of Ms. Parsons' case, Johnson, was overturned by the United States Supreme Court in Howell v. Howell, 137 S. Ct. 1400 (2017). (T.R. Vol. V, p. 627). The Supreme Court stated, "[s]tate courts cannot 'vest' that which (under governing federal law) they lack authority to give ... [the vested interest] is at most, contingent, depending for its amount on a subsequent condition." Howell, at 1405. (T.R. Vol. V, p. 629).

The Trial Court conducted a hearing on September 12, 2017, which concluded on September 13, 2017. (Transc. Vols. XIII, XIV). The Trial Court issued its oral ruling on November 29, 2017. (Transc. Vol. XV). The Trial Court noted,

> The focus now is centered around the case of Howell v. Howell decided by the United States Supreme Court with their published opinion under date of May 15, 2017. . . In that regard, the Court is faced with what impact the Howell opinion has upon several court cases, which were, "abrogated," specifically by the ruling of the Supreme Court, and specifically including the Tennessee Supreme Court decision of Johnson v. Johnson, 37 S.W.3d 892. (Transc. Vol. XV, pp. 16-17).

The Trial Court identified the findings in Howell, in pertinent part as follows:

> 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. (Transc. Vol. XV, pp. 17-18).

The Trial Court then compared the Howell case to the Johnson case, reciting the following from the Johnson case:

> 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. (Id.).

The Trial Court found that "[o]n their facts, both cases are strikingly similar to the case now before us." (Transc. Vol XV, pp. 17-18). The Trial Court ultimately agreed that the Howell case applied to this case and that "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." (Trancs. Vol. XV, p. 19).

The Trial Court also found the plain language of the parties' MDA was unambiguous. (Transc. Vol. XV, p. 30). The Trial Court then cited the basis for its ruling as follows:

> 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.
>
> It cannot be said that this petitioner acquired a, quote, vested interest, end quote, in that which ceased to exist under the applicable federal regulations.
> . . .

> However, unfortunate, the Court is compelled to a conclusion that the contract embedded in the Marital Dissolution Agreement that was executed by the parties with clear and open minds cannot be altered under, even under an, quote, equitable, end quote, interpretation. (Transc. Vol. XV, pp. 30-31).

The Trial Court ultimately dismissed Ms. Parsons' *Amended Petition*, but ordered an increase in Mr. Parsons' child support payments of $685 per month due to Ms. Parsons' loss of the FERS Supplement. The Trial Court declined to award attorney fees to either party, finding that neither party was a "prevailing party."

On December 20, 2017, Mr. Parsons filed a *Motion to Alter, Amend, or Set-Aside the Judgment, or in the Alternative Stay the Judgment Pending Appeal* ("*Motion to Set-Aside*"). Mr. Parsons argued the Trial Court had no authority under Tenn. Code Ann. § 36-5-101(f)(1) to modify a child support order without notice or an opportunity to be heard. (T.R. Vol. VI, pp. 801-806). Mr. Parsons further argued the issue was *res judicata*, as his additional income and Ms. Parsons' loss of her half of the FERS Supplement had already been litigated before the Divorce Referee and ruled on in the *Order Granting Mother's Petition to Modify Child Support* entered on April 6, 2016. (Id.). In his ruling, the Divorce Referee accounted for Ms. Parsons' loss of her share of the FERS Supplement, and the Trial Court ordered an increase in the child support Ms. Parsons would be receiving as a result. Any further modification of the child support would have had to have been made pursuant to a new change in circumstances or significant variance.

Mr. Parsons finally argued that Ms. Parsons did not prevail on any claim, issue, or theory of relief raised in her *Amended Petition*, and therefore, Mr. Parsons was the prevailing party, entitled to his attorney's fees and expenses, pursuant to the parties' MDA. (Id. at 804). The parties' MDA provides in pertinent part as follows:

> 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. (T.R. Vol. I, p. 58).

Ms. Parsons filed a response to Mr. Parsons' *Motion to Set-Aside*, and Mr. Parsons then filed a rebuttal to Ms. Parsons' response. (T.R. Vol. VI, pp. 813-827; T.R. Vol. VI, pp. 837-842). The Trial Court heard oral arguments on August 31, 2018, issuing an oral ruling the same day. The Trial Court agreed with Mr. Parsons that its order for an upward deviation in child support was erroneous, granting Mr. Parsons' *Motion to Set-Aside*. However, the Trial Court determined as follows regarding the attorney's fees and suit expenses:

> That is, in this situation, given the circumstances as they unfolded, there are no, quote, winners and losers in this case.
>
> Both sides are, in essence, winners and losers, and it would be impossible for the Court to say that one is more a winner than the other and will deny any request to set or award litigation expenses and attorney fees to either party.

An order memorializing the Trial Court's ruling was entered on October 18, 2018. Again, Ms. Parsons appealed.

In her brief to the Court of Appeals, Ms. Parsons maintained that Mr. Parsons impermissibly modified the parties' MDA, when he failed to continue paying her half of the FERS Supplement, after the benefit terminated pursuant to federal law. Ms. Parsons insisted that she had a vested, non-modifiable interest in a share of the FERS Supplement. Ms. Parsons again relied on the holding in Johnson, claiming Howell "abrogated" Johnson "on other grounds." Mr. Parsons argued that the Tennessee Supreme Court's holding in Johnson was abrogated by the United States Supreme Court in Howell, specifically in relation to the principal that "[s]tate courts cannot 'vest' that which (under governing federal law) they lack authority to give … [the vested interest] is at most, contingent, depending for its amount on a subsequent condition." Howell, at 1405.

In its December 12, 2019 *Opinion*, the Court of Appeals in this case found the benefits at issue in Johnson and Howell were readily distinguishable from the FERS Supplement at issue in the case at bar because both Johnson and Howell concerned military retirement benefits, which are not in the nature of the FERS Supplement. The Court of Appeals went on to state that the parties' interest in the FERS Supplement was contractual in nature because it was divided in the MDA. The Court of Appeals notably cited that there was no provision in the parties' MDA to protect Ms.

Parsons' interest in the FERS Supplement, should Mr. Parsons' actions lead to termination of the benefit. The Court then cited the Trial Court stating that,

> [T]he parties very easily could have included a contingency clause that would have required [Mr. Parsons] to make up the difference of the loss to [Ms. Parsons] in the even the portion of the FERS Supplement should be terminated.
>
> This, the parties did not do.

The Appellate Court further found that there was no provision prohibiting Mr. Parsons from earning above the earning cap. In conclusion, the Court of Appeals held Ms. Parsons was not contractually entitled to compensation for her 50% share of the FERS Supplement after it terminated. The Court of Appeals concluded that the parties were permitted to contract for attorney's fees in their MDA, and held that Mr. Parsons was definitively the prevailing party on appeal, and was entitled to his reasonable attorney's fees and expenses at both the trial level and on appeal.

ARGUMENT

Tennessee Rule of Appellate Procedure ("TRAP") 11, includes the following non-exhaustive list of factors the Supreme Court of Tennessee should consider when determining whether to grant a permissive appeal:

1. The need to secure uniformity of decision,
2. The need to secure settlement of important questions of law,
3. The need to secure settlement of questions of public interest, and
4. The need for the exercise of the Supreme Court's supervisory authority.

The Advisory Commission Comments to TRAP 11 further elaborate on these grounds, making it clear that "the essential purpose of the rules, therefore, is to identify those **cases of such extraordinary importance** as to justify the burdens of time, expense and effort associated with double appeals." (emphasis added) Tenn. R. App. P. 11, Advisory Commission Comments. The presence of one or more of the four (4) TRAP 11 factors does not guarantee that a case meets this exacting standard. Id. In addition, this Court has made it clear that its discretionary jurisdiction "is rarely granted solely for error-correction purposes." Id. (citing State v. West, 844 S.W.2d 144, 146 (Tenn. 1992)). As a "law-developed court, rather than an error correction court," West 844 S.W.

2d at 146, the Tennessee Supreme Court generally accepts only those cases presenting unresolved legal issues of substantial public interest. Appellant purports to rely on the need to secure uniformity of decision, the need to secure settlement of important questions of law, and the need for the exercise of the Supreme Court's supervisory authority in support of her application. As discussed in detail below, Appellant fails to meet any standard justifying an extraordinary appeal to this Supreme Court.

1. The Need to Secure Uniformity of Decision

The first factor listed under TRAP 11 is "the need to secure uniformity of decision." This factor does not apply in this case because no conflicting Tennessee cases exist on the issues presented in Appellant's "Questions Presented for Review."

The Supreme Court of the United States has already ruled on the vesting issue raised by Appellant in its recent Howell case. The Appellant continues to cite to the Tennessee case, Johnson, for the principal that "parties obtain a vested interest in the property allocated to them in their marital dissolution agreement." (Appellant's *Application for Permission to Appeal*, p. 5). However, Johnson only speaks to a nonemployee spouse's vested interest in military retirement, not all retirement benefits divided under the MDA, and the United States Supreme Court in Howell specifically overruled Johnson on the military vesting issue. The Supreme Court specifically found that **"[s]tate courts cannot 'vest' that which (under governing federal law) they lack authority to give ... [the vested interest] is at most, contingent, depending for its amount on a subsequent condition."** Howell, at 1405 (emphasis added).

The Court of Appeals in this case believed Johnson and Howell were distinguishable because they only addressed military retirement. The Court of Appeals instead applied contractual principles in its decision in this case. It found that the FERS benefits were contractual, and that the terms of the MDA did not address what would happen if Mr. Parsons lost the FERS Supplement, nor did the MDA prohibit him from taking any action that would cause the FERS Supplement to terminate. Ms. Parsons was not contractually entitled to compensation for her 50% share of the FERS Supplement once it terminated, pursuant to federal law.

