2007-2008 Family Law Case Update

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2007-2008 Family Law Case Update
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ALIMONY

Jackson v. Jackson S07F0945 (September 24, 2007)

The parties were divorced after 23 years of marriage and the wife seek alimony and child support. A temporary order was entered awarding the wife temporary alimony. A final bench trial was held in which the court declined to award the wife alimony but required the husband to continue to pay payments which included temporary alimony and child support and attorney's fees that were due under an earlier contempt ruling on the temporary order entered earlier. The wife appeals the court's ruling denying her alimony and the Supreme Court affirms the Trial Court.

The wife contends that the Trial Court abused its discretion by denying her claim for alimony because evidence showed the husband abandoned his family and failed to support his minor child and caused the marital home to go into foreclosure. However, there was also other evidence before the court that the wife initiated the separation; that she was gainfully employed and had been so throughout most of the marriage; that she failed to cooperate with the husband in taking steps that would have resolved or alleviated several financial problems arising out of the parties' separation; that the wife had mismanaged marital funds and ran up extravagant bills; and failed to take advantage of low cost health insurance coverage for the minor child. Taking these factors into consideration, this court cannot conclude that the Trial Court erred by declining to award the wife alimony.

Child Support - Scarborough v. Scarborough S07A0971 (September 24, 2007)

On May 4, 2001, the parties reached a separation agreement which required husband to pay the wife monthly child support in the amount of $1,000. On October 15, 2001, a final decree was entered incorporating the separation agreement. On October 10, 2001, the Husband turned sixty-five and began receiving retirement benefits under the Social Security Act. In addition, the wife began receiving retirement benefits on behalf of the parties' children and the Husband unilaterally child support payment. Neither the separation agreement nor the divorce decree addressed the receipt of future social security retirement benefits or any impact this would have on the child support obligation. On February 11, 2005, the Wife filed a petition for contempt alleging the Husband was in arrears in child support payment. The Husband answered counterclaiming that he owed nothing because he was entitled to a credit for the social security retirement benefits being made to the Wife for the benefit of the children. The trial court found the Husband was not entitled to the credit, and ordered the Husband to pay the accumulated child support arrearage. Husband appeals; Supreme Court reverses.

This court generally recognizes that a parent is generally entitled to a credit against his support obligation for social security disability payments paid for the benefit of the child because such payments substitute for income. Also, retirement benefits received on behalf of the child should be credited against the non-custodial parent's child support obligation. The wife argues that the intent of the agreement was that the social security benefits would augment and not supplant the child support obligation. And the wife cites *Koch* as her authority. In *Koch*, this

ALIMONY

Rieffel v. Rieffel, S07F0093 **(April 24, 2007)**

The parties were married for 28 years and were divorced in June, 2006. The parties had six children (only one of whom was a minor at the time of divorce). The parties reached a settlement which resolved all issues of the marriage except for alimony, attorney's fees, and funds that were used to repair the marital residence. The husband agreed to pay monthly child support in the amount of $867.00 which represented 20% of the husband's gross monthly income. The husband also relinquished all rights, title, and interest to the marital residence for full payment of the arrearages he owed pursuant to the parties' consent order of separate maintenance. The Court awarded the wife monthly alimony of $850.00 for 12 years, $4,000.00 in attorney's fees, and $5,000.00 for repairs for the marital residence. The Supreme Court affirms.

The husband appeals the Trial Court's ruling with regard to alimony, attorney's fees, and repairs for the marital home. In absence of any mathematical formula, the fact finders are given wide latitude in fixing the amount of alimony. Pursuant to O.C.G.A. §19-6-5(a), the fact finder is required to consider several specific factors and the Supreme Court included that the Trial Court did not use the discretion in awarding the wife 12 years of alimony.

With regards to attorney's fees, O.C.G.A. §19-6-2(a)(1) authorizes the Trial Court to exercise discretion and award attorney's fees in a divorce action after taking consideration of the financial circumstances of the parties. The record in the transcript of the final hearing established the Trial Court properly considered the relevant financial positions of the parties and did not abuse its discretion in awarding attorney's fees to the wife.

On appeal, the husband contends that the separate maintenance Consent Final Order was null and void since the parties' attempt at reconciliation of voluntary cohabitation on several occasions. A reconciliation and cohabitation will annul a prior support agreement as long as it was entered into in good faith and not as a scheme to avoid payment of support. However, an order entered with the consent of counsel, as here, is binding on a client unless there was fraud, accident, mistake or collusion of counsel. Therefore, an absence of any showing of fraud, mistake, or collusion of counsel, the husband cannot complain of an Order entered by consent.

ATTORNEY'S FEES

Cothran v. Mehosky A07A1746 (July 16, 2007)

The parties were divorced on July 15, 1997, and in the final decree, the father acknowledged paternity of two children born during the marriage and was ordered to pay child support. On November 30, 2005, the father filed an action to set aside paternity and to modify the child support award claiming that he was not the biological father of one of the children. The Trial Court ordered the mother to submit to DNA paternity testing and

she refused to comply. Prior to the Court's ruling at the December 5, 2006 contempt hearing, the parties entered into an agreement which the mother conceded that the father was not the biological father of the son and child support was modified. The only issue remaining was a request for attorney's fees. The Trial Court awarded part of the father's attorney's fees pursuant to O.C.G.A. §19-6-2 for counsel's work in preparation for the contempt hearing. The Trial Court reasoned that O.C.G.A. §19-6-2(a) authorized attorney's fees in alimony, divorce and alimony, or contempt proceedings. The Court of Appeals reverses.

When an action seeks to solely modify alimony or a divorce decree and does not contain any contempt allegations for failure to comply with the original alimony or divorce decree, it falls outside the parameters of O.C.G.A. §19-6-2. The present action was not for alimony or divorce which had been settled approximately 8-1/2 years earlier. The instant action was to set aside paternity and to decrease child support obligations and therefore, was an action for modification of the original divorce decree even though the contempt proceedings arose when the mother later failed to comply with the Court's Order for DNA testing, but these proceedings did not arise out of the original divorce case as required by O.C.G.A. §19-6-2, but instead arose out of the paternity and modification action.

ATTORNEY'S FEES

Haley v. Haley S07A0241 (June 25, 2007)

The mother filed a Petition for Modification in which the parties entered into a Settlement Agreement in which the father agreed to increase his child support payments from $750.00 per month for two children to $2,700.00 per month for one child. However, the parties were unable to resolve the issue for reimbursement of the wife's attorney's fees in the amount of $40,848.00. The agreement stated "the issue of Ms. Haley's claim for expenses and attorney's fees will be submitted to the Trial Judge by brief for a decision by the Court. Mr. Haley will not seek from Ms. Haley expenses of litigation or attorney's fees." The Trial Court determined the mother prevailed on her child support modification action and awarded her $16,150.00 in attorney's fees. The Supreme Court affirms.

The father contends that the mother's claim for attorney's fees is controlled by O.C.G.A. §19-6-19(b), however, the Supreme Court concludes that the mother's claim for attorney's fees does not rest on § 19-6-19, but rather on the parties' contract. The Settlement Agreement makes no reference to §19-6-19(b), thereby the parties agreeing to submit the attorney fee issues to the Trial Court for resolution, authorized the Trial Court to exercise discretion against what factors are found to be relevant to determine if the mother was entitled to attorney's fees including whether she was the prevailing party in the litigation. Therefore, by contract, the parties authorized the Trial Court to award attorney's fees in the amount the Court found to be appropriate and reasonable under the

circumstances. Justice Carley concurs in judgment only. Justice Hunstein concurs. Justice Melton dissents.

