No. 20-442

IN THE
SUPREME COURT OF THE UNITED STATES

KELLY COLVARD PARSONS,

Petitioner,

v.

RICHARD JEARL PARSONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE LAWRENCE RICE, III (#134565)
COUNSEL OF RECORD FOR RESPONDENT
RICE CAPERTON RICE PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
lrice@ricelaw.com
(901) 526-6701

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Case

Tennessee State Cases

Federal Statute

Federal Rule

State Rule

STATEMENT OF THE CASE

Respondent, Richard Jearl Parsons ("Ex-Husband"), adopts and incorporates Petitioner's, Kelly Colvard Parsons ("Ex-Wife") Statement into his Statement of the Case, except for the following factual corrections made pursuant to Supreme Court Rule 15(2).

Ex-Husband did not state in his divorce deposition that "his earnings from Raytheon would not exceed the FERS Supplement cap of $15,000 a year." (*Pet. Writ*, p. 2). The following is the excerpt from Ex-Husband's divorce deposition regarding his future employment with Raytheon:

> Q. Okay. Who is the job with, I'm sorry?
> A. It's with Raytheon Corporation.
> Q. Doing what?
> A. My class – I think my title would be casual employee for training of new air traffic controllers.
> Q. Is it part time or full time?
> A. It would be considered part time. It's a casual, what they call a casual job.
> Q. And I don't mean this to be critical. I don't know what that means. So I'm trying to get you to help me. How many hours –
> A. You and me are in the same because I have not had a formal, I guess, meeting with them to explain all that to me. All I have is paperwork. I have had an interview and I have some knowledge but not full knowledge of exactly what it's going to be.
> Q. All right. Tell me the knowledge that you do have about the job in terms of hours and pay.
> A. 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 were 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.
> ...

> Q. And do you know your hours?
> A. No, sir.
> Q. Okay. And as I understand your earlier, response, and please correct me if I'm mistaken, not only do you not know your hours, you don't know the days of the week or whether it's daytime or nighttime or evening? Is that a fair statement on my part?
> A. That is correct. (*Depo. Tr.*, Apr. 21, 2014, pp. 36-37).

On July 10, 2014, at the time the parties signed their Marital Dissolution Agreement and Permanent Parenting Plan, Ex-Husband was just beginning his employment with Raytheon. For child support purposes the parties estimated that Ex-Husband would make approximately $15,000 per year from his employment with Raytheon. As recognized by the Trial Court and the Tennessee Court of Appeals, Ex-Wife did not insist that any term be included in the parties' Marital Dissolution Agreement to protect her interest in the FERS Supplement should Ex-Husband lose the benefit. (*Ruling Tr.*, Nov. 29, 2017, pp. 28-29 (No. 18, *Appendix* of Petitioner); *COA Opinion*, Dec. 12, 2019, p. 10 (No. 19, *Appendix* of Petitioner)). There was also no term included that prevented Ex-Husband from earning above the exempt amount of earnings, so when Ex-Husband lost his benefit, so did Ex-Wife, under the express terms of the Marital Dissolution Agreement. (*COA Opinion*, Dec. 12, 2019, p. 10).

After many months of communications with the Office of Personal Management ("OPM"), the parties learned that OPM would not divide Husband's FERS Supplement between the parties, so Ex-Husband had to pay Ex-Wife her share directly from the funds he received. Ex-Wife believed she was entitled to half of the gross amount, while Ex-Husband followed the agreement of the parties,[1] and paid Ex-Wife half of the net amount he received after taxes because Ex-Husband was bearing the full tax burden of receiving the benefit. On August 1, 2015, about a year

[1] Pursuant to the parties' Court Order Assigning Benefits under the Federal Employees Retirement System, Ex-Wife was to be "responsible for all local, state, and federal taxes that are payable in connection with all amounts assigned to [Ex-Wife] under this Court Order."

after the parties were divorced, Ex-Husband learned that he would be losing his FERS Supplement due to exceeding the earnings cap, and informed Ex-Wife of the same. Ex-Wife sought an increase in child support based on losing the income from the FERS Supplement, which was granted on April 6, 2016. (*Order*, Apr. 6, 2016, pp. 1-2 (No. 5, *Appendix* of Petitioner)).

Around the same time, Ex-Wife filed a Petition for Civil and Criminal Contempt against Ex-Husband for not continuing to pay her half of the FERS Supplement he was no longer receiving. Ex-Wife twice appealed the Trial Court's rulings on her Petition for Contempt. In her Petition for Writ of Certiorari, Ex-Wife claims to have prevailed in her initial appeal, but fails to clarify that she only prevailed on procedural grounds. The Court of Appeals specifically stated in its March 30, 2017 written opinion that "[a]t 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." (*COA Opinion*, Mar. 30, 2017, p. 8 (No. 7, *Appendix* of Petitioner)). Inconsistent with the Court of Appeals' two (2) opinions in this case, Ex-Wife claims in her Petition for Writ that in the first appeal, the Court of Appeals "seemingly rejected Husband's" arguments on the merits of the case and believed that "Husband still appeared to owe Wife certain funds." (*Pet. Writ*, p. 5). This was never stated, nor was it ultimately determined by the Court of Appeals to be accurate.