The following determination made by the Court of Appeals that the parties' MDA is a contract, is well established and consistent law in Tennessee, and requires no decision be made by this Supreme Court to create uniformity:

> The language in the MDA is clear and unambiguous, and this Court gives effect to the language as expressed in the contract, and nothing more. See Kafozi, 184 S.W.3d at 698-99. Furthermore, we will neither modify a contract, nor impose obligations or rights on the parties, for which they have not bargained. See Petty v. Sloan, 197 Tenn. 630, 277 S.W.2d 355, 359 (Tenn. 1955) (quoting Smithart v. John Hancock Mutual Life Ins. Co., 167 Tenn. 513, 71 S.W.2d 1059, 1063 (Tenn. 1934)) ("'A court is not at liberty to make a new contract for parties who have spoken for themselves.'"); Marshall v. Jackson & Jones Oils, Inc., 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999) (citing Atkins v. Kirkpatrick, 823 S.W.2d 547, 553 (Tenn. Ct. App.1991)) (stating that courts "may not relieve parties of the contractual obligations simply because these obligations later prove to be burdensome or unwise."); see also Eberbach v. Eberbach, 535 S.W.3d 467, 478 (Tenn. 2017) ("Indeed, one of the bedrocks of Tennessee law is that our courts are without power to make another and different contract from the one executed by the parties themselves."). Again, in this case, there is nothing in the MDA to preclude Mr. Parsons from action that might terminate the FERS Supplement. Neither is there any provision in the MDA to obligate Mr. Parsons to [*18] continue to compensate Ms. Parsons for 50% of the FERS Supplement should his actions result in its termination.

In Tennessee, MDAs are treated as contracts, and are subject to the rules governing construction of contacts. See Barnes v. Barnes 193 S.W.3d 495,498 (Tenn. 2006); Honeycutt v. Honeycutt, 152 S.W.3d 556,5 61 (Tenn. Ct. App. 2003). Contracts are interpreted and enforced according to their objective language, not a person's subjective expectation. See Chapman Drug Co. v. Chapman, 341 S.W.2d 392 (Tenn. 1960) (stating "The parties to the contract herein were competent to contract and entered into the contract fairly and understandingly without fraud and for a consideration and thus it is that when parties thus contract the courts are not concerned with the wisdom or folly of their contract); Matthews v. Matthews, 148 S.W.2d 3 (Tenn. Ct. App. 1940) (stating "So far as there was no concealment of a single fact, nor any misrepresentation of a fact, and no Damoclean sword kept hanging over the head of wife during the negotiations. Such an agreement is within the category of contracts and is to be looked upon and enforced as an agreement and is to be constituted as other contracts as respects its interpretation, its meaning and effect."). "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). The Court of Appeals in Elliott v. Elliot, clarified that:

> 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 agreements under the guise of "construing" them... Elliott v. Elliot, 149 S.W.3d 77, 84 (Tenn. Ct. App. 2004) (Duvier v. Duvier, 1995 Tenn. App. LEXIS 494, at *3).

However, if this Supreme Court believes that the Johnson and Howell cases are analogous and applicable to this case, then there is still uniformity of decision, and this Supreme Court has no reason to grant Appellant's *Application* to create uniformity.

When the United States Supreme Court issued its opinion in Howell, it found the following:

1. That a state court is preempted from ordering reimbursement or indemnification of any waived military benefits 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 Congress. All such orders are thus preempted." Howell, at 1406, and
2. That a state court "cannot 'vest' that (which under governing federal law) they lack the authority to give." Howell, at 1405 ... and when a former spouse's interest is subject to later reduction, the existence of that contingency means "that the value of [the former spouse's] share of military retirement pay was possibly worth less." Id.

Each of these two separate rationales for the United State Supreme Court's decision in Howell functions independently of the other. Howell specifically cites Johnson as one of several misdirected state court cases, and overrules it on both issues of "vestment" and preemption. The United State Supreme Court's Howell decision makes clear that in this case, Ms. Parsons' interest is not vested, but if it was arguably vested, the interest in which that vestment lies would be subject to the condition subsequent that existed under federal law, which neither Ms. Parsons nor the Trial Court could extinguish. Similar to military retirement, receipt of a FERS Supplement is governed by federal law. When Mr. Parsons exceeded the earnings cap, federal law extinguished the parties'

right to collect the FERS Supplement. The state court then had no ability to reinstate that right, absent explicit terms in the MDA, allocating payment of said amount from some other source.

As the Court of Appeals noted, all parties were aware that for every Two Dollars ($2.00) Mr. Parsons earned over $15,120 in one year, the FERS Supplement would be reduced by ($1.00). In 2014, Mr. Parsons earned an amount above the federal cap that reduced his FERS Supplement to zero ($0.00). While both parties were aware of this potential outcome, to Ms. Parsons detriment, no express provisions were contracted for in the parties' MDA to protect Ms. Parsons' contingent interest. Ms. Parsons' unfounded position that her unwritten expectations should have been part of the parties' contract, contradicts Tennessee law and the plain language of the MDA, which states in pertinent part as follows:

> **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. (emphasis added).

A failure to include subsequently wished for terms in a contract, is not an issue this Supreme Court needs to or should address to create uniformity. No Tennessee cases have come out since Howell that stray from the holding in Howell, even those that cite Johnson. The cases Ms. Parsons cites to, that also cite Johnson, stand for principles that are well established law in Tennessee, such as an MDA being considered a contract in Tennessee. None of the cases cited abrogate Howell's holdings related to vesting or preemption. Uniformity in the law already exists as to these issues.

Appellant also cites Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993), as setting forth the principle that a "nonemployee spouse obtains a fixed, vested property interest in his or her spouse's retirement benefits upon the entry of a divorce decree." (Appellant's *Application for Permission to Appeal*, p. 4). This is not the principle of the Towner case. The issue in Towner is whether an alimony award explicitly agreed to be paid in lieu of military retirement was in the nature of support or property division. The Towner Court determined that the alimony was in the nature of

property division, as the MDA expressly stated that the alimony was being paid in lieu of receiving retirement benefits, which are property. The alimony, therefore, maintained its contractual nature. As a result, neither the former husband nor the court could terminate payments under the statutes governing support awards. Towner is not a case that creates a divergency in the case law on vesting that would suggest that the Supreme Court grant Appellant's *Application for Permission to Appeal.*

Lastly, this Supreme Court has already clearly ruled that when parties to post-divorce litigation have a MDA that contains a mandatory fee award, prevailing parties are **entitled** to recover their reasonable attorney's fees. See Eberbach v. Eberbach, 535 S.W.3d 467, 478 (Tenn. 2017), see also, Scobey v. Scobey, No. M2016-00963-COA-R3-CV, 2017 Tenn. App. LEXIS 612, *26-8. The Court of Appeals correctly held that Mr. Parsons was the definitively prevailing party at both the Trial Court and Appellate levels, and as such, he is entitled to his reasonable attorney's fees and suit expenses. A TRAP 11 review of the attorney's fees issue to secure uniformity of decisions is not necessary, and this Supreme Court should not grant Appellant's *Application* pursuant to this factor.

2. The Need to Secure Settlement of Important Questions of Law

The second factor as set out in TRAP 11 is "the need to secure settlement of important questions of law." Tenn. R. App. P. 11(a). In this case the decisions of the Trial Court and the Court of Appeals considered preemption and how Ms. Parsons' interest in a federal benefit was governed by contract interpretation. These issues have been definitively decided by this Supreme Court and/or the United States Supreme Court.

As discussed above, the issue of preemption and the "vesting" of a contingent interest have been definitively decided by the United States Supreme Court in Howell. The United States Supreme Court has already decided the applicable legal issues and set forth a controlling case that directs that state courts are not permitted to "reimburse" a party who loses an interest in a benefit that is terminated by federal law. Howell, at 1406. If this Court believes Howell applies to this case, then the Trial Court properly interpreted and applied Howell. If this Court does not believe Howell applies, but believes preemption and contract principles apply, as the Court of Appeals

did, then the Court of Appeals properly applied well-established law in those areas, and there is no conflict in which this Court needs to secure an important question of law.

3. The Need to Secure Settlement of Questions of Public Interest

The third factor to be considered under TRAP 11 is "the need to secure settlement of questions of public interest." Appellant has made no argument that this factor applies to this case, or that their *Application* for permissive appeal could be granted on such grounds. There are no questions of public interest involved in this case.

4. The Need for the Exercise of the Supreme Court's Supervisory Authority

The final factor listed under TRAP 11, that this Supreme Court is supposed to consider, when deciding whether to grant an appellant's application for permission to appeal, is "the need for the exercise of the Supreme Court's Supervisory Authority." The Tennessee Supreme Court has supervisory control of all inferior courts of this State, pursuant to Tenn. Code Ann. § 16-3-501 et seq. However, Appellant's contention that the Court of Appeals' decision in the present case warrants such an exercise of this Supreme Court's special "supervisory authority" is flawed. As this Supreme Court stated in Moore-Pennoyer v. State, this Supreme Court,

> [A]s the constitutionally designated repository of judicial power that exercises supervisory authority over the Judicial Department, this Court, and only this Court, has the authority to prescribe rules, policies, and procedures relating to matters essential to the judicial function. See Tenn. Const. art. II, § 2 ("No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."); Mallard, 40 S.W.3d at 481. In such matters, this Court "is supreme in fact as well as in name." Id. (citing Barger, 535 S.W.2d at 341). Moore-Pennoyer v. State, 515 S.W.3d 271, 277 (Tenn. 2017).