ATTORNEY FEES/GROSS INCOME

Padilla v. Padilla S07F0463 (June 4, 2007)

The parties were married in Florida in 1984 and separated in October, 1998. In March, 1999, the father remained in Florida and the wife moved with the three children to Lawrenceville, Georgia. The couple made attempts to reconcile in Georgia but were unsuccessful. In 2000, the wife filed for divorce in Gwinnett County. The case was ultimately dismissed in January of 2001 for lack of jurisdiction. The wife had approximately $3,500.00 in attorney's fees pursuing the Gwinnett County divorce. In 2003, the parties were still separated and the wife's income was being garnished pursuant to an IRS tax garnishment because of underpayment of taxes by the husband. The wife retained counsel to receive innocent spouse protection. The wife received innocent spouse protection, and the garnishment was lifted from her wages. The approximate attorney's fees for the innocent spouse protection services was $3,700.00. In May of 2005, the wife filed for divorce in Cherokee County, Georgia. A non-jury final was held on June 7, 2006, where the Trial Court awarded the wife $8,500.00 in attorney's fees paid to the wife's attorney who represented her in the proceedings, and awarded the wife additional $7,200.00 in attorney's fees which represented the proceedings before the IRS in an effort to procure innocent spouse protection and $3,500.00 in attorney fees in her representation her in the Gwinnett County case that was dismissed in 2001. The Court also awarded the wife $2,500.00 for an automobile that was considered her separate property and was sold during the marriage and established the gross income of the father for child support purposes at $12,250.00 per month. The Supreme affirms in part, reverses in part, and remands with direction..

With regards to the issue of attorney's fees, the general award of attorney's fees is not available unless supported by statute or contract. The wife argues that O.C.G.A. §19-6-2 may include attorney's fees incurred in proceedings prior and independent of the underlying divorce action. However, the plain language for the purpose of O.C.G.A. §19-6-2 for the purpose of insuring that adequate representation of the respective needs of both spouses in divorce supports the inclusion of fees from separate litigations and the fee award under O.C.G.A. §19-6-2(a). Therefore, the award of $8,500.00 of attorney's fees in the instant case are affirmed and the award of $7,200.00 in fees for the prior divorce action and for the innocent spouse protection prior to filing of the Georgia divorce are reversed.

With regards to the gross income of the husband, the trial court considered in the husband's gross income for moving expenses and job-related relocation which appeared on the husband's W-2 statements as taxable income. Under the former O.C.G.A. Section 19-6-15(b)(2), gross income shall include one hundred percent of wage and salary income and other compensation for personal services. The trial court erred by including

the husband's moving expenses reimbursement, even though it was included as taxable income, because the reimbursement of moving expenses does not improve the obligor's financial position but merely maintains the status quo from before the job-related move, offsetting the unusual and often significant costs incurred therein.

With regards to the automobile, the Supreme Court affirms the trial court's ruling as to the value established.

CHILD SUPPORT

Alejandro v. Alejandro S07F0743 (September 24, 2007)

The parties were married in 1998 while both were in college. There were two minor children born of the marriage in 1999 and 2000. In 2002, the wife filed a Complaint for Divorce for which a Final Judgment and Decree of Divorce awarded the mother primary physical custody and ordered the father to pay child support and made equitable division of the couple's property. The husband appeals the ruling, among other things, that his gross income was improperly calculated by the Trial Court. Supreme Court affirms.

The husband testified that his true annual gross income was between $25,000 and $28,000.00. The Trial Court calculated the husband's child support obligation based on a gross income of $45,000.00 a year. However, the husband also testified that his annual income in 2000 and 2001 was between $40,000.00 and $45,000.00 and that he moved in 2002 to Ohio to make more money and within a period of 13 months before the trial, the husband had bank deposits over $56,000.00 and anticipated his income from salary and commissions of $40,000.00. Therefore, the Trial Court as the finder of facts can resolve conflicts in evidence in determining the gross income.

CHILD SUPPORT

***Gowins v. Gary,* 284 Ga.App. 370 (March 20, 2007)**

Unmarried Mother and Father had twin children. Mother filed a contempt action against Father for non-payment of child support. The parties had reached an agreement regarding child support in July, 2002 which was incorporated into an April 29, 2005 order by the trial court. The trial court found the Father in contempt of the April 29, 2005 order in the amount of $135,000. However, the trial court further found that the original settlement agreement was a contract between the parties and was not an order prior to the court's incorporation of the agreement in April, 2005. Therefore the trial court had no authority to enforce the agreement for the period between July, 2002 and the April 29, 2005 order. The trial court also refused to award interest on the amount of child support it found enforceable pursuant to the contempt action. Mother appeals and the Court of Appeals affirmed in part, reversed in part, vacated in part and remanded with direction.

The Court reversed the trial court's ruling that it had no authority to enforce the child support due for the period between the entry of the settlement agreement and the April 29, 2005 order that because the April, 2005 order incorporated the July 2002 settlement agreement. The terms of the incorporated agreement no longer establish a private debt for the support between the parties, but become the judgment of the court enforceable by contempt proceedings, and the child support obligations imposed by the agreement from the date it was executed on July 3, 2002 became the support obligations awarded by the court's judgment. The Court further found that the trial court had the authority to find the Father in willful contempt for support payments "which accrued under the terms of the settlement agreement regardless of whether the payments accrued before or after the judgment was entered." The Court then remanded the matter back to the trial court for a determination of whether the Father's failure to pay was willful.

Regarding the award of interest on the amounts due, the Court found that the trial court erred in its award of interest in this action and vacated the interest award. The Court further found that the trial court should apply the current version of O.C.G.A 7-2-12.1 when reviewing the matter on remand.

CHILD SUPPORT

Hammond v. Hammond, S07F0917 (September 24, 2007)

The parties were divorced after a bench trial and the court entered a Final Judgment and Decree of Divorce on September, 2006. The wife appeals, among other things, that the Trial Court erred its calculation of the child support obligation. The Supreme Court affirms in part and reverses in part.

The wife argues that the Trial Court erred in calculating the husband's gross income of $3,604.43 per month. The wife argues that the husband had significant overtime pay that should have been used in the calculation of this figure. The husband testified that he had been able to earn large amounts of overtime in the past, but his company has reorganized thus making overtime payments now largely unavailable. Even though the wife argues that this testimony is not credible, the Trial Court weighs the credibility of the witnesses and this Court cannot re-weigh the facts and assess the credibility of the witnesses.

The wife also argues that the Trial Court erred in calculating her gross income of $1,316.83 by including her monthly child support in the amount of $240.00 that she receives as a result of a previous marriage. Payments received by a parent for the benefit of a child of another relationship should not be included in the gross income, but instead provide support for the child. The Court also noted that this ruling is consistent with the new enacted child support guidelines which excludes from gross income child support payments received by either parent for the benefit of a child of another relationship. Therefore, the wife's gross income calculation for the purpose of child support is reversed and remanded

CHILD SUPPORT

***Scarborough v. Scarborough*, S07A0971 (September 24, 2007)**

On May 4, 2001, the parties reached a separation agreement which required husband to pay the wife monthly child support in the amount of $1,000. On October 15, 2001, a final decree was entered incorporating the separation agreement. On October 10, 2001, the Husband turned sixty-five and began receiving retirement benefits under the Social Security Act. In addition, the wife began receiving retirement benefits on behalf of the parties' children and the Husband unilaterally stopped child support payment. Neither the separation agreement nor the divorce decree addressed the receipt of future social security retirement benefits or any impact this would have on the child support obligation. On February 11, 2005, the Wife filed a petition for contempt alleging the Husband was in arrears in child support payment. The Husband answered counterclaiming that he owed nothing because he was entitled to a credit for the social security retirement benefits being made to the Wife for the benefit of the children. The trial court found the Husband was not entitled to the credit, and it ordered the Husband to pay the accumulated child support arrearage. Husband appeals and Supreme Court reverses.

