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

RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In Husband's Brief in Opposition to Petition for Writ of Certiorari, Husband faults Wife for failing to "insist that any term be included in the parties' Marital Dissolution Agreement to protect her interest in the FERS Supplement should [Husband] lose the benefit." (Husband's Brief in Opposition to Petition for Writ of Certiorari, at 2). Wife submits that in accordance with Towner v. Towner, 858 S.W.2d 888, 889 (Tenn. 1993), Johnson v. Johnson, 37 S.W.3d 892, 898 (Tenn. 2001), and their progeny, Wife was not required to include a provision in the parties' Agreement to protect her share of the FERS Supplement, as her "interest in [Husband's] 'retirement benefits' vested **as of the date of the entry of the court's decree** and could not be unilaterally altered." Johnson, 37 S.W.3d at 897 (emphasis added).

Further, in Husband's Brief in Opposition to Petition for Writ of Certiorari, Husband alleged that the cases cited by Wife in her Petition for Write of Certiorari, specifically, 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), and 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)) are "distinguishable and inapplicable" to the case at hand. (Husband's Brief in Opposition to Petition for Writ of Certiorari, at 6). Wife acknowledges that the foregoing cases may have certain factual dissimilarities from the present case. However, Minor, Pruitt, Flowers, and Elliott, all reflect that Johnson has been routinely cited in cases that do involve military retirement benefits and stand for the

proposition that a party's interest in the property allocated to him or her in an agreement vests as of the date of the entry of their final decree of divorce and cannot be unilaterally altered. Minor v. Minor, 2014 WL 356508, at *5; Pruitt v. Pruitt, 293 S.W.3d at 542; Flowers v. Flowers, 2007 WL 412302, at *1; Elliott v. Elliott, 149 S.W.3d at 84.

ARGUMENT

Wife submits that in Husband's Brief in Opposition to Petition for Writ of Certiorari, Husband admits that he testified, during his pre-divorce deposition, that he "would be scheduled to where [he] would probably make about $15,000 a year, which would be equal to the Social Security cap because [he] receive[s] that what you want to call the FERS Benefit." (Husband's Brief in Opposition to Petition for Writ of Certiorari, at 1). Husband further admitted that the parties' Martial Dissolution Agreement and Permanent Parenting Plan were premised upon Husband's assurances that his earned income would total $15,000 or less. Id. at 2.

This fact is made blatantly apparent by the parties' Permanent Parenting Plan, in which Husband swore, under the penalty of perjury, that his gross income was $4,597 a month. Pursuant to the parties' Marital Dissolution Agreement, Husband's gross monthly income of $4,597 was comprised of half of Husband's Civil Service Annuity, totaling $2,662 a month, and half of Husband's FERS Supplement, totaling $685 a month. This income figure also includes Husband's earned income of $15,000 a year, or $1,250 a month, from Raytheon Corporation. When these amounts

are added together, they total the **exact** monthly income figure of $4,597 contained within the parties' Parenting Plan ($2,662 + $685 + $1,250 = **$4,597**).

However, in Husband's Brief in Opposition to Petition for Writ of Certiorari, Husband faults Wife for failing to "insist that any term be included in the parties' Marital Dissolution Agreement to protect her interest in the FERS Supplement should [Husband] lose the benefit." Id. at 2. Wife submits that in accordance with Towner v. Towner, 858 S.W.2d 888, 889 (Tenn. 1993), Johnson v. Johnson, 37 S.W.3d 892, 898 (Tenn. 2001), and their progeny, Wife was not required to include a provision in the parties' Agreement to protect her share of the FERS Supplement, as her "interest in [Husband's] 'retirement benefits' vested **as of the date of the entry of the court's decree** and could not be unilaterally altered." Johnson, 37 S.W.3d at 897 (emphasis added).

There was no need for the parties to include a provision in their Agreement detailing what would transpire if Husband frustrated Wife's receipt of her vested interest, as pursuant to Johnson, Wife's vested interest in half of Husband's FERS Supplement entitled her to monthly payments of $685. Id. at 898. Husband's failure to compensate Wife to the extent of her vested interest in his retirement benefits constitutes a unilateral modification of the parties' Agreement and Final Decree of Divorce, in violation of Towner. Id. at 897.

Wife further alleges that in her Petition for Writ of Certiorari, Wife noted that the Tennessee Supreme Court's decision in Johnson v. Johnson has been limited by the United States Supreme Court's ruling in Howell v. Howell, which was decided on

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

However, unlike Howell, the Tennessee Supreme Court's holding in Johnson is not limited solely to the context of military retirement benefits. Tennessee courts have routinely cited Johnson in cases that **do not involve military retirement benefits** for the proposition that parties obtain a vested interest in the property allocated to them in their marital dissolution agreement, and neither party may frustrate the other's receipt of his or her vested interest. *See* Minor v. Minor, 2014 WL 356508, at *5; Pruitt v. Pruitt, 293 S.W.3d at 542; Flowers v. Flowers, 2007 WL 412302, at *1; Elliott v. Elliott, 149 S.W.3d at 84.

In Husband's Brief in Opposition to Petition for Writ of Certiorari, Husband alleged that the foregoing cases are "distinguishable and inapplicable" to the case at hand. (Husband's Brief in Opposition to Petition for Writ of Certiorari, at 6). Wife acknowledges that the foregoing cases may have certain factual dissimilarities from the present case. However, Minor, Pruitt, Flowers, and Elliott, all reflect that Johnson has been routinely cited in cases that do involve military retirement benefits

and stand for the proposition that a party's interest in the property allocated to him or her in an agreement vests as of the date of the entry of their final decree of divorce and cannot be unilaterally altered. Minor v. Minor, 2014 WL 356508, at *5; Pruitt v. Pruitt, 293 S.W.3d at 542; Flowers v. Flowers, 2007 WL 412302, at *1; Elliott v. Elliott, 149 S.W.3d at 84.

CONCLUSION

Based on all of the foregoing, Wife submits that this Honorable Court should grant Wife's Petition for Writ of Certiorari, as the Western Section of the Appellate Court of the State of Tennessee erred, as a matter of law, when it concluded that Wife did not obtain a vested, nonmodifiable property interest in her share of Husband's marital retirement benefits as of the date of the entry of the parties' Final Decree of Divorce, in direct conflict with longstanding Tennessee case law, Towner v. Towner, 858 S.W.2d 888 (Tenn. 1993) and Johnson v. Johnson, 37 S.W.3d 892 (Tenn. 2001).

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

to indemnify or reimburse his former spouse for the loss of her share of his military retirement pay caused by the receipt of disability benefits.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing document has been forwarded to United States Supreme Court, Clerk's Office, 1 First Street, NE, Washington, DC 20543, via prepaid FedEx overnight; and to Larry Rice and Erin O'Dea, Attorneys for Appellee, 275 Jefferson Avenue, Memphis, Tennessee 38103, via regular U.S. Mail, postage prepaid, this the 23rd day of November, 2020.

Mitchell D. Moskovitz