This Supreme Court has generally reserved its exercise of supervisory authority for supervising the judicial system and establishing procedures for the administration and general practices of the lower courts. See Dungan v. Dungan, 579 S.W.2d 183, 185 (Tenn. 1979) (emphasizing "its affirmative constitutional duty under both the United States Constitution and the Constitution of Tennessee to open the courts to bona fide indigents seeking, in good faith, the judicial dissolution of their marriages. That duty triggers the inherent and statutory supervisory powers of this Court" in finding that trial judges had a right to order substitute service instead of

publication for the limited purpose of conferring in rem jurisdiction of the marital status); Evans v. Wilson, 776 S.W.2d 939, 941 (Tenn. 1989)(exercising its supervisory authority, holding "that a trial judge in suggesting an additur, must establish a time frame in which the defendant may accept the suggestion," and establishing procedures for the trial judge's suggestions pursuant to the additur and remittur statutes); State v. Brown, 644 S.W.2d 418, 420-21 (Tenn. Crim. Ct. App. 1982)(holding that the Chief Justice had the supervisory authority, pursuant to Tenn. Code Ann. § 16-3-501 et seq., to designate a trial judge to hear a motion for a new trial).

Here, Appellant provides no compelling reason for this Supreme Court to exercise its supervisory authority because the highest Court in the land, the United States Supreme Court, has already decided the issues raised in this case in its Howell *Opinion*. Decisions by the United States Supreme Court are outside the supervisory authority of the Tennessee Supreme Court. There are no rules, policies, or procedures of which the Appellant has questioned the application in this case. The Appellant only questions the application of the controlling Howell case, and other well-established law pertaining to preemption and contract principles. This case is not one in which it is necessary or proper for this Supreme Court to exercise any sort of supervisory authority.

5. Any Other Reason that may be Considered by the Supreme Court in Granting a Permissive Appeal, Pursuant to TRAP 11

While TRAP 11 does not expressly list any factors beyond the ones addressed above, the Rule refers to the four (4) listed factors as "neither controlling nor fully measuring the court's discretion" in determining whether to grant a permissive appeal. In this case, Appellant has listed no other reason why this Supreme Court may or should grant her *Application for Permission to Appeal*, and no other reasons exist that should compel this Supreme Court to grant said *Application*.

CONCLUSION

Appellant has offered no compelling reasons, pursuant to TRAP 11, or any other authority why this Supreme Court should grant Appellant's *Application for Permission to Appeal*. Appellant argues this Court must settle an important question of law and secure uniformity of decision, but this Court and the United States Supreme Court, in Howell, have already done so. There is also no

reason given why this Supreme Court has any need to exercise its supervisory authority in this case, as the application of rules, policies, or procedures are not questioned here. Appellee respectfully requests that this Court deny Appellant's *Application for Permission to Appeal* the Court of Appeals' previous decision in this case, and remand this matter back to the Trial Court to assess Mr. Parsons' reasonable attorney's fees and suit expenses, in accordance with the terms of the parties' MDA, as originally directed by the Court of Appeals.

Respectfully submitted,

LARRY RICE (#5292)
Attorney for Appellee
Rice, Amundsen & Caperton, PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
(901) 526-6701

CERTIFICATE OF SERVICE

I, the undersigned, certify that served a true and correct copy of the foregoing document has been forwarded via U.S. Mail, postage prepaid, to Mitch Moskovitz, Esq., and/or Kirkland Bible, Esq., Attorneys for Appellant, at 530 Oak Court Drive, Suite 355, Memphis, Tennessee 38117, on this the 21st day of Feb 2020.

LARRY RICE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

KELLY COLVARD PARSONS v. RICHARD JEARL PARSONS

Circuit Court for Shelby County
No. CT-004932-13

No. W2018-02008-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Kelly Colvard Parsons and the record before us, the application is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE

KELLY COLVARD PARSONS

Appellant,

vs.

W2018-02008-COA-R3-CV
(Shelby Circuit No. CT-004932-12)

RICHARD JEARL PARSONS,

Appellee.

APPELLANT'S PETITION FOR RULE 39 REHEARING OF DENIAL OF APPLICATION FOR PERMISSION TO APPEAL

Comes now the Appellant, pursuant to Rule 39 of the Tennessee Rule of Appellate Procedure, and respectfully moves this Honorable Court to consider and grant Appellant's request for rehearing, and in support of said Petition, Appellant alleges as follows:

1. On December 12, 2019, the Western Section of the Court of Appeals at Jackson, Tennessee issued an opinion and judgment reversing in part, affirming in part, and remanding certain matters to the Honorable James F. Russell, Judge of Division II of the Circuit Court of Shelby County, Tennessee. *See* Parsons v. Parsons, 2019 WL 6770520 (Tenn. Ct. App. Sept. 18, 2019) (a copy of which is attached hereto as part of Collective Exhibit "A").

2. Subsequent thereto, on or about February 10, 2020, within the time prescribed by the Tennessee Rules of Appellate Procedure, Appellant filed her Application for Permission to Appeal to this Honorable Court. (A copy of Appellant's Application for Permission to Appeal is attached hereto as part of Collective Exhibit "A" and is incorporated by reference, as if copied herein verbatim).

3. On June 3, 2020, this Honorable Court entered an Order denying Appellant's Application for Permission to Appeal.

4. Appellant acknowledges the extraordinary nature of her request set forth in the present Petition, but submits that Tennessee Rule of Appellate Procedure 39 affords an appropriate remedy for this Honorable Court to reconsider, rehear, and grant Appellant's request given the need pursuant to Rule 39(a) to address significant issues of law.

5. As set forth in Appellant's Application for Permission to Appeal, Appellant submits that the Court of Appeals' ruling on December 12, 2019 in Parsons v. Parsons, 2019 WL 6770520 (Tenn. Ct. App. Sept. 18, 2019) upsets the well-established principle set forth by this Honorable Court in Towner v. Towner, 858 S.W.2d 888 (Tenn. 19993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) that a nonemployee spouse obtains a vested interest in his or her spouse's retirement benefits as the date of the entry of the parties' divorce decree, which is not subject to modification or termination due to a post-decree change in circumstances unilaterally imposed by the employee spouse.

Based on the Western Section of the Court of Appeals' decision in the case at hand on December 12, 2019, a nonemployee spouse's vested property interest may be unilaterally diminished by an act of the employee spouse, contrary to Towner and Johnson. Accordingly, Appellant submits that rehearing is necessary to secure uniformity of law as it relates to well-established principles regarding vesting of parties' property interests in a final decree of divorce.

6. As outlined in Appellant's Application for Permission to Appeal, this post-divorce cause was first before the Western Section of the Court of Appeals in Parsons v. Parsons, 2017 WL 1192111, Tenn. Ct. App (Mar. 30, 2017), during which the Court of Appeals reversed the trial court's decision and remanded this matter to the trial court. (A copy of Parsons v. Parsons, 2017 WL 1192111, Tenn. Ct. App (Mar. 30, 2017) is attached hereto as part of Collective Exhibit "A").

7. Appellant submits that during the initial oral argument in advance of Western Section of the Court of Appeals' ruling on March 30, 2017, the Court of Appeals specifically inquired of counsel for Appellee, pursuant to both Towner and Johnson, that regardless of the improper contempt standard utilized by the trial court in the original post-divorce hearing in this cause, Appellee still appeared to owe Appellant certain funds, as Appellee's actions effected a reduction in the whole of Appellant's retirement benefits, including a reduction in the half in which Appellant had a vested interest.

8. In the Western Section of the Court of Appeals' subsequent ruling on December 12, 2019, Court of Appeals contradicted its above-referenced comments and concluded that Appellant did not obtain a vested, nonmodifiable property interest in her share of Appellee's marital retirement benefits as of the date of the entry of the entry of the parties' Final Decree of Divorce, in direct conflict with Towner and Johnson, despite no change in the law on this issue.

9. Appellant further submits that during the oral argument in advance of Western Section of the Court of Appeals' ruling on March 30, 2017, her counsel respectfully requested that the Court of Appeals utilize its authority to address all issues

consistent with its above-referenced comments, and to not remand this cause to the trial court. Appellant submits that the remand of same increased cost and expense.

10. Appellant further alleges that on May 15, 2017, less than two (2) months after the Western Section of the Court of Appeals remanded the present matter to the trial court following Appellant's first appeal in Parsons v. Parsons, 2017 WL 1192111, Tenn. Ct. App (Mar. 30, 2017), the United States Supreme Court issued its ruling in Howell v. Howell, 137 S. Ct. 1400 (2017)). The Howell opinion was basis for the trial court's denial of the requested relief of Appellant during the remand hearing on all remaining issues.

11. As set forth in Appellant's Application for Permission to Appeal, Appellant alleged that in Howell, the United States Supreme Court held that a state court cannot order a **veteran** to indemnify or reimburse his former spouse for the loss of her share of his **military retirement pay** caused by the receipt of **disability benefits**, as pursuant to 10 U.S.C. § 1408, federal law preempts state courts from dividing military retirement pay that a veteran has waived in order to receive disability benefits. In the present case, Appellee is not a veteran, nor is he disabled.

12. Appellant submits that in the Western Section of the Court of Appeals' December 12, 2019 opinion, the Court of Appeals did not address Howell and its application, if any, to Towner, Johnson, and long-standing Tennessee law. However, the record in this cause fully supports that the Howell opinion was the underlying basis for the trial court's denial of Appellant's request for relief.

13. Despite all of the above, in the Western Section of the Court of Appeals' December 12, 2019 opinion, the Court of Appeals ordered Appellant to pay Appellee's attorney fees, in spite of Appellant's reliance on long-standing precedent for her position

in this cause, and in spite of the Court's failure to address Howell and its application, if any, in this cause.

14. Appellant acknowledges the extraordinary request sought herein, but submits that rehearing is required given the need for uniformity of law, as the Western Section of the Court of Appeals' ruling of December 12, 2019 incorrectly and contradictorily overlooks or misapprehends significant issues of law that should be addressed by this Honorable Court. Appellant further submits that the Court of Appeals ruling of December 12, 2019 overlooks material facts and principles of law that are in need of being addressed to avoid disputes of law.