This court recognizes that a parent is generally entitled to a credit against his support obligation for social security disability payments paid for the benefit of the child because such payments substitute for income. Also, retirement benefits received on behalf of the child should be credited against the non-custodial parent's child support obligation. The wife argues that the intent of the agreement was that the social security benefits would augment and not supplant the child support obligation. The wife cites *Koch* as her authority. In *Koch*, this court held that child support obligations cannot be offset by pre-existing social security disability benefits paid for the benefit of dependent children where the non-custodial parent's disability and associated benefits are presently being paid on behalf of the children at the time the parties entered into a settlement agreement and where the agreement did not make any special provisions regarding receipt of those disability payments. In *Koch*, because the social security benefits were already being paid at the time the agreement was written, it was assumed that the parties had taken the presence of these current payments into account when they calculated the non-custodial parent's child support obligation.

In the instant case, at the time of the settlement agreement, social security benefits were neither due nor payable. In the absence of a provision otherwise, it cannot be assumed either of the parties considered the future possibility of such payments. This court also notes that the recently enacted O.C.G.A.§19-06-15(f)(3)(a) provides "Benefits received under Title II of the federal Social Security Act by a Child on the obligor's account shall be counted as child support payments and shall be applied against the Final Child Support Order to be paid by the obligor for the Child."

Wife also argues that the Husband is precluded from terminating his support obligation absent a petition for modification. However, this court has previously

determined the social security benefits can be credited to satisfy the support obligation without obtaining a modification of the original decree.

CHILD SUPPORT

***Sebby v. Costo,* A07A2138 (March 5, 2008)**

After the parties hearing, the father was awarded visitation rights and established a child support obligation. Among other things, the husband appeals the Trial Court failed to apply the revised child support guidelines provided in O.C.G.A. §19-6-15, et seq. It appears the Trial Court order was issued the 8th day of February, 2007 nunc pro tunc December 21, 2006. In Georgia, an order issued nunc pro tunc is designed to record some previously unrecorded action actually taken or judgment actually rendered. While it does not appear that the Trial Court applied the revised Child Support Guidelines, such guidelines did not become effective until January 1, 2007. Since the husband did not attach a transcript to the appeal, it is presumed the Trial Court's judgment is correct. Judgment affirmed.

CHILD SUPPORT/ GROSS INCOME

***Banciu v. Banciu,* S07F1075 (October 29, 2007)**

After a bench trial on November 21, 2006, the court awarded a final judgment and decree on December 18, 2006, which awarded, inter alia, real and personal property, joint legal and physical custody of the minor children, with primary physical custody of the two older boys to the Husband and primary physical custody of the younger son to the Wife, visitation and child support to be paid by the husband in the amount of $1,875 per month based upon the finding of the Husband's income was approximately at least $90,000 per year or at least $7,500 a month. and the wife's income was $325.00 monthly; and $500 per month in alimony to the Wife for a period of thirty-six months. Husband appeals arguing that the superior court abused its discretion basing child support on his imputed income which was allegedly contrary to evidence and without findings of fact. The Supreme Court affirms.

The Husband argues, among other things, that the only evidence of his income comes from his own testimony and documents which showed income of $4,000 per month. The superior court made express findings that the Husband's gross income was at least $90,000 per year or at least $7,500 per month. In this case, the evidence showed the Husband's earning capacity far exceeded $48,000 per year, that he was the President of a stucco company that grossed over $700,000 in 2005 and that some company co-workers were paid sums far more than $48,000 per year. The evidence also showed that the Husband had purchased a new truck, in addition to an older Mercedes Benz automobile, he owned multiple parcels of real estate, including rental properties, he owned two homes in Georgia, a condominium in Florida with a purchase price of over half a million dollars,

and the Husband was the principal earner during the marriage. Therefore, the superior court was understandably skeptical of the Husband's stated income on his financial affidavits and was authorized to consider the Husband's earning capacity in setting his child support obligation.

Contempt

Gallagher v. Breaux, A07A0471 (July 6, 2007)

On January 11, 2006, the mother moved for contempt alleging that the father had failed to pay court ordered child support for the parties' two children. The father was unrepresented by counsel. The father was ordered to pay $850.00 per month in child support and child support arrearage in the amount of $24,709.96. At the contempt hearing, the father testified that he was currently employed at a sandwich shop and was paid $200.00 per week and was paying $100.00 per month toward restitution order by a Florida Federal Court arising out of an earlier child support dispute. The father admitted he had not paid the monthly $850.00 child support payment since December, 2003 and that he had a lawsuit pending against the U.S. government for, among other things, back wages and had turned down a government offer of $120,000.00 plus a government job with an annual salary of $60,000.00. The Trial Court found the father in contempt and that he owed $24,709.96 in back child support and had a present ability to pay. The Court also determined that the father's non-payment of child support was willful and deliberate and ordered him incarcerated until he paid back the child support.

The father moved for reconsideration of the Trial Court's Order and was represented by counsel. The father testified that he had no liquid assets, did not own an automobile and had no other assets with which to pay back the child support. Also, the father could not obtain funds from his family because he already received $55,000.00 from his family for past child support obligations. The father also stated his efforts to obtain other employment had been unsuccessful due in large part of the fact he was a convicted felon, but testified that he could obtain a job through the halfway house within 14 days if he were released from jail. The father's attorney requested that the father be released from jail and get a job and earn money to pay back his child support; however, the Trial Court declined to do so. Instead, the Trial Judge signed an Order maintaining the original contempt but recommended the father to be considered for work release program. The Order provided that any fees the father earned the program would first go to the Sheriff for his board and fees and the remainder would go to pay his child support obligation. The father appeals and the Appeals Court reversed.

The father appeals stating, among other things, the Trial Court erred in ruling that the father was not in willful contempt because he showed an inability to pay; by placing him in a work release program for an unspecified period of time until he paid back the child support; and ordering that 100% of his earnings from the work release program be paid to the plaintiff minus board and fees to the sheriff. A person who has failed to pay child support under a court order when he has the ability to pay may be subject to incarceration for either civil or criminal contempt. Because the father was sentenced for

an indefinite period until the performance of a specific act (pay back child support) the contempt in this case was civil. The essence of civil contempt involved in a proceeding to enforce child support is willful disobedience of a prior order. A Trial Court must release a party from incarceration for civil contempt when he lacks an ability to purge himself of the contempt.

The purpose of civil contempt is to provide a remedy and to obtain compliance with the Trial Court's order, and the justification for imprisonment is lost when that compliance is impossible. This court cannot say the Trial Court abused its discretion by initially finding the father to be in civil contempt when there was evidence at the initial hearing that he had refused compensation employment which would have allowed him to pay his child support obligation and that he failed to seek employment commensurate with his skills and training. But, we find the Trial Court erred in failing to release the father from incarceration based upon the evidence at the Motion for Reconsideration hearing which clearly established the father lacked ability to purge himself. Once the father established inability to pay, the Trial Court had no authority to continue his incarceration, thus had no authority to confine him in a diversion center or to place him in a work release program under O.C.G.A. §15-1-4(c).

CONTEMPT

***Gary v. Gowins,* S07G1104 (March 10, 2008)**

The mother and father were the parents of twins born in 2000. The parties were never married and entered in a July, 2002 settlement agreement placing sole legal custody of the children with the mother and obtaining the father to pay child support in the amount of $14,000.00 per month per child. In July, 2004, the mother filed a Complaint for Paternity and Child Support asking the Court to incorporate the settlement agreement to its Final Judgment and Decree. The father answered to set aside the settlement agreement arguing that he agreed to pay child support in the amount of $14,000 per month for both children and not $14,000 per month for each child. In April, 2005 the Court rejected the father's claim of mutual mistake and incorporated the agreement to the Final Judgment and ordered the father to pay $14,000.00 per month per child. The father filed a Motion for New Trial and sought clarification as to whether he was required to pay back the child support. The Trial Court denied the Motion specifically stating that no award of back child support had been granted in the Final Judgment.