The Court of Appeals ultimately determined that because there was nothing in the Marital Dissolution Agreement to protect Ex-Wife's interest in the FERS Supplement, should the benefit be lost, Ex-Wife was not contractually entitled to compensation for her half of the FERS Supplement after it terminated, and that because Husband was the definitively prevailing party at trial and on appeal, Ex-Wife owed Ex-Husband his reasonable attorney's fees. (*COA Opinion*, Dec. 12, 2019, pp. 10; 13). Ex-Wife also mis-states that the Court of Appeals referred to Ex-Husband

"frustrating" the Final Decree by exceeding the earnings cap for his FERS Supplement when no such assertion was made by the Court. (*Pet. Writ*, p. 6). Ex-Wife further claims that the Court of Appeals "failed to acknowledge the parties' arguments regarding Johnson and Howell." (*Pet. Writ*, p. 9). The Court of Appeals explicitly discussed and then distinguished Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001) and Howell v. Howell, 137 S. Ct. 1400 (2017) from the present case as follows:

> [T]he benefits at issue in ***Johnson*** and ***Howell*** are readily distinguishable from the FERS Supplement issues here. ***Johnson*** and ***Howell*** concern military retirement benefits, which are not in the nature of the FERS Supplement, see discussion supra. Here, the parties' respective interest 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 the same, and there is nothing in the MDA to preclude Mr. Parsons form 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. (*COA Opinion*, Dec. 12, 2019, pp. 10).

The Court of Appeals decided this case in Ex-Husband's favor, based on well-established Tennessee law involving contract principles. (*COA Opinion*, Dec. 12, 2019, pp. 9-10; 13).

ARGUMENT

This is not a proper case for the United States Supreme Court to address. This case involves a state court interpretation of a contractual provision in a Marital Dissolution Agreement. The case was properly decided by the state courts. Ex-Wife cites to 10 U.S.C. § 1408 in her Petition for Writ of Certiorari as the only federal constitutional and/or statutory provision involved in this case, and then states that it does not apply here. The state courts did not base their decisions in this case upon the interpretation of this or any other federal law or constitutional provision. Their decisions were properly based on contract principles pursuant to Tennessee law. (*Ruling Tr.*, Nov. 29, 2017, p. 30; *COA Opinion*, Dec. 12, 2019, p. 10).

United States Supreme Court Rule 10 ("Rule 10") outlines when a petition for writ of certiorari may be granted. Rule 10 states that petitions "will be granted only for compelling reasons." Rule 10 further provides the following criteria the Supreme Court considers when deciding whether to grant a petition for writ of certiorari:

> a. A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> b. A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> c. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

None of the foregoing reasons for granting a petition for writ of certiorari exist in this case. No important questions of federal law were decided. The state courts rendered

their decisions based on well-established contract principles in Tennessee law. (*Ruling Tr.*, Nov. 29, 2017, p. 30; *COA Opinion*, Dec. 12, 2019, p. 10).

Ex-Wife argues that the findings of the Tennessee Supreme Court in the cases of Johnson and Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993), regarding federal military retirement benefits, are inconsistent with the Tennessee Appellate Court's decision in this case. The United States Supreme Court in Howell, reminded the state courts that they cannot "vest" that which they lack the authority to give and that at best, when a non-military spouse is granted an interest in the military spouse's retirement in a divorce, the non-military spouse receives only an interest that is contingent upon a subsequent condition. (Howell, 137 S. Ct. at 1405-1406). The Tennessee state courts found that Johnson and Towner were distinguishable from the current case because this case does not involve military retirement, as the above cited cases did. (*Ruling Tr.*, Nov. 29, 2017, pp. 16-20; *COA Opinion*, Dec. 12, 2019, p. 10). The state courts, instead, found that the parties' interests in the FERS Supplement were contractual. (*Ruling Tr.*, Nov. 29, 2017, p. 30; *COA Opinion*, Dec. 12, 2019, p. 10). The parties' respective rights in the contingent benefit were defined by the express terms of the Marital Dissolution Agreement. (*Id.*). The Tennessee courts further found that Ex-Wife failed to include any terms in the Marital Dissolution Agreement that would protect her interest in the FERS Supplement should Ex-Husband lose the benefit for any reason. (*Ruling Tr.*, Nov. 29, 2017, pp. 28-29; *COA Opinion*, Dec. 12, 2019, p. 10).

Ex-Wife references multiple cases that cite to Johnson, as reasons why the Johnson vesting logic should apply to this case, but all are distinguishable and inapplicable. In Elliott v. Elliott, 149 S.W.3d 77 (Tenn. Ct. App. 2004), the Tennessee Court of Appeals determined that the recipient spouse was vested in her half of the husband's stock options granted to her under the Marital Dissolution Agreement, and that when the husband failed to transfer them to her or exercise them and pay her their value, then he impermissibly impeded the division of the marital estate. Elliott

v. Elliott, 149 S.W.3d at 86. Elliott is distinguishable from this case in that the stock options had a defined value at the time of the divorce, and the wife in Elliott was entitled to half of that defined value under the parties' Marital Dissolution Agreement. In the Parsons case, Ex-Husband's FERS Supplement could terminate at any time, so the value was incalculable. Ex-Wife's interest was also incalculable. Ex-Wife had an interest, subject to a condition subsequent, and she did not include any terms in the Marital Dissolution Agreement to prevent that condition from occurring, or to indemnify her if it did.