15. In an effort to assist this Honorable Court, Appellant respectfully adopts and incorporates herein all of the arguments previously set forth in her Application for Permission to Appeal, previously filed in this cause on or about February 10, 2020 and attached hereto as part of Collective Exhibit "A."

Respectfully Submitted,

Mitchell D. Moskovitz (#15576)
Kirkland Bible (#31988)
530 Oak Court Drive, Suite 355
Memphis, Tennessee 38117
(901) 821-0044

Attorneys for Appellant,
Kelly Colvard Parsons

CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing document has been forwarded to Tennessee Court of Appeals, Nancy Acred, Chief Deputy Clerk, Supreme Court of Tennessee, Supreme Court Building, P. O. Box 909, Jackson, TN 38302-0909, via prepaid FedEx overnight; and to Larry Rice and Erin O'Dea, Attorneys for Appellee, 275 Jefferson Avenue, Memphis, Tennessee 38103, via regular U.S. Mail, postage prepaid, this the 12th day of June, 2020.

Mitchell D. Moskovitz

2019 WL 6770520
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Kelly Colvard PARSONS
v.
Richard Jearl PARSONS

No. W2018-02008-COA-R3-CV
|
September 18, 2019 Session
|
FILED 12/12/2019

Appeal from the Circuit Court for Shelby County, No. CT-004932-13, James F. Russell, Judge

Attorneys and Law Firms

Mitchell D. Moskovitz, and Kirkland Bible, Memphis, Tennessee, for the appellant, Kelly Colvard Parsons.

Larry Rice, Memphis, Tennessee, for the appellee, Richard Jearl Parsons.

Kenny Armstrong, J., delivered the opinion of the court, in which J. Steven Stafford, P.J., W.S. and Carma Dennis McGee, J., joined.

OPINION

Kenny Armstrong, J.

Wife/Appellant appeals the trial court's denial of relief on her post-divorce petition for contempt and breach of contract. The parties' MDA awarded Wife 50% of Husband/Appellee's FERS Supplement, which was subsequently terminated due to Husband's yearly earned income being in excess of the FERS cap of $15,120.00. Because the parties' MDA did not preclude Husband from earning income in excess of the cap, and did not include a provision for such occurrence, the trial court properly denied Wife's petition. Although the trial court *sua sponte* modified child support to award an additional amount equal to the lost FERS Supplement, it did so in error. Accordingly, we affirm the trial court's grant of Husband's motion to alter or amend the award of additional child support. Because the MDA allows the prevailing party to recover attorney's fees and expenses, we reverse the trial court's denial of Husband's reasonable fees and expenses, and remand for determination of same, and for entry of judgment thereon. Reversed in part, affirmed in part, and remanded.

I. Background

*1 The procedural history in this case is protracted, and this is the second appeal to this Court. In the interests of judicial economy and consistency, we restate the relevant background information from ***Parsons v. Parsons***, No. W2016-01238-COA-R3-CV, 2017 WL 1192111 (Tenn. Ct. App. Mar. 30, 2017) (“***Parsons I***”):

> On July 10, 2014, Appellant Kelly Parsons, and Appellee Richard Parson[s] filed a marital dissolution agreement (MDA) that was incorporated into a final decree of divorce, which was entered by the [Shelby County Circuit Court (“trial court”)] on July 16, 2014. During the parties' marriage, Mr. Parsons was employed by the Federal Aviation Administration (FAA) as an air-traffic controller. In November 2013, seven months prior to the divorce, Mr. Parsons retired from his job pursuant to an FAA mandate, requiring retirement at the age of 56. Mr. Parsons' retirement benefits included a monthly annuity from the Civil Service Retirement System (CSRS) in the amount of $5,325. Additionally, Mr. Parsons was to receive a monthly supplement from the Federal Employees Retirement System (FERS) in the amount of $1,370 until he turned 62 and became eligible for social security. In order to maintain eligibility and continue receiving the FERS [S]upplement, Mr. Parsons' earnings could not exceed $15,120[.00] per year.
>
> The terms of the parties' MDA provided that Ms. Parsons would receive 50% of Mr. Parsons' ... FERS [S]upplement, to wit:
>
> * * *
>
> 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. 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/or FERS [S]upplement.

* * *

In April 2015, pursuant to the parties' parenting plan, Ms. Parsons received Mr. Parsons' 2014 tax return and discovered that in addition to the federal retirement benefits contemplated in the MDA, Mr. Parsons had earned income in excess of $52,000, which exceeded the FERS cap of $15,120[.00]. Thus, Mr. Parsons was not eligible for the FERS [S]upplement of $1,370 per month.

On June 22, 2015, Ms. Parsons filed a petition for civil and criminal contempt. In her petition, she alleged that Mr. Parsons should be held in willful civil and criminal contempt for failing and refusing to pay her the 50% share of his FERS [S]upplement. Ms. Parsons also alleged, inter alia, that Mr. Parsons owed an arrearage of $4,795 for unpaid FERS benefits. The petition requested that the trial court order Mr. Parsons to pay such arrearages ....

On July 27, 2015, Mr. Parsons' attorney sent a letter informing Ms. Parsons that Mr. Parsons' FERS [S]upplement had been reduced to zero beginning August 2015. The letter also indicated that "because fifty percent (50%) of Zero Dollars ($0.00) is Zero Dollars ($0.00), [Ms. Parsons] will not receive a FERS [S]upplement payment beginning August 1, 2015." [Fn. 1. While the FERS [S]upplement ended in July 2015, Ms. Parsons alleges in her petition that Mr. Parsons did not pay her the 50% share of the [S]upplement for the months of December 2014 through June 2015 (the month the petition was filed), even though he was receiving the full FERS [S]upplement directly from the Office of Personnel Management.]. A letter from the Office of Personnel Management indicated that the reason for the elimination of the FERS [S]upplement is because Mr. Parsons' earned income during 2014 exceeded the $15,120[.00] income cap. Ms. Parsons argues that her interest in Mr. Parsons' retirement benefits is a property interest, and as such, is non-modifiable. Ms. Parsons also argues that the entry of the final decree of divorce gave her a vested interest in one-half of Mr. Parsons' FERS [S]upplement, and that Mr. Parsons' failure to compensate her to the extent of her vested interest was an improper unilateral modification of the final decree of divorce. Mr. Parsons argues that Ms. Parsons knew prior to the entry of the MDA and the final decree of divorce that Mr. Parsons' income would exceed the $15,120[.00] cap. Specifically, Mr. Parsons produced a letter from his new employer, Raytheon, dated April 7, 2014 stating that his hourly rate would be $26.50 and that he could not exceed more than 1500 hours per year. However, we note that Mr. Parsons signed the permanent parenting plan on July 10, 2014 swearing and affirming that his gross monthly income was only $4,597.00 per month, which included his federal retirement benefits and his expected earnings from Raytheon.

*2 The hearing on the contempt petition was held on March 2, 2016. After Ms. Parsons' attorney completed direct examination of Ms. Parsons, Mr. Parsons' attorney made an oral motion to dismiss ... on the ground that Ms. Parsons failed to elect whether she was seeking civil or criminal contempt. Prior to ruling on the motion, the trial court heard statements from counsel for both parties regarding the status of the proof. The attorneys were in agreement that Ms. Parsons had not completed her proof; however, Mr. Parsons argued that the case was fundamentally flawed because it had proceeded without Ms. Parsons electing whether she was proceeding on either civil or criminal contempt. Mr. Parsons argued that the only remedy was dismissal. In order to expedite the proceeding, Ms. Parsons agreed to dismiss the criminal contempt component and proceed solely on the allegations of civil contempt. Despite statements from both attorneys that Appellant had not closed her proof, the trial court granted the motion to dismiss....

Parsons, 2017 WL 1192111, at *1-2 (footnote in original). In ***Parsons I***, we determined that the trial court applied an incorrect burden of proof and improper procedure; as such, we vacated the trial court's order and remanded the case for further proceedings.

On remand from ***Parsons I***, Ms. Parsons filed an amended petition for contempt on June 23, 2017. In addition to contempt, Ms. Parsons amended her petition to add, in the alternative, a breach of contract claim. Specifically, Ms. Parsons alleged that Mr. Parsons breached the MDA because he failed to pay her 50% of his FERS Supplement from December 2014 through the date of her amended petition. On September 12 and 13, 2017, the trial court heard Ms. Parsons' amended petition. On November 29, 2017, the trial court announced its ruling. [1] In pertinent part, the trial court held that: (1) there was no contempt because Ms. Parsons did not have a vested interest in the FERS Supplement; and (2) there was no order requiring Mr. Parsons to compensate Ms. Parsons should the FERS Supplement terminate. The trial

court also denied Ms. Parsons' breach of contract claim on its finding that the MDA was a valid contract, which could not be altered "even under equitable interpretations." Nonetheless, the trial court ostensibly restored Ms. Parsons' share of the FERS Supplement by awarding an upward deviation in child support equal to $685 per month, which amount is equal to 50% of Mr. Parsons' previous FERS Supplement.

On December 20, 2017, Mr. Parsons filed a motion to alter or amend, wherein he sought reversal of the portion of the trial court's order awarding an upward deviation in child support. On August 31, 2018, the trial court heard Mr. Parsons' motion. By order of October 18, 2018, the trial court granted the motion and reversed its prior ruling. Specifically, the trial court found that its award of $685 per month "was an erroneous upward deviation in child support." Ms. Parsons appeals.

II. Issues

Ms. Parsons raises three issues for review, which we restate as follows:

1. Whether the trial court erred in finding that Mr. Parsons was not required to compensate Ms. Parsons for her share of the FERS Supplement after it terminated.

2. Whether the trial court erred in reversing the upward deviation in child support.

3. Whether the trial court erred in denying Ms. Parsons her attorney's fees and expenses under the MDA.

In the posture of Appellee, Mr. Parsons asserts that the trial court erred in denying his attorney's fees and expenses under the MDA.