In November, 2005 the mother filed a contempt action stating that the father was in willful contempt for failure to pay child support as required under the April, 2005 judgment. The Trial Court held him in contempt for payments he did not make since the date of the agreement was incorporated into the final judgment and ruled that the father not be held in contempt for failure to pay child support due under the parties' agreement prior to its incorporation. The Court of Appeals reversed stating that when the July 2002, separation agreement was incorporated into the April, 2005 judgment, the child support

obligation imposed by the agreement from the date it was executed in July, 2002 became the support obligation awarded by the Court.

The Supreme Court granted certiorari in this case to determine if the Court of Appeals erred by holding that the Trial Court had authority to consider holding a parent in contempt for failing to make a child support payment which accrued under a settlement agreement prior to the date the agreement was incorporated into the Court's judgment. The Court of Appeals is reversed, and the trial court is affirmed.

In this case, the Trial Court incorporated the settlement agreement into the Final Judgment though the judgment itself is silent as to the father's specific obligation to make child support payments which accrued under the parties then private settlement agreement. The Trial Court, in its clarification Order, stated the judgment did not include an award of back child support, and refused to hold the father in contempt for failure to make child support payments due prior to the April, 2005 judgment because there was no Order requiring him to do so.

Before a person may be held in contempt for violating a Court Order, the Order should inform him in definite terms as to the duties thereby imposed upon him. The Trial Court can approve or disapprove the settlement agreement in whole or in part. The Court of Appeals erred by giving no weight to the Trial Court's authority. Therefore, the Supreme Court reverses the Court of Appeals' unsupported conclusion that the Trial Court's general statement incorporating the settlement agreement into the judgment overruled the Court's more specific language clarifying its judgment. Justices Hunstein and Sears concurred, stating this is a narrow holding under the particular facts of this case..

CONTEMPT

Page v. Baylard, S06A1833 (February 5, 2007)

A Final Judgment and Decree of Divorce incorporating a Settlement Agreement was granted to the parties in 1988. There was one child born as issue of the marriage of whom the wife was awarded custody and the husband was obligated for child support. In 2003, the wife filed a Petition for Contempt alleging the husband had refused to reimburse her for certain health expenses incurred by the minor child for which the husband was obligated under the Final Decree. The Trial Court entered a judgment in wife's favor and ordered the husband to reimburse the wife in the amount of $23,375.00 representing his share of the cost of treatment for the child in long term residential preparatory school plus $6,040.11 in attorney's fees. The Supreme Court reverses.

The evidence produced at the evidentiary hearing on the contempt establishes that the child during her adolescence years, became unruly, ran away from home, used drugs and alcohol and was the subject of delinquency proceedings in Juvenile Court over several months. The wife researched various residential programs, and in 2002, the child

was admitted to Peachford for several days where she received drug detoxification and further evaluation. After the child's release from Peachford, the wife enrolled the child at ABM family preparatory school which was a residential long term treatment center in Westmoreland, Tennessee. The wife had been in communication with the Director of ABM over the previous several months. While making a decision as to when to enroll the child, the husband was not consulted prior to the child's admission. The first time the husband learned of the child's whereabouts, was when the child had been attending ABM for sixteen months. The tuition for ABM was $2,750.00 per month for a total cost of $46,750.00. The pertinent part of the settlement agreement states "as an additional portion of the child support, husband will maintain the child under any dental care and hospitalization program available through his place of employment, and will pay one-half of all reasonable and necessary medical and dental expenses incurred on behalf of the child which are not covered by insurance. In the event that a major expenditure is to be incurred, the husband will be consulted prior to services rendered except in an emergency situation."

The monthly tuition of $2,750.00 is clearly a major expenditure and although the child's emotional status was urgent, it had been an on-going problem for a period of several months. Therefore, there is no evidence that it was a type of emergency which would relieve the wife of her obligation to consult with the husband. The Settlement Agreement incorporated into the divorce decree is clear, unambiguous, and capable of only one interpretation as written and therefore, the provision's meaning must be strictly enforced. Here, in the event that a major expenditure is to be incurred, the husband will be consulted prior to services rendered, except in emergency situations. The language creates a condition precedent which must be performed before a contract becomes absolute and obligatory upon the party. Failure of this condition precedent prevents the wife from enforcing any rights of the reimbursement for expenses paid to ABM of the child. Justice Melton dissents with opinion.

CONTEMPT

Webb v. Watkins, A06A2178 (February 1, 2007)

On July 30, 2003, the mother filed a Petition to Establish Paternity of her natural child born out of wedlock. The father timely responded admitting that he was the child's father and requested a leave of court to legitimate the child. October 1, 2004, the Trial Court entered a Final Order on the mother's petition and declared the child to be the father's legitimate child and ordered the amount of child support of $3,000.00 per month beginning November 1, 2004. At the time of the final hearing, the husband's monthly income was $21,666.66 and the mother's income was $2,500.00. Shortly after the final order was entered in October, 2004, the father lost his job and fell into arrears. In June, 2005, the mother filed her application for contempt alleging the father was in child support arrears of $8,500.00. A contempt hearing was held on August 26, 2005 holding the father in willful contempt for failure to pay child support in the amount of $15,140.00 ordering the purge of contempt by paying $7,500.00 by October 1, 2005 and the

remainder and at the rate of $841.11 per month for 9 months. In addition, the Trial Court awarded the mother her attorney's fees in the amount of $2,800.00 and maintained the child support payments at $3,000.00 per month. Father appeals and the Court of Appeals affirmed in part, reversed in part.

If there is any evidence in the record to support the Trial Judge's determination that a party has willfully disobeyed the Trial Court's Order, the decision of the Trial Court will be affirmed on appeal. The father's failure to make court ordered child support is undisputed in the record. The evidence also showed at the time of the contempt hearing, the father owned a watch valued at over $8,000.00 and a home in which he had equity of more than $7,000.00. Additional evidence showed that the father transferred to his girlfriend one-half interest in her $1,000,000.00 home in which she had quitclaimed to him at the time their cohabitation began.

The father also contends the Trial Court erred in awarding mother attorney's fees because it fails to state a statutory basis under which the award was made. The Court of Appeals agrees and remands the case to determine the statutory basis under which the award was made.

CONTEMPT/COLLEGE EXPENSES

Norris v. Norris, S06A1524 and S06X1525 (February 5, 2007)

The parties were divorced and in the Final Judgment and Decree of Divorce, obligated the husband to pay the expenses of a college education of the minor child, including, but not limited to, tuition, room and board, books and other miscellaneous expenditures. The husband's responsibility for the expenses of tuition of the college education shall not exceed the amount of tuition of an in-state college student at the University of Georgia attending the bachelor's program, either as a Batchelor of Arts of Batchelor of Science or other similar type degree. The wife filed a contempt action against her former husband alleging that he failed to pay the college expenses of their son in violation of the Final Judgment and Decree of Divorce. The Trial Court determined that the husband was obligated in the Final Judgment and Decree to pay college expenses, imposed an eleven semester limit, and ordered the husband to pay an additional $36,210.29. The Supreme Court reverses.

The husband's obligation to pay his son's college expenses was solely from the agreement of the parties as incorporated in the Final Judgment and Decree. The Trial Court determined that the eleven semester limitation is reasonable and terminated the husband's obligation for any period of time thereafter. Here, the Agreement obligated the husband to pay for the expenses of the college education of the parties' minor child. The only limitation placed on the husband's obligation was the agreement that the rate of tuition for which the husband would be responsible was equivalent to an in-state student attending the University of Georgia in a bachelor program. The parties could have placed

a time limitation on the husband's contractual obligation to pay college expenses, but they did not and it was error for the Trial Court to impose such a limitation.