Flowers v. Flowers, No. M2005-01536-COA-R3-CV, 2007 Tenn. App. LEXIS 75 (Tenn. Ct. App. Feb. 6, 2007), is another unpublished Tennessee state case cited by Ex-Wife that is distinguishable from this case. In Flowers, the Marital Dissolution Agreement required the husband to name the wife as the sole and irrevocable beneficiary of the husband's IRA accounts and pension benefits. The husband later named his second wife the beneficiary of some of the same benefits, previously contractually promised to the first wife. The husband then passed away, and the revocation of the first wife's benefits became a matter for his estate. The Tennessee court found that the first wife had an irrevocable interest in the benefits that the husband tried to redesignate. Flowers is distinguishable from this case, in that the first wife was granted an irrevocable interest in a calculable benefit, that had no condition upon it. In the Parsons case, both parties' interests were conditional and only available until Ex-Husband turned 62 and remained under the earnings cap. No express language was included in the Marital Dissolution Agreement to prevent Ex-Husband from exceeding the earnings cap or requiring Ex-Husband to indemnify Ex-Wife should the earnings cap be exceeded.

Ex-Wife cites Pruitt v Pruitt, 293 S.W.3d 537 (Tenn. Ct. App. 2008), as another Tennessee case she believes to be applicable to this case, but it is not. The Pruitt Court cited to Johnson and Towner for the principle that "[o]nce the Final Decree of Divorce becomes a final, non-appealable judgment, it is no longer subject to

modification." Pruitt, 293 S.W.3d at 542. In Pruitt, the parties entered into a subsequent Qualified Domestic Relations Order ("QDRO") nine years after the first one had been entered, modifying the property division in regard to the husband's retirement. Id at 544. The Pruitt Court found that the second QDRO was unenforceable because it substantively modified the division of marital property. Pruitt, 293 S.W.3d at 544. In our case, the parties did not modify the Marital Dissolution Agreement or the Final Decree. The FERS Supplement terminated by its own terms, of which all parties were aware at the time of the divorce. (*Depo. Tr.*, Apr. 21, 2014, pp. 36-38; 40-41). Ex-Wife in this case failed to include any express language in the Marital Dissolution Agreement to prevent Ex-Husband from exceeding the earnings cap or requiring Ex-Husband to indemnify her for her share, if he exceeded the earnings cap. The issue in this case was Ex-Wife's failure to construct a contract that provided for this condition subsequent. It was not a modification of a Final Decree.

The Final Decree in Pruitt also instructed the husband to name the wife as the surviving spouse to his pension and expressly provided that "Wife shall be entitled to a pro-rata share of Husband's early retirement subsidy." Id at 546. The husband failed to name the wife as the surviving spouse, but still received his retirement benefits, which the court ordered him to share pro-rata with the wife. Id. Unlike in our case, the husband in Pruitt was still receiving the benefits of which the wife was entitled under the Final Decree. Ex-Wife in Parsons only received a conditional interest in the FERS Supplement, the same as Ex-Husband. Without some express language in the Marital Dissolution Agreement stating otherwise, when Ex-Husband lost his contingent benefit, so did Ex-Wife.

The case of Minor v. Nichols, No. W2012-01720-COA-R3-CV, 2014 Tenn. App. LEXIS 41 (Tenn. Ct. App. Jan. 31, 2014), which Wife mistakenly refers to as Minor v. Minor is a Memorandum Opinion, and pursuant to the Rules of the Court of Appeals of Tennessee, Rule 10, a Memorandum Opinion "shall not be published, and

shall not be cited or relied on for any reason in any unrelated case." Due to the foregoing, the details distinguishing the Minor case from the case at bar will not be discussed.

The Tennessee Courts were presented with the same arguments and cases that Wife now offers to this Court. The Tennessee state court held the cases were not applicable and arguments were not persuasive. This is a case of contract interpretation under Tennessee law, and the express terms of the Marital Dissolution Agreement were determinative in the prior courts' holdings. This is not a United States Supreme Court matter. The Tennessee Supreme Court rejected Ex-Wife's Application for Permission to Appeal and her Petition for Rule 39 Rehearing of Denial of Application for Permission to Appeal. There is no compelling reason for the United States Supreme Court to become involved with the Tennessee state courts' interpretation of a contractual provision in a Marital Dissolution Agreement that is consistent with this Court's decision in Howell.

CONCLUSION

For the forgoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

George Lawrence Rice, III (#134565)
Counsel of Record for Respondent
Rice Caperton Rice PLLC
275 Jefferson Avenue
Memphis, Tennessee 38103
lrice@ricelaw.com
(901) 526-6701