III. Standard of Review

This case was tried without a jury. Therefore, we review the trial court's findings of fact *de novo* with a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). The trial court's conclusions of law, however, are reviewed *de novo* and "are accorded no presumption of correctness." ***Brunswick Acceptance Co., LLC v. MEJ, LLC***, 292 S.W.3d 638, 642 (Tenn. Ct. App. 2008).

IV. FERS Benefit

*3 Before addressing the parties' respective arguments, it is helpful to discuss the general nature of the federal FERS supplemental benefits. FERS, the Federal Employee Retirement System, is a retirement plan for Federal civilian employees. *FERS Information*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, https://www.opm.gov/retirement-services/fers-information/ (last visited October 31, 2019). The FERS retirement package includes benefits from three sources: (1) Social Security; (2) the Thrift Savings Plan; and (3) the Federal Employees Retirement Basic Benefit ("FERS basic benefit"). *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 1 (May 2012), https://www.opm.gov/retirementservices/publications-forms/pamphlets/ri90-8.pdf. Within the FERS basic benefit plan, which the Office of Personnel Management ("OPM") administers, is a special retirement supplement that is available to select employees. The special retirement supplement was "designed to bridge the gap between when [a qualified employee] retire[s] and age 62 when [the employee] first becomes eligible for a Social Security benefit." Reg Jones, *Understanding the Special Retirement Supplement 2019*, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. Air traffic controllers are eligible for the special retirement supplement because air traffic controllers must retire at age 56. Tammy Flanagan, *The FERS Supplement: Q & A*, GOVERNMENT EXECUTIVE (May 16, 2019), https://www.govexec.com/pay-benefits/2019/05/fers-supplement-q/157077/. The supplement is administered by OPM's Civil Service Retirement and Disability Fund, not through the Social Security Office. Reg Jones, *Understanding the Special Retirement Supplement 2019*, FEDERAL TIMES (May 28, 2019), https://www.federaltimes.com/fedlife/retirement/2019/05/28/understanding-the-special-retirement-supplement-2019/. However, similar to Social Security, the special retirement supplement is subject to an earnings test. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. A qualified employee cannot earn more than the exempt amount of earnings, or risk having his or her special retirement supplement reduced by $1.00 for every $2.00 of earnings over the exempt

amount. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. Therefore, it is possible that a qualified employee could have his or her retirement supplement reduced to $0 if he or she earns income over the minimum level of earnings. *Information for FERS Annuitants*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, 12 (May 2012), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri90-8.pdf. For earnings during 2014, the year Mr. Parsons began working for Raytheon, the exempt amount of earnings was $15,120.00.

From the foregoing discussion, it is clear that Mr. Parsons' FERS Supplement is a specialized retirement asset. Tennessee Code Annotated section 36-4-121(b)(1)(B)(ii) provides that it is also "marital property." Tenn. Code Ann. § 36-4-121(b)(1)(B)(ii) (" 'Marital property' includes ... retirement[ ] and other fringe benefit rights accrued as a result of employment during the marriage[.]"). Here, the trial court divided the parties' marital property, including the FERS Supplement, according to their MDA.

In Tennessee, MDAs are treated as contracts and are subject to the rules governing construction of contracts. *See **Barnes v. Barnes***, 193 S.W.3d 495, 498 (Tenn. 2006); ***Honeycutt v. Honeycutt***, 152 S.W.3d 556, 561 (Tenn. Ct. App. 2003). To the extent our analysis requires interpretation or application of the parties' MDA, we note that "interpretation of a contract is a matter of law, [and] our review is *de novo* on the record with no presumption of correctness...." ***Honeycutt***, 152 S.W.3d at 561 (quoting ***Witham v. Witham***, No. W2000-00732-COA-R3-CV, 2001 WL 846067, at *3 (Tenn. Ct. App. July 24, 2001)). In ***Kafozi v. Windward Cove, LLC***, 184 S.W.3d 693, 698 (Tenn. Ct. App. 2005), *perm. app. denied* (Tenn. Jan. 30, 2006), this Court explained that

> [i]n resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language. ***Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.***, 78 S.W.3d 885, 889-90 (Tenn. 2002) (citing ***Guiliano v. Cleo, Inc.***, 995 S.W.2d 88, 95 (Tenn. 1999)). A determination of the intention of the parties "is generally treated as a question of law because the words of the contract are definite and undisputed, and in deciding the legal effect of the words, there is no genuine factual issue left for a jury to decide." ***Planters Gin Co.***, 78 S.W.3d at 890 (citing 5 Joseph M. Perillo, *Corbin on Contracts*, § 24.30 (rev. ed. 1998); ***Doe v. HCA Health Servs. of Tenn., Inc.***, 46 S.W.3d 191, 196 (Tenn. 2001)). The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. ***Planters Gin Co.***, 78 S.W.3d at 890. The parties' intent is presumed to be that specifically expressed in the body of the contract. "In other words, the object to be attained in construing a contract is to ascertain the meaning and intent of the parties as expressed in the language used and to give effect to such intent if it does not conflict with any rule of law, good morals, or public policy." ***Id.*** (quoting 17 Am. Jur. 2d, *Contracts*, § 245).
>
> *4 This Court's initial task in construing the [c]ontract at issue is to determine whether the language of the contract is ambiguous. ***Planters Gin Co.***, 78 S.W.3d at 890. If the language is clear and unambiguous, the literal meaning of the language controls the outcome of the dispute. ***Id.*** A contract is ambiguous only when its meaning is uncertain and may *fairly* be understood in more than one way. ***Id.*** (emphasis added). If the contract is found to be ambiguous, we then apply established rules of construction to determine the intent of the parties. ***Id.*** Only if ambiguity remains after applying the pertinent rules of construction does the legal meaning of the contract become a question of fact. ***Id.***

Kafozi, 184 S.W.3d at 698-99.

Turning to the parties' respective arguments, Ms. Parsons maintains that Mr. Parsons "unilaterally and impermissibly" modified the parties' MDA when he failed to compensate her for her share of the FERS Supplement after the benefit terminated. The MDA provides, in relevant part that

> [the MDA] contains the entire understanding and agreement between 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.

(emphasis added). The trial court found that "the contract embedded in the *Marital Dissolution Agreement* [was] executed by the parties with clear and open minds." Ms. Parsons does not dispute that she entered into the MDA voluntarily, nor does she allege contract formation errors that would prevent enforcement of the MDA. More importantly, however, it is undisputed that, at the time they entered into the MDA, both parties had full knowledge of the character of the FERS Supplement. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. Likewise, when questioned at oral argument before this Court, Ms. Parsons' counsel stated, in relevant part:

> Q: At the time the MDA was agreed to, wasn't it understood that he could lose the FERS payment either by reaching a certain age or if his income exceeded a certain amount?
>
> A: Yes.
>
> Q: That was understood?
>
> A: Yes.
>
> Q: Yet, the MDA includes no provision in the event that that happens.
>
> A: That's correct.

Indeed, the clause in the MDA concerning the FERS Supplement states only that

> 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. 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/or FERS [S]upplement.

Although the MDA clearly and unambiguously provides that Ms. Parsons is entitled to 50% of the FERS Supplement, the MDA is silent concerning Mr. Parsons' obligation should the FERS Supplement terminate. Furthermore, there is no language in the MDA that precludes Mr. Parsons from seeking employment or earning more than the exempt amount of earnings. Despite her knowledge that the FERS Supplement could terminate if Mr. Parsons' earnings exceeded the exempt amount of earnings, the parties did not include any contractual terms to insure Ms. Parsons against such contingency. As stated by the trial court in its ruling (incorporated into its final order):

> *5 the parties very easily could have included a contingency clause that would have required [Mr. Parsons] to make up the difference of the loss to [Ms. Parsons] 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 [Mr. Parsons] make up the difference lost by [Ms. Parsons] in terms of the FERS Supplement benefit.

We agree. The language in the MDA is clear and unambiguous, and this Court gives effect to the language as expressed in the contract, and nothing more. *See **Kafozi***, 184 S.W.3d at 698-99. Furthermore, we will neither modify a contract, nor impose obligations or rights on the parties, for which they have not bargained. *See **Petty** v. **Sloan***, 277 S.W.2d 355, 359 (Tenn. 1955) (quoting ***Smithart** v. **John Hancock Mutual Life Ins. Co.***, 71 S.W.2d 1059, 1063 (Tenn. 1934)) (" 'A court is not at liberty to make a new contract for parties who have spoken for themselves.' "); ***Marshall** v. **Jackson & Jones Oils, Inc.***, 20 S.W.3d 678, 682 (Tenn. Ct. App. 1999) (citing ***Atkins** v. **Kirkpatrick***, 823 S.W.2d 547, 553 (Tenn. Ct. App.1991)) (stating that courts "may not relieve parties of the contractual obligations simply because these obligations later prove to be burdensome or unwise."); *see also **Eberbach** v. **Eberbach***, 535 S.W.3d 467, 478 (Tenn. 2017) ("Indeed, one of the bedrocks of Tennessee law is that our courts are without power to make another and different contract from the one executed by the parties themselves."). Again, in this case, there is nothing in the MDA to preclude Mr. Parsons from action that might terminate the FERS

Supplement. Neither is there any provision in the MDA to obligate Mr. Parsons to continue to compensate Ms. Parsons for 50% of the FERS Supplement should his actions result in its termination.

Nonetheless, Ms. Parsons insists that she has a vested, non-modifiable interest in a share of the FERS Supplement. In support of her argument, Ms. Parsons relies on the Tennessee Supreme Court case, ***Johnson v. Johnson***, 37 S.W.3d 892 (Tenn. 2001), wherein the Court held

> that when [a] MDA divides **military retirement benefits**, the non-military spouse has a vested interest in his or her portion of those benefits as of the date of the court's decree. That vested interest cannot thereafter be unilaterally diminished by an act of the military spouse. Such an act constitutes an impermissible modification of a division of marital property and a violation of the court decree incorporating the MDA.