Once the wife's Application for Appeal was granted, the husband filed a Cross Appeal raising the issue that the Trial Court erred by failing to give him credit for monies that the child withdrew from the Uniform Transfer to Minor's Account established by the husband's parents in which the child used to pay certain college expenses. However, husband raised the same issues in the Application for Discretionary Review which was dismissed by this Court because it was untimely filed and therefore, the husband's cross appeal is barred under the doctrine of res judicata and is dismissed. Justice Melton concurred specially with opinion and Justice Sears and Thompson dissent with opinion.

CONTEMPT/CONTRACT CONSTRUCTION

Roquemore v. Burgess, S06A2014 (February 5, 2007)

The parties were divorced in September, 2002 and incorporated into the divorce decree was an agreement which obligated the husband to pay the wife $15,000.00 in consideration for her relinquishment of her interest in the marital home and certain businesses. The agreement also provided that the money would be paid to the wife upon the sale of the home or at any time before the sale upon the election of the husband and that the payment will further be secured by life insurance proceeds of a policy the agreement required the husband to maintain. In August of 2005, the $15,000.00 had not been paid and the Wife filed a contempt action. In November, 2005, the Trial Court entered an Order requiring the parties to have the property appraised by an independent third party and list the property for sale at the appraised value and accept any offer within 5% of the appraised value. If the property had not been sold within 6 months, the wife was to take over the listing of the property. Wife subsequently filed a Motion for Reconsideration of her contempt motion and the Trial Court, after hearing, entered an Order holding the husband in contempt providing that he could purge himself of contempt by complying with the November, 2005 Order. The Trial Court entered an Order stating that even though the Order did not specify a time for performance, the husband should have sold the property within a reasonable time and that the husband had not made a good faith effort to comply with the decree. The husband appeals and the Supreme Court reverses.

The Trial Court has discretion to determine whether the decree has been violated and has authority to interpret and clarify the decree. The Court does not have the power in a contempt proceeding to modify the terms of the Agreement or Decree. Here, there was no explicit requirement in the Agreement that the husband sells the home and no time is specified for the payment of $15,000.00 to the wife. There are several parts of the Agreement that are at odds with the Trial Court's assumption that the parties intended the house to be sold. The portion of the Agreement giving the husband the right to pay the wife $15,000.00 before selling the home undermines the notion that the decree requires the sale of the house or that the funds necessary were to come from the proceeds of a sale

of the house since payment prior to the sale would certainly alleviate the need to sell. In addition, provisions securing the payment of the $15,000.00 from proceeds of the life insurance policy the husband was required to maintain, contemplated that he might not pay her the $15,000.00 while he was alive. Therefore, the Agreement provides 3 alternative sources for payment, only one of which involved the sale of the home. Since the agreement cannot be read to establish intent of the parties that the husband be required to sell the marital home and to pay the wife from the proceeds, the Trial Court's order creating such a requirement amounted to a modification of the decree, not an interpretation.

CONTEMPT/VENUE

Jacob v. Koslow S07A0517 (May 14, 2007)

The parties were divorced in Fulton County in 1993. Sometime thereafter, both the husband and wife moved to Cherokee County. In September, 2005, the wife filed a Petition in Cherokee County to have the husband held in contempt of the Fulton County divorce decree. The husband answered the Complaint and raised various defenses of lack of jurisdiction and venue and moved for judgment on the pleadings or in the alternative, to transfer the case to Fulton County. The Trial Court denied the Motion but certified its ruling for immediate review. The Supreme Court reverses.

The Supreme Court now holds that where a Superior Court, other than the Superior Court rendering the original divorce decree, acquires jurisdiction and venue to modify a decree, said court likewise possesses the jurisdiction and venue to entertain a counterclaim for contempt of the original decree. The Court of Appeals also extended this rule in *Corbett v. Corbett* where the parties were divorced in Macon County, but the husband filed a modification petition and motion for contempt in Carroll County where the wife currently resided. The Trial Court refused to modify the divorce decree, but did hold the wife in contempt. The Court of Appeals reasoned, in part, that inasmuch as the Carroll County court acquired jurisdiction to modify the original decree, it had the power to hold the wife in contempt of that decree.

The instant case has different facts in that the wife did not seek to modify the original decree, she simply filed a petition to hold the husband in contempt in Cherokee County and not where the original decree was entered in Fulton County not withstanding that both parties currently live in Cherokee County. Even though there has been established a flexible approach to contempt jurisdiction in divorce cases, it is not intended to expand jurisdiction generally to allow a husband or a wife to be punished for contempt of an Order or decree which was rendered in another county.

CONTEMPT/VERBAL ORDER

***Shirley v. Abshire,* A07A2221 (December 10, 2007)**

The parties, Shirley (Father) and the Mother (Abshire) divorced in 2003. They were given joint legal custody of the two (2) minor children with the mother being awarded primary physical custody of both children. Under the divorce decree, visitation generally began at 6:00 P.M. The Father petitioned for modification of custody and after a hearing in November, 2006, the Trial Court awarded each parent primary physical custody of one (1) of the children. The Final Order was signed and filed on January 11, 2007, nunc pro tunc to November 16, 2006 providing that visitation would begin at 6:00 A.M. on the designated days.

In February, 2007, the Mother filed a Motion for Contempt alleging that she was denied visitation during the Christmas Holiday of 2006. In the Court's written Order, it stated, in pertinent part, that the Court verbally instructed the parties, through their counsel, during a telephone conference call in December of 2006 that the exchange was to take place at 5:45 a.m. The new pro tunc Order said that the exchange time was 6:00 a.m. The Court finds that the verbal instructions of 5:45 a.m. to counsel for each party was not complied with by the Father. The Court ordered the Father to pay the Mother's travel expenses for December, 2006 visitation as well as her attorney's fees. The Father appeals and the Court of Appeals reverses.

Pertinent part of O.C.G.A. §9-11-58(b) states that what a Judge orally declares is no judgment until it has been put in writing and filed with the Clerk. Therefore, the Trial Court holding the Father in contempt of a verbal modification order which had not been reduced to writing signed by the Judge and filed with the Clerk.

EQUITABLE DIVISION

***Cubbedge v. Cubbedge,* A07A0739 (August 9, 2007)**

The parties were divorced in 2001. The divorce decree incorporated a settlement agreement that contained the following provision: "Husband shall transfer, assign one-fifth of any inheritance he ever receives in the future to the wife. Husband shall notify the wife immediately if he is entitled to inherit any assets from anyone. Husband shall not take any action to defer or refuse to accept any property or funds to which he is entitled as a result of a bequest he shall receive." The Husband's parents became aware of the provision several years after the decree and had an attorney make an *inter vivos* gift of their assets to the husband by establishing a family limited partnership with the parents as general partners and the husband as a limited partner. The husband was not aware of the parents' creation of the limited partnership until he was asked to sign the documents establishing it.

After the partnership was established, the husband notified the wife to buy out her one-fifth share of the inheritance for approximately $5,000. Wife did not accept the offer but brought suit seeking creation of a legal title to or imposition of an implied constructive trust or a lien in her favor for one-fifth of any assets transferred by the parents to the husband, any limited partnership created for the purpose of circumventing

her rights under the divorce decree. Wife also sued the parents for tortuous interference with contractual rights.