Id. at 897-98 (emphasis added).

Conversely, Mr. Parsons argues that the Tennessee Supreme Court's holding in ***Johnson*** was abrogated by the United States Supreme Court in ***Howell v. Howell***, 137 S. Ct. 1400 (2017). In ***Howell***, the United States Supreme Court held that a state court cannot

> increase, pro rata, the amount the divorced spouse receives each month from the **veteran's retirement pay** in order to indemnify the divorced spouse for the loss caused by the veteran's waiver [of retirement pay to receive service-related disability benefits], [*id.* at 1402, because] [s]tate courts cannot "vest" that which (under governing federal law) they lack the authority to give.

*6 *Id.* at 1405 (emphasis added). In addressing the parties' arguments, the trial court held:

> 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.

In the first instance, the benefits at issue in ***Johnson*** and ***Howell*** are readily distinguishable from the FERS Supplement at issue here. ***Johnson*** and ***Howell*** concern military retirement benefits, which are not in the nature of a FERS Supplement, *see* discussion *supra*. Here, the parties' respective interests in the FERS Supplement are contractual because this property was divided in the MDA. As discussed above, there is nothing in the MDA to protect Ms. Parsons' interest in the FERS Supplement should Mr. Parsons' actions lead to termination of same, and there is nothing in the MDA to preclude Mr. Parsons from earning above the exempt amount of earnings. Therefore, Ms. Parsons was not contractually entitled to compensation for her 50% of the FERS Supplement after it terminated. [2]

V. Child Support

Concerning child support, in its June 6, 2018 order, the trial court held:

> 17. This [c]ourt is of the considered opinion that the loss of the FERS Supplement Benefit is a material and significant change in circumstances such that the child support order should be modified upward in addition to the recalculation that is already now in place.
>
> * * *
>
> 19. This [c]ourt 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....

Mr. Parsons filed a motion to alter or amend the trial court's order, asking the trial court to reverse the portion of its order requiring him to pay an additional $685 per month in child support. By order of October 18, 2018, the trial court reversed its prior ruling finding that the $685 per month "was an erroneous upward deviation in child support." Ms. Parsons now asks this Court to reverse the trial court and reinstate the additional $685 in monthly child support payments. We decline to do so.

*7 The trial court was correct to reverse its prior ruling on the issue of child support. Based on the pleadings, the issue of modification of child support was not properly before the trial court. As noted above, Ms. Parsons' petition was for contempt and breach of contract. At no point in the petition does she ask the trial court to revisit the previous child support order. "The purpose of an action can only be determined from the pleadings," and "[a] trial court has no authority, *sua sponte*, to modify its child support decrees." ***Long v. Long***, No. 01A01-9406-CV-00270, 1995 WL 33741, at *3 (Tenn. Ct. App. Jan. 27, 1995)

Furthermore, at the time it entered the order increasing child support by $685 per month, the trial court had already granted modification of child support based on the termination of the FERS Supplement. On August 27, 2015, Ms. Parsons filed a petition to modify child support alleging, in pertinent part, that her income was reduced by $685 per month because she no longer received half of the FERS Supplement. Based on her income reduction, Ms. Parsons asked the trial court to modify Mr. Parsons' child support obligation. On April 6, 2016, the trial court entered an order granting Ms. Parsons' petition to modify child support, wherein it increased Mr. Parsons' child support obligation from zero dollars to five hundred and forty-three dollars ($543.00) based on the material change in circumstances, i.e. Ms. Parsons' decreased income. The trial court also ordered Mr. Parsons to pay two thousand six hundred and ninety-eight dollars ($2,698.00) in child support arrearages. Neither party appealed the April 6, 2016 order. As such, the order increasing Mr. Parsons' child support was "*res judicata* as to all circumstances in existence at the time of the entry of said [order]." ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Hicks v. Hicks***, 176 S.W.2d 371, 375-76 (Tenn. Ct. App. 1943)). The facts surrounding termination of the FERS Supplement were in existence and under consideration at the time the trial court entered the April 6, 2016 order. Under the doctrine of *res judicata*, the trial court could not revisit child support **on the same facts** in the absence of a Rule 60 motion. If Ms. Parsons should request modification of child support based on a material change in circumstances arising from facts **not** in existence at the time of April 6, 2016, she would have to file a petition specifically to that end. *See* ***Watts v. Watts***, No. 01-A01-9011CH00406, 1991 WL 93780, at *2 (Tenn. Ct. App. June 5, 1991) (citing ***Jones v. Jones***, 659 S.W.2d 23, 24 (Tenn. Ct. App. 1983) ("In order to obtain an increase in child support [after a final order], the petitioner has the burden of showing there has been a material change of circumstances justifying an increase in child support, and that the change has taken place from and after the entry of the previous [order]."). No such petition was filed in this case. Accordingly, the trial court erred in *sua sponte* granting an upward deviation in child support. However, it corrected this error in granting Mr. Parsons' motion to alter or amend, and we affirm the grant of that motion.

VI. Attorney's Fees

Under the MDA, both parties sought attorney's fees at trial and now seek their respective fees and expenses at the appellate level. In ***Eberbach***, the Tennessee Supreme Court explained that parties may contract for attorney's fees in a MDA, to-wit:

> A [MDA] is a contract entered into by a husband and wife in contemplation of divorce. *See* ***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)). As a contract, a MDA generally is subject to the rules governing construction of contracts. ***Id.*** ... Thus, a MDA may include enforceable contractual provisions regarding an award of attorney's fees in post-divorce legal proceedings.

*8 ***Eberbach***, 535 S.W.3d at 474-75. Concerning an award of attorney's fees, the parties' MDA provides:

Noncompliance

> 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.

(emphasis in original). The trial court denied the parties' respective requests for attorney's fees stating that neither party was the "prevailing party," and that there were no "winners [or] losers in this case." We disagree. Here, the trial court denied Ms. Parsons' petition for contempt and breach of contract concerning the FERS Supplement. Although Ms. Parsons was initially awarded an increase in child support in the amount of 50% of the FERS Supplement, on grant of Mr. Parsons' motion to alter or amend, the trial court correctly reversed its modification of child support. Accordingly, Mr. Parsons was definitively the prevailing party at trial. Likewise, Mr. Parsons is the prevailing party on appeal. As such, under the plain language of the MDA, he is entitled to his reasonable attorney's fees and expenses at both the trial level and on appeal. Therefore, we remand the case for determination of Mr. Parsons' reasonable attorney's fees and costs and for entry of judgment in his favor on same.

VII. Conclusion

For the foregoing reasons, we reverse the trial court's order denying Mr. Parsons' attorney's fees under the MDA. The trial court's judgment is otherwise affirmed. The case is remanded for determination of Mr. Parsons' reasonable trial and appellate attorney's fees and expenses, for entry of judgment on same, and for such further proceedings as may be necessary and are consistent with this Opinion. Costs of the appeal are assessed to the Appellant Kelly Colvard Parsons, for all of which execution may issue if necessary.

All Citations

Slip Copy, 2019 WL 6770520

Footnotes

1 The trial court incorporated its oral ruling into its written Order Dismissing Amended Petition for Civil and Criminal Contempt and in the Alternative for Breach of Contract, which was filed on June 6, 2018.

2 Ms. Parsons also argues that Mr. Parsons is guilty of breaching his implied duty of good faith and fair dealing regarding the MDA. "When considering whether the parties have complied with this duty of good faith and fair dealing, the court must ascertain the intention of the parties as determined by a reasonable and fair construction of the language of the contract." ***Woods v. Woods***, No. W1999-00733-COA-R3-CV, 2000 WL 34411144, at *3 (Tenn. Ct. App. Aug. 22, 2000). As discussed, *supra*, the parties intended to enter into the MDA as written. The undisputed facts demonstrate that Mr. Parsons complied with his duty of good faith and fair dealing when he disclosed to Ms. Parsons that the FERS Supplement could terminate. Specifically, Ms. Parsons testified that she was aware that the Supplement could terminate should Mr. Parsons earn more than $15,120.00. As such, we cannot now conclude that he breached this duty because Ms. Parsons chose to enter into the MDA without any provision protecting her should the FERS Supplement terminate.

End of Document

2017 WL 1192111
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT JACKSON.

Kelly Colvard PARSONS
v.
Richard Jearl PARSONS

No. W2016-01238-COA-R3-CV
|
February 14, 2017 Session
|
FILED 03/30/2017

Appeal from the Circuit Court for Shelby County, No. CT-004932-13 James F. Russell, Judge

Attorneys and Law Firms

Mitchell D. Moskovitz, and Kirkland Bible, Memphis, Tennessee, for the appellant, Kelly Colvard Parsons.

Larry Rice, Memphis, Tennessee, for the appellee, Richard Jearl Parsons.

Kenny Armstrong, J., delivered the opinion of the court, in which D. Michael Swiney, C.J. and J. Steven Stafford, P.J., W.S., joined.

OPINION

Kenny Armstrong, J.

This is a post-divorce matter in which Ms. Parsons filed a petition for civil and criminal contempt against her former husband, Mr. Parsons. Ms. Parsons argues that Mr. Parsons unilaterally modified the terms of their divorce by failing to compensate her for what she alleges to be a vested interest in his federal retirement benefits. At the conclusion of Ms. Parsons' direct examination, Mr. Parsons moved for dismissal on the ground that Ms. Parsons did not elect whether she was seeking civil or criminal contempt at the outset of the proceedings. The trial court dismissed Ms. Parsons' petition for contempt, finding that she did not prove contempt by clear and convincing evidence. Because the trial court used the wrong legal standard and did not allow Ms. Parsons to complete her proof, we vacate and remand to the trial court for further proceedings.