The trial court awarded summary judgment to the husband and the parents. The trial court defined inheritance as property received from an ancestor under the laws of intestacy or by bequest or devise and that the parents' *inter vivos* transfer of their assets to a family limited partnership would not result in the husband's receipt of an inheritance and would not trigger the provisions of the divorce decree relating to inheritances. The court also found that the parents did not tortuously interfere with the wife's contractual rights because the parents were the owners of the assets used to fund the limited partnership and were non-parties to the divorce decree and had a right to transfer their assets. Wife appeals and the Appeals Court affirms.

The Court distinguished *Meeks v. Kirkland* in that in *Meeks,* the wife was awarded one-half of any interest in any property the husband would receive from his father's estate. At the time of the divorce, the husband's father was living and therefore the decree dealt with a mere expectancy or possibility in which the husband had no interest and as such was utterly void and ineffectual to vest in her any interest in property acquired by him in the future. The court also distinguished *Baldree v. Baldree* and *Searcy v. Searcy* in that a husband's interest in an undistributed estate of deceased parents could be awarded to the wife as alimony, or as in *Baldree* where the husband's inheritance from his uncle became an asset, it becomes a legally protected and assignable interest.

In the instant case, because the husband's parents were alive at the time of the entry of the divorce decree and remained so, the drafter of the wife's decree sought to avoid the application of *Meeks* by requiring the husband to transfer a share of any future inheritance after the expectancy had matured, rather than by attempting to effectuate the transfer by decree. Even if this mechanism were effective to distinguish *Meeks,* it fails because the trial court correctly stated that inheritance is defined as property received from an ancestor under the laws of intestacy or by will at the ancestor's death. Therefore, assets received through the establishment and operation of a family trust would not be an inheritance, or would not be considered an advancement against the husband's future inheritance.

Since 1998, under Georgia law the intent to treat a lifetime transfer as advancement is shown only if the will provides for deduction or its value or if the advancement is declared in writing signed by the transferor or within thirty days of making the transfer or acknowledged in a writing signed by the recipient at the time. Neither are shown in the instant case.

The trial court was also correct in granting summary judgment to the parents because the parents were not bound by any contractual restrictions and thus had the legal right to give, bequeath or devise their property to the husband.

EQUITABLE DIVISION/PENSIONS

***Taylor v. Taylor,* S07F1634 (January 28, 2008)**

The parties filed for divorce and entered into a partial settlement agreement. The only two (2) issues for consideration was the equitable division with respect to the parties' pensions and attorney's fees. The hearing was held and the Trial Court entered a Final Divorce Decree approving and incorporating the parties' partial settlement agreement and made an equitable division award to the Wife based upon her and her husband's pension contribution as employees and ruled that each party shall be responsible for their own attorney's fees. The Wife appeals and the Supreme Court affirms.

The Trial Court awarded the Wife one-half of the difference between her own pension contributions and the greater amount of the Husband's pension contributions. The Wife contended that the Trial Court abused its discretion in failing to classify the employer contributions to the parties' pensions accounts as marital property and equitably divide the parties' entire pension benefits. The law is well settled that retirement benefits acquired during the marriage are marital properties subject to equitable division whether they are vested or unvested benefits. Here, the Final Decree of Divorce entered in the case at bar contains the results of the process, but doesn't contain any findings of facts to clarify the rationality used by the Trial Court to reached its results. Neither party asked the Trial to make factual findings, therefore, the Court was unable to conclude that the Trial Court's equitable division of marital property was improper as a matter of law or as a matter of fact.

Notwithstanding the lack of findings of facts, equitable division of marital property does not necessarily mean equal division of property and the Court was not even required to award the Wife any of the Husband's retirement account. Therefore, the Court cannot conclude that the Trial Court made an erroneous finding or improperly applied the law to its findings.

FINAL / INTERLOCUTORY APPEAL

Miller v. Miller S07D1339 (June 11, 2007)

The Trial Court entered an Order in the parties underlying divorce action. The Order was titled "Final Judgment and Decree of Divorce." However, the court reserved in paragraphs 12 and 13 of its Order, the right to review the parties' submissions regarding eligibility for a reimbursement of certain government benefits allegedly obtained improperly. The wife appeals as a final order and not an interlocutory order. The Supreme Court dismisses.

The Supreme Court clearly has subject matter jurisdiction over the appeal because it was taken from a judgment of decree of divorce. However, paragraph 13 provided 90 days for action by the parties, the propriety of which would be open to review by the trial court. As such, the appeal would be interlocutory in nature. Therefore, the applicant was required to follow the interlocutory appeal procedures as set out in O.C.G.A. §5-6-34(b). Justice Hunstein, Carley and Melton dissent.

GROSS INCOME

Dyals v. Dyals, S07F0366 (April 24, 2007)

The parties were married and had two (2) minor children and divorced in 2006. At the time of the divorce, the husband owned two (2) landscaping businesses and worked for the Gwinnett County Sheriff's Department. The Final Judgment and Decree of Divorce ordered the husband to pay $1,375.00 per month in child support based upon the Jury's determination that the husband's monthly gross income was $5,000.00 and based on the jury's determination that special circumstances existed that justified an upward modification of child support. The Supreme Court affirms.

The husband challenges that there was insufficient evidence to support the Jury's determination that his monthly gross income was $5,000.00 per month, arguing that bank statements alone cannot provide significant basis for the jury to reach an accurate conclusion with regard to the income generated by his two landscaping businesses. However, the husband's deposition testimony indicated that the combined income of his two landscaping businesses was between $90,000.00 and $110,000.00 in 2004 and his first landscaping business was making $60,000.00 in 2004 and that his second landscaping business projected to make an additional $60,000.00 a year at the time he purchased it. The husband's monthly salary with the Sheriff's Department was $3,000.00 per month. Therefore, the Jury could conclude from the deposition testimony and trial testimony that his total monthly income was at least $5,000.00. Because some evidence of the records supports the Jury's findings, the verdict will not be disturbed.

The husband also asserts that it was inappropriate for the landscaping business' bank statements containing occasional circles and highlights made by wife's counsel go out with the Jury because the marking constitution a continuing argument of counsel. However, the record shows that wife's counsel removed the objectionable pages from the exhibit and that the husband's counsel approved the remaining pages of the exhibits before allowing them to go out with the Jury. Therefore, the Husband's counsel induced such error by approving the pages and will not be heard to complain of the results on appeal.

GROSS INCOME - 14 YEAR OLD ELECTION

Sharpe v. Perkins, A07A0714 (March 20, 2007)

The parties were married in 1980 and had 3 daughters during the marriage and were divorced in 1993. The parties were granted joint legal custody with the mother having sole physical custody of the 3 minor daughters. In 2005, the only remaining minor daughter was 14 years old and was residing nearly equally with both parents based on an informal arrangement. Also, the father was primarily deriving his income from purchasing real estate, renovating homes and then renting those homes to tenants. In 2004, the father had approximately $176,000.00 in capital gains based mostly upon the purchase and resale of unimproved properties. He estimated that his 2005 tax returns would also reflect the same amount of capital gains. In April of 2005, the mother filed a Petition to Modify child support of their one (1) remaining minor daughter requesting the child support obligation to be increased. The father filed an Answer and Counterclaim filing an election signed by their minor daughter which stated in pertinent part "after giving careful consideration to all of the factors involved, I am requesting that the Court award joint legal and physical custody to myself and both of my parents so that I spend an equal amount of time with both parents." The mother also filed a Motion for contempt for failure to pay the minor daughter's private school tuition as required by the divorce settlement. The trial was heard whereby both the Modification and the Contempt matters were addressed. The Trial Court increased the father's monthly child support obligation and denied his counterclaim to obtain joint physical custody of their minor daughter finding that the daughter's election was invalid. The Court did not hold the father in contempt, but did require him to pay the $7,000.00 in unpaid private school tuitions. The Court of Appeals affirms.