I. Background

*1 On July 10, 2014, Appellant Kelly Parsons, and Appellee Richard Parson filed a marital dissolution agreement (MDA) that was incorporated into a final decree of divorce, which was entered by the trial court on July 16, 2014. During the parties' marriage, Mr. Parsons was employed by the Federal Aviation Administration (FAA) as an air-traffic controller. In November 2013, seven months prior to the divorce, Mr. Parsons retired from his job pursuant to an FAA mandate, requiring retirement at the age of 56. Mr. Parsons' retirement benefits included a monthly annuity from the Civil Service Retirement System (CSRS) in the amount of $5,325. Additionally, Mr. Parsons was to receive a monthly supplement from the Federal Employees Retirement System (FERS) in the amount of $1,370 until he turned 62 and became eligible for social security. In order to maintain eligibility and continue receiving the FERS supplement, Mr. Parsons' earnings could not exceed $15,120 per year.

The terms of the parties' MDA provided that Ms. Parsons would receive 50% of Mr. Parsons' gross monthly CSRS annuity and 50% percent of Mr. Parsons' FERS supplement, to wit:

> 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. 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/or FERS supplement.
>
> 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 1 st of July, 2014, and the first business day of the month each month thereafter until Wife's receipt of the pension and FERS benefit.

Pursuant to the MDA, in July 2014, the parties hired Mr. Bourland to draft and submit the necessary orders allocating Mr. Parsons' federal retirement benefits pursuant to the MDA. On August 22, 2014, the trial court entered a consent order assigning the FERS benefits. However, Mr. Bourland was unable to secure payment of Ms. Parsons' portion of the FERS supplement, due to the apparent refusal of the Office of Personnel Management to allocate the funds pursuant to the parties' MDA.

*2 In April 2015, pursuant to the parties' parenting plan, Ms. Parsons received Mr. Parsons' 2014 tax return and discovered that in addition to the federal retirement benefits contemplated in the MDA, Mr. Parsons had earned income in excess of $52,000, which exceeded the FERS cap of $15,120. Thus, Mr. Parsons was not eligible for the FERS supplement of $1,370 per month.

On June 22, 2015, Ms. Parsons filed a petition for civil and criminal contempt. In her petition, she alleged that Mr. Parsons should be held in willful civil and criminal contempt for failing and refusing to pay her the 50% share of his FERS supplement. Ms. Parsons also alleged, inter alia, that Mr. Parsons owed an arrearage of $4,795 for unpaid FERS benefits. The petition requested that the trial court order Mr. Parsons to pay such arrearages and, that the trial court award Ms. Parsons attorney's fees for filing the petition. The petition also alleged that Mr. Parsons owed Ms. Parsons money in relation to expenditures on behalf of the parties' children; however, these expenditures are not at issue on appeal.

On July 27, 2015, Mr. Parsons' attorney sent a letter informing Ms. Parsons that Mr. Parsons' FERS supplement had been reduced to zero beginning August 2015. The letter also indicated that "because fifty percent (50%) of Zero Dollars ($0.00) is Zero Dollars ($0.00), [Ms. Parsons] will not receive a FERS supplement payment beginning August 1, 2015." [1] A letter from the Office of Personnel Management indicated that the reason for the elimination of the FERS supplement is because Mr. Parsons' earned income during 2014 exceeded the $15,120 income cap. Ms. Parsons argues that her interest in Mr. Parsons' retirement benefits is a property interest, and as such, is non-modifiable. Ms. Parsons also argues that the entry of the final decree of divorce gave her a vested interest in one-half of Mr. Parsons' FERS supplement, and that Mr. Parsons' failure to compensate her to the extent of her vested interest was an improper unilateral modification of the final decree of divorce. Mr. Parsons argues that Ms. Parsons knew prior to the entry of the MDA and the final decree of divorce that Mr. Parsons' income would exceed the $15,000 cap. Specifically, Mr. Parsons produced a letter from his new employer, Raytheon, dated April 7, 2014 stating that his hourly rate would be $26.50 and that he could not exceed more than 1500 hours per year. However, we note that Mr. Parsons signed the permanent parenting plan on July 10, 2014 swearing and affirming that his gross monthly income was only $4,597.00 per month, which included his federal retirement benefits and his expected earnings from Raytheon.

The hearing on the contempt petition was held on March 2, 2016. After Ms. Parsons' attorney completed direct examination of Ms. Parsons, Mr. Parsons' attorney made an oral motion to dismiss (see discussion infra) on the ground that Ms. Parsons failed to elect whether she was seeking civil or criminal contempt. Prior to ruling on the motion, the trial court heard statements from counsel for both parties regarding the status of the proof. The attorneys were in agreement that Ms. Parsons had not completed her proof; however, Mr. Parsons argued that the case was fundamentally flawed because it had proceeded without Ms. Parsons electing whether she was proceeding on either civil or criminal contempt. Mr. Parsons argued that the only remedy was dismissal. In order to expedite the proceeding, Ms. Parsons agreed to dismiss the criminal contempt component and proceed solely on the allegations of civil contempt. Despite statements from both attorneys that Appellant had not closed her proof, the trial court granted the motion to dismiss stating, in pertinent part, that:

> *3 The Court is thus compelled to a conclusion that the petitioner has failed to sustain the requisite burden of proof, that is by clear and convincing evidence, of any, "civil" contempt....
>
> [T]he Court observes that the dilemma in which the parties now find themselves is not one of their own making. Moreover, the turn of events was not contemplated by either of these parties, in the way it has unfolded, at the time of entering the [MDA] and the [FDD].

The trial court entered its order dismissing the petition for contempt on May 19, 2016.

II. Issues

Appellant raises the following issues as stated in her brief:

1. Did the trial court err when it dismissed Ms. Parsons' action for civil contempt based on her failure to sustain a burden of proof of "clear and convincing evidence," when the correct burden of proof for civil contempt is a preponderance of the evidence?

2. Did the trial court err when it dismissed Ms. Parsons' Petition for Civil and Criminal Contempt before Ms. Parsons completed her proof?

3. Did the trial court err in granting Mr. Parsons' motion to dismiss, which was based solely upon Ms. Parsons' failure to elect to proceed under civil or criminal contempt at the onset of the hearing, when "failure to elect" is not grounds for dismissal in Tennessee?

4. Did the trial court err when it failed to enforce the parties' Final Decree of Divorce, which was unilaterally and impermissibly modified by Mr. Parsons?

5. Did the trial court err when it failed to award Ms. Parsons her attorney fees and suit expenses related to her petition for civil and criminal contempt?

III. Standard of Review

When reviewing a trial court' finding of civil contempt, "the factual issues of whether a party violated an order and whether a particular violation was willful, are reviewed de novo, with a presumption of correctness afforded the trial court's findings." ***Lovlace v. Copley***, 418 S.W.3d 1, 17 (Tenn. 2013). Our review of the trial court's conclusions of law is de novo, with no presumption of correctness. ***Whaley v. Perkins***, 197 S.W.3d 665, 670 (Tenn. 2006); ***Kendrick v. Shoemake***, 90 S.W.3d 566, 569 (Tenn. 2002); ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's decision to hold a person in contempt is entitled to great weight. ***Hooks v. Hooks***, 8 Tenn. Civ. App. (Higgins) 507, 508 (1918). Accordingly, decisions to hold a person in civil contempt are reviewed using the abuse of discretion standard of review. ***Hawk v. Hawk***, 855 S.W.2d 573, 583 (Tenn. 1993); ***Moody v. Hutchison***, 159 S.W.3d 15, 25–26 (Tenn. Ct. App. 2004). This review-constraining standard does not permit reviewing courts to substitute their own judgment for that of the court whose decision is being reviewed. ***Williams v. Baptist Mem'l Hosp.***, 193 S.W.3d 545, 551 (Tenn. 2006); ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). An abuse of discretion occurs when a court strays beyond the framework of the applicable legal standards or when it fails to properly consider the factors customarily used to guide that discretionary decision. ***State v. Lewis***, 235 S.W.3d 136, 141 (Tenn. 2007). Discretionary decisions must take the applicable law and relevant facts into account. ***Ballard v. Herzke***, 924 S.W.2d 652, 661 (Tenn. 1996). Thus, reviewing courts will set aside a discretionary decision only when the court that made the decision applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. ***Konvalinka v. Chattanooga–Hamilton Cty. Hosp. Auth.***, 249 S.W.3d 346, 358 (Tenn. 2008); ***Mercer v. Vanderbilt Univ.***, 134 S.W.3d 121, 131 (Tenn. 2004); ***Perry v. Perry***, 114 S.W.3d 465, 467 (Tenn. 2003).

IV. Analysis

A. Burden of Proof

*4 Ms. Parsons argues that the trial court erred when it dismissed her petition for civil contempt based on her failure to sustain a burden of proof of clear and convincing evidence. Citing ***Oriel v. Russell***, 278 U.S. 358 (1928), the trial court ruled as follows:

> The Court is thus compelled to a conclusion that the petitioner has failed to sustain the requisite burden of proof, that is by clear and convincing evidence, of any quote, "civil", end quote, contempt.