Pursuant to O.C.G.A. §19-9-3(A)(4) provides that "in all custody cases in which a child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live." The statute requires that the child choose one parent with whom he or she desires to live and any language implying that the child's selection can establish joint physical custody is notably absent. By contrast, O.C.G.A. §19-9-3(A)(5) provides that joint custody as defined by Code Section 19-9-6, may be considered as an alternate form of custody by the Court. Therefore, in reading the statute so as to give these two (2) sections sensible and intelligent effect, we hold that the Court retains exclusive authority to grant joint physical custody. Here, the 14 year old election fails to choose one parent over the other and instead attempts to interfere with the Court's exclusive authority to designate joint custodial status and therefore, the election was invalid.

The father also argues that the Trial Court erred in characterizing his capital gains from property sales as gross income in his Modification Order to increase his child support obligation. The father conceded that he received such capital gains, but argues that the Court should not have included those gains in the calculation of the gross income because those gains were derived from a one-time event and thus, would be nonrecurring. However, the father cites no authority in support of his claim that the nonrecurring capital gain should not be included in the gross income calculations. The Trial Court ruled based upon the former O.C.G.A. §19-6-15(B)(2).

The father also contends that the Trial Court erred in ordering him to pay the private school tuition under the terms of the original divorce settlement agreement because it is barred by the doctrine of laches. The right of a child to child support belongs to the child and cannot be waived by a parent.

INSURANCE BENEFICIARY

***Stanton v. Fisher,* A07A1916 (March 13, 2008)**

The parties were divorced in 1998 and there were three children born as issue of the marriage. In 2003, the father remarried and obtained an accidental death and dismemberment insurance policy where the father designated his new wife as beneficiary. The father divorced his new wife in 2004. In 2006, the father died as a result of multiple traumatic injuries sustained in a motorcycle accident. The first wife and the father's children made a claim to the insurance proceeds. The first wife claimed that the father showed her a letter that the father was sending to the insurance company stating that he was divorced from the second wife and wanted to change the beneficiary to his three children and the three children were named in the letter. The father's second wife claimed an interest as the designated beneficiary of the insurance proceeds. Because of the conflicting claims, the insurance company deposited funds into the Clerk of the Court. Both parties filed motions for summary judgment and the Trial Court granted the second wife's motion. The Court of Appeals affirms.

Georgia law with regards to changing of a beneficiary is that when an insured is authorized by the insurance policy to change the beneficiary during his life, and the insured dies without having exercised the authority, the named beneficiary has invested interest in the proceeds of the policy. If, however, the insured has done substantially all that he is able to do to affect a change of beneficiary and all that remains to be done is ministerial action of the insurer, the change will take affect though the details are not complete before the death of the insured. Some affirmative act on the part of the insured to change the beneficiary is required and his mere intention will not suffice to work the change of beneficiary.

Even though the first wife filed an affidavit stating that the deceased father showed a letter stating he was changing the beneficiary is hearsay without an exception and cannot be considered in support of a motion for summary judgment. Therefore, there was no genuine issue of material fact of whether the father did substantially all that he could do to affect the change of beneficiary.

INSURANCE PROCEEDS

***Sparks v. Jackson,* A07A1963 (February 29, 2008)**

The parties were married in 1988 and were divorced in 1998. As part of the divorce decree, the husband agreed to maintain his current level of life insurance through his employment which was $220,000.00 with the wife named as an irrevocable beneficiary for the benefit of the children. The husband remarried and in June, 2005, and the husband designated his new wife (Sparks) as the beneficiary of his life insurance policy. In November, 2005 the husband died. Both the ex-wife (Jackson) and the widow (Sparks) filed a petition against the life insurance company for payment. The insurance company interplead the funds the Superior Court Clerk's office for determination of division of the proceeds. The total proceeds deposited into the Clerk of the Court was $238,644.00.

Both parties filed motions for summary judgment and the Trial Court granted summary judgment to the ex-wife (Jackson) and awarded all of the funds to the ex-wife. The widow argues, among other things, that she was the only beneficiary named on the life insurance policy and that the Court also erred by awarding the ex-wife more than $220,000.00 that was stated in the divorce decree. Affirmed in part, revised in part.

As a general rule, if the insured names a beneficiary by revocable designation, the beneficiary does not acquire a vested right or interest in the policy and the insured may change the beneficiary at will. However, the insured may forfeit this right if he agrees for valuable consideration not to change beneficiary. In the context of a divorce settlement, the terms of a property settlement agreement may preclude the insured from making a change of beneficiary even though he is given the right by the terms of the insurance policy. Therefore, where a divorce decree requires the husband to name his children or his former wife as beneficiary of his life insurance policy and to keep the policy enforce, the children or the former wife obtain a vested interest in the policy proceeds.

The widow also argues that the record does not show that the policy was the same insurance policy that was in effect at the time the decease divorced from the ex-wife. However, where a policy of one insurance replaces the policy or amount specified in such separation agreement, the minor's interest in the prior policy applies to the replacement policy. The widow also argues that ERISA preempts Georgia law that the settlement agreement fails to meet the ERISA requirement for the beneficiary designation. However, the widow did not make this claim to the Trial Court and the Appellate Court will not consider arguments raised for the first time on appeal except in special circumstances which may include jurisdictional challenge, claim of sovereign immunity, serious issue of public policy, a change in the law, or error that works manifest injustice. Here, the widow fails to show the existence of any special circumstances. However, the Trial Court did err in awarding all of the policy to the ex-wife. The settlement agreement which gave the children a vested right of $220,000.00 and therefore, the widow is entitled to the remainder of the proceeds and division of any interest thereof.

JURISDICTION

Padron v. Padron, S06A1965 (February 26, 2007)

Husband filed a Complaint for Divorce in which he asserted he was a resident of Georgia and had been for more than 6 months prior to the filing of the Petition. Thereafter, the parties' Settlement Agreement was presented to the Trial Court and the Court, *sua sponte*, ruled that it lacked jurisdiction over the case because the Appellate was not a resident as required by O.C.G.A. §19-5-2. The Supreme Court reverses.

As used in O.C.G.A. §19-5-2, resident means domiciliary and jurisdiction, strictly speaking, is founded upon domicile. Domicile is established by actual residence with the intent to remain there for an indefinite period of time. A person's immigration status does not, as a matter of law, preclude that person from establishing residency for the purpose of attaining a dissolution of marriage.

MEDIATION

Wilson v. Wilson, F07F1201 (November 21, 2007)

The Wife filed for divorce in Coweta Judicial Circuit which had adopted the Alternative Dispute Resolution Program (ADR). The attorney for the husband filled out a form to initiate mediation with the Coweta ADR Program, but was postponed due to pending discovery. Without informing the Mediation Center or their attorneys, on December 22nd, the parties met with a registered mediator of their choosing and as a result of mediation, the parties reached an agreement and agreed to submit it to the Court for incorporation into a Final Decree of Divorce. On December 27th, the husband sent a letter to the wife's attorney stating that the husband would not comply with the terms of the agreement and therefore it was set aside. On December 29th, the wife filed a Motion to Enforce Settlement Agreement. The husband agreed the agreement was not enforceable because the parties engaged in a court referred mediation and under the mediation Rule 12(d)(2), each party had 3 calendar days in which to object to the mediated agreement, since the attorneys were not present at the mediation, the husband had properly objected to the filing with notice to the wife's attorney. The husband also contended he was not competent to enter such agreement because he suffered from depression and did not understand the obligations he was undertaking.

The wife contended the parties were not engaged in court referred mediation; therefore, it was not subject to the ADR Rules. A hearing was held on January 29th and the Trial Court entered an Order enforcing the mediated agreement. The Trial Court ruled that it was a private mediation and was not subject to ADR Rules. The Court also stated that the husband had mental capacity to enter into the agreement. The husband appeals. The Supreme Court affirms in part and remands in part.