The trial court's ruling is patently incorrect in that it applied an incorrect legal standard, i.e. clear and convincing evidence as opposed to preponderance of the evidence. The quantum of proof needed to find a person guilty of civil contempt is a

preponderance of the evidence. ***Konvalinka v. Chattanooga–Hamilton Cty. Hosp. Auth.***, 249 S.W.3d 346, 356 (Tenn. 2008); ***Doe v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee***, 104 S.W.3d 465, 474 (Tenn. 2003); see also ***Luplow v. Luplow***, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014); ***McLarty v. Walker***, 307 S.W. 3d 254, 259 (Tenn. Ct. App. 2009). Mr. Parsons argues that the trial court's analysis of civil contempt using the clear and convincing evidence standard was harmless error. We disagree. Our standard of review is clear. We will set aside a discretionary decision when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. ***Konvalinka***, 249 S.W.3d at 358 (citing ***Mercer v. Vanderbilt Univ.***, 134 S.W.3d 121, 131 (Tenn. 2004); ***Perry v. Perry***, 114 S.W.3d 465, 467 (Tenn. 2003)). The trial court speaks through its orders. ***Palmer v. Palmer***, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1977). From the order, supra, we can only conclude that the trial court applied the clear and convincing standard. Having applied an incorrect legal standard, the trial court erred. While this error alone is sufficient for reversal of the trial court's decision, we will now address Ms. Parsons' issue concerning completion of proof.

B. Completion of Proof

Ms. Parsons argues that the trial court erred when it dismissed her petition for contempt before she completed her proof. Prior to ruling on the motion, counsel for both parties argued, as follows, regarding the status of the proof:

> Ms. Parsons' counsel: [W]e were finished with [Ms. Parsons'] direct when [Mr. Parsons' counsel] made the motion to dismiss... I don't want to correct the Court, because I think in essence everything you said, I think, is exactly what occurred except that we didn't conclude our proof. We concluded our direct examination. ...
>
> Trial Court: Well, I perhaps misunderstood, but I thought we covered that. And I was specifically trying to determine whether or not the petitioner had closed her proof.
>
> Mr. Parsons' counsel: It is my understanding that [Ms. Parsons' counsel] has not closed his proof either. I hate to keep agreeing with opposing counsel. Who will I argue with? But I believe he's right about that. ... I still need to cross examine this lady. And then he gets to elect whether or not he's going to close his proof or somebody else, or put somebody else on.

Despite the foregoing statements that proof was not complete, the trial court ruled on the motion, to wit:

> *5 The motion itself comes in a bit of an unusual procedural context in that it was made at the end of the direct examination of the Petitioner. It seems to be in the form of a motion for directed verdict at the close of the Plaintiff's proof, which we would recognize in a jury trial type context, but the court is treating it in that fashion.

In the first instance, the trial court's reasoning is confusing. This Court has repeatedly held that motions for "directed verdicts" have no place in bench trials. Boyer v. Meimermann, 238 S.W.3d 249, 254 (Tenn. Ct. App. 2007); Burton v. Warren Farmers Coop., 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002) "[T]he proper motion would have been a motion for an involuntary dismissal at the conclusion of the plaintiff's proof in accordance with [Tennessee Rule of Civil Procedure] 41.02." Main St. Mkt., LLC v. Weinberg, 432 S.W.3d 329, 335–36 (Tenn. Ct. App. 2013) (quoting Boyer, 238 S.W. 3d at 254). In similar cases where a defendant has moved for a directed verdict in a bench trial, this Court has construed the motion as one for involuntary dismissal pursuant to Rule 41.02(2). See, e.g., Nazi v. Jerry's Oil Co., Inc., No. W2013–02638–COA–R3–CV, 2014 WL 3555984, at *4 (Tenn. Ct. App. July 18, 2014); Kathryne B.F. v. Michael B., No. W2013–01757–COA–R3–CV, 2014 WL 992110, at *3 n.2 (Tenn. Ct. App. March 13, 2014); In re Adoption of Jordan F.J., No. W2013–00427–COA–R3–PT, 2013 WL 6118416, * (Tenn. Ct. App. Nov. 20, 2013); Wilson v. Monroe County, 411 S.W.3d 431, 438–39 (Tenn. Ct. App. 2013). Therefore, we will construe the trial court's order as if it were an order granting a motion for involuntary dismissal under Rule 41.02(2).

Tennessee Rule of Civil Procedure 41.02(2), which governs involuntary dismissals in bench trials, provides as follows:

> After the plaintiff in an action tried by the court without a jury **has completed the presentation of plaintiff's evidence**, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court grants the motion for involuntary dismissal, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

Tenn. R. Civ. P. 41.02(2) (emphasis added). Rule 41.02(2) clearly contemplates that the proper time to lodge a motion for involuntary dismissal is after plaintiff "completed the presentation of plaintiff's evidence." Tenn. R. Civ. P. 41.02(2); see also ***Burrow v. Barr***, No. 01A01–9806–CV–00311, 1999 WL 722633, at *5 (Tenn. Ct. App. Sept. 17, 1999). The Tennessee Supreme Court has stated that Rule 41.01(2) "contemplates that the plaintiff's evidence shall be heard and evaluated by the court prior to any involuntary dismissal order at trial." ***Harris v. Baptist Mem'l Hosp.***, 574 S.W.2d 730, 731 (Tenn. 1978). Accordingly, this Court has consistently held that a trial court's dismissal of a case prior to the close of plaintiff's proof is reversible error. In ***Ruff v. Raleigh Assembly of God Church, Inc.***, No. 02A01–9410–CV–00226, 1996 WL 9730, at *4 (Tenn. Ct. App. Jan. 9, 1996), we held that the trial court erred in dismissing the case prior to the close of plaintiff's proof and remanded the case for completion of plaintiff's proof. ***Id.*** Likewise, in ***In re G.T.B.***, No. M2008-00731–COA–R3–PT, 2008 WL 4998399 (Tenn. Ct. App. Nov. 24, 2008), the trial court dismissed the case prior to the completion of plaintiff's proof. On appeal, this Court concluded that the trial court erred in dismissing the case prior to the completion of proof, stating that "once a case has proceeded to trial, the trial court should allow [the plaintiff] to present all of its proof, subject to the rules of evidence, before deciding whether the case should be dismissed, either sua sponte or upon the defendant's motion." ***In re G.T.B.***, 2008 WL 4998399, at *4. In this case, counsel for both parties agreed that Ms. Parsons had not yet completed her proof. Clearly, the trial court's decision to dismiss the petition when it did is reversible error.

*6 Based on these holdings, we pretermit Appellant's remaining issues. However, we note that the trial court's order focuses solely on the issue of contempt and does not address the primary issue of non-payment of the FERS supplement. At oral argument, Ms. Parsons urged this court to make a decision concerning the merits of her claim for FERS benefits rather than remanding the matter to the trial court to allow completion of the proof and application of the appropriate burden of proof. We decline the invitation to do so. As a reviewing court, it is not our province to make an initial determination concerning the merits of an appellant's claim. This Court can only consider such matters as were brought to the attention of the trial court and acted upon or permitted by the trial court. ***Jacks v. City of Millington Bd. of Zoning Appeals***, 298 S.W.3d 163, 174 (Tenn. Ct. App. 2009); ***Stewart Title Guar. Co. v. Fed. Deposit Ins. Corp.***, 936 S.W.2d 266, 271 (Tenn. Ct. App. 1996); ***Irvin v. Binkley***, 577 S.W.2d 677, 679 (Tenn.Ct.App.1978). Appellant has asked for attorney's fees on appeal. "Whether to award attorney's fees on appeal is a matter within the sole discretion of this Court." ***Luplow v. Luplow***, 450 S.W.3d 105, 120 (Tenn. Ct. App. 2014) (internal citations omitted). We respectfully deny Ms. Parsons' request for attorney's fees and expenses on appeal.

V. Conclusion

For the foregoing reasons, we vacate the trial court's order and remand for further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against Appellee, Richard Jearl Parsons, for all of which execution may issue if necessary.

All Citations

Slip Copy, 2017 WL 1192111

Footnotes

1 While the FERS supplement ended in July 2015, Ms. Parsons alleges in her petition that Mr. Parsons did not pay her the 50% share of the supplement for the months of December 2014 through June 2015 (the month the petition was filed), even though he was receiving the full FERS supplement directly from the Office of Personnel Management.

End of Document

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

KELLY COLVARD PARSONS v. RICHARD JEARL PARSONS

Circuit Court for Shelby County
No. CT-004932-13

No. W2018-02008-SC-R11-CV

ORDER

On June 3, 2020, this Court denied the application for permission to appeal filed by Kelly Colvard Parsons. On June 15, 2020, Ms. Parsons filed a petition to rehear. Upon due consideration, the petition to rehear is DENIED.

PER CURIAM

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

KELLY COLVARD PARSONS, Plaintiff/Appellant,	)	COURT OF APPEALS OF TENNESSEE AT JACKSON W2018-02008-SC-R11-CV
v.	)	
RICHARD JEARL PARSONS, Defendant/Appellee.	)	Court of Shelby County CT-004932-12

APPELLEE'S MOTION FOR ASSESMENT OF ATTORNEY'S FEES AND COSTS FOR APPELLANT'S FRIVOLOUS FILING

LARRY RICE (#5292)
Attorney for Appellee
Rice, Amundsen & Caperton, PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
(901) 526-6701

APPELLEE'S REQUEST FOR ASSESMENT OF ATTORNEY'S FEES AND COSTS FOR APPELLANT'S FRIVOLOUS FILING

Appellee requests attorney's fees and costs, as permitted following the issuance of the Mandate on June 8, 2020, for Appellant's frivolous filing of her *Petition for Rehearing* because Howell v. Howell, 137 S. Ct. 1400 (2017), controls in this matter, and has made the law uniform throughout the United States and Tennessee.

Respectfully submitted,

LARRY RICE (#5292)
Attorney for Appellee
Rice, Amundsen & Caperton, PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
(901) 526-6701

CERTIFICATE OF SERVICE

I, the undersigned, certify that served a true and correct copy of the foregoing document via U.S. Mail, postage prepaid, to Mitch Moskovitz, Esq., and/or Kirkland Bible, Esq., Attorneys for Appellant, at 530 Oak Court Drive, Suite 355, Memphis, Tennessee 38117, on this the 16th day of June 2020.

LARRY RICE