The Supreme Court finds that the mediation was Court ordered mediation even though the parties did not participate in certain parts of the process of the local program and did not fulfill their responsibilities to communicate with the program director. Therefore, even though the husband was entitled to the benefits of Rule 12(d)(2), the court concludes the husband did not comply with the rules. The husband filed his

objection to the mediated agreement to opposing counsel and not with the program coordinator and therefore, did not timely object to the mediated agreement.

The husband also argues that the Trial Court erred by calling the mediator to testify at the hearing on the enforceability of the settlement agreement as it violated the confidentiality portion of the mediated agreement signed by the parties and the mediator. The mediator did not testify to substantive settlement discussions or specific confidential communications and only testified, in relevant part, about his status as a private mediator and about his general impression that both of the parties had the mental capacity to engage in the mediation and settlement. The Court here, creates an exception that when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from mediation, then that party waives the privilege confidentiality and the mediator could testify to such issues. Otherwise, the court might be deprived of evidence that it needs to rule reliably on a party's contention of mental incompetence. By not adopting this rule, it could encourage either party to try to escape the commitments they made during the mediation or to use threats of such escapes to try to renegotiate after the mediation for more favorable terms that they never would have been able to secure without this artificial and unfair leverage.

Issue of attorney's fees was remanded because the Trial Court failed to make findings sufficient to support such an award of attorney's fees.

MODIFICATION LUMP SUM/PERIODIC ALIMONY

***Shepherd v. Collins,* S07A1658 (February 11, 2008)**

The parties were divorced in December, 1998 and the settlement agreement provided, inter alia, that the wife would have primary custody of the parties' four minor children and the husband would pay child support in the amount of $2,092.50 per month and he would also pay alimony to the wife for a period of 180 months with $1500 per month for a period of 60 months, $1,000 per month for a period of 60 months and $500 for a period of 60 months. The payments shall begin on November 1, 1998. Even though said payments are alimony, they shall continue if the wife should remarry and they shall cease only upon the death of the wife or until 180 payments have been made, whichever first shall occur.

In September, 2005, the husband filed a complaint for modification of alimony and child support pleading a substantial downward change in his income and financial status. The Trial Court found that there had been a significant change of circumstances and reduced the husband's child support obligation from $2,092.50 per month to $1,150.00 per month but refused to modify downward the husband's alimony payments because it found the language in the agreement established a lump sum alimony obligation payable in installments. Supreme Court affirmed in part, reversed in part, and remanded.

The Trial Court determined that the language of the agreement established an obligation for lump sum alimony rather than for periodic alimony. Periodic alimony is subject to modification where lump sum alimony in installments is not. In making a threshold distinction between periodic alimony and lump sum alimony, if the words of the documents creating an obligation state the exact amount of each payment and the exact number of the payments to be made without other limitations, conditions, or statements of intent, the obligation is one for lump sum alimony payable in installments. In the instant case, there was a contingency regarding the wife's survival and therefore the amount of the husband's total alimony obligation was uncertain and therefore must be deemed to be periodic. Accordingly, that portion of the Judgment finding lump sum alimony is reversed and remanded.

MOTION TO SET ASIDE

Arnold v. Arnold S07F0763 (June 25, 2007)

The parties were divorced by Court Order on October 31, 2006. Prior to the entry of that Order, there was a Settlement Agreement executed resolving all issues in the divorce. The agreement was submitted to the Court for approval and incorporated into the Final Judgment and Decree. However, before the entry of the Final Decree, the Husband filed a Motion to Set Aside the agreement contending that it disproportionately distributed his military retirement income and that child support had been incorrectly calculated. The motion was also later amended to include allegations of newly discovered evidence of the Wife's adultery during the marriage, nondisclosure of assets and repudiation of the agreement based upon her failure to comply with the agreement. The Trial Court denied the Motion to Set Aside. The Supreme Court affirms.

The Trial Court may exercise its discretion to approve or disapprove in whole or in part an agreement notwithstanding the binding effect of the agreement as to the parties themselves. Both parties testified that the husband signed the agreement voluntarily and he read and understood the effect of the provisions. There is no evidence the wife misrepresented the parties' assets or that the agreement was obtained by other fraudulent means. Even though the wife may be subject to contempt for her alleged failure to pay a debt as required under the agreement, her non-compliance did not constitute a repudiation of the agreement or otherwise divest the Trial Court of its discretion to accept or reject the Settlement Agreement before incorporating into the Final Decree.

MOTION TO SET ASIDE

Scott v. Scott S07A0246 (May 14, 2007)

On June 30, 2003, the parties entered into a separation agreement. On August 6, 2003, the Trial Court entered a Final Judgment and Decree of Divorce incorporating the Settlement Agreement as requested. The Court entered an Income Deduction Order and neither party objected to the divorce decree or the Income Deduction Order. On

September 22, 2005, the husband filed a Motion pursuant to O.C.G.A. §9-11-60(d)(3) to set aside the divorce decree as to child support contending that the final decree provisions regarding child support were non-amendable defects on the face of the record and pleadings. More specifically, the husband contended that the decree set forth child support as only a percentage of the husband's income without setting forth the specific baseline dollar amount to be paid. On July 31, 2006, the Trial Court granted the Motion setting aside the final decree with regards only to the issue of child support. The Supreme Court reversed.

The Supreme Court clarified that in considering a motion to set aside under O.C.G.A. §9-11-60(d)(3), as opposed to (d)(2), negligence or fault on the part of the movant is not a bar to the movant's claims. Therefore, despite the fact that the husband may have been negligent in this case for not attacking the divorce decree by direct appeal, he retained the right to seek a motion to set aside under Section 9-11-60(d)(3) for the existence of a non-amendable defect on the face of the record. In the instant case, the husband failed to show any part of the consented to Settlement Agreement and Divorce Decree, as void or otherwise contains any non-amendable defect.

The husband also contends that the Trial Court was correct in setting aside the decree because the decree fails to set forth a specific baseline dollar amount of child support as required by O.C.G.A. §19-5-12. However, the decree did give dollar ranges at 23% was equal to $3,359.92 and 28% was equal to $4,090.33 of the husband’s gross income. Although certain paragraphs contained only percentages, the Trial Court set forth at least the minimum dollar amount these percentages represent.

PARTNERSHIP PROPERTY/SEPARATE ESTATE

Bloomfield v. Bloomfield S07F0096 (June 4, 2007)

The parties were divorced after a bench trial in which a Final Judgment and Decree of Divorce was entered on May 1, 2006. The husband appeals. The Supreme Court reverses in part and affirms in part. The husband first argues the Trial Court inappropriately awarded ownership interest in a home in Ponte Vedra, Florida through separate trust for the benefit of each of the parties' children. The wife's father originally purchased the home and placed it into a family limited partnership as the partnership's sole asset. The wife's father then gifted the limited partnership interest to the wife, the wife's siblings, and trust for the benefit of the parties' three children. Thereafter, the wife's father gifted 1 % controlling interest as a general partnership to the husband. Later, in 1998, the husband and wife bought out the limited partnership interest of the wife's siblings, but not the interest of their children's trust. In 2001, the husband, as general partner, deeded the property from the partnership to himself and the wife as joint tenant without providing any compensation to the children's trust.

The Trial Court ruled that since the children's trust has never been satisfied, the children's trust maintain the current ownership interest in the property itself and, upon the future sale of the property, the trust would be compensated in an amount equal to their

original percentage ownership in the property as limited partners. Pursuant to the parties' agreement and to statutory law pursuant to O.C.G.A. §14-9-65, the children are not presently entitled to an ownership interest in the property which the limited partnership no longer owns. The children's trust are, however, presently entitled to cash compensation, including interest, for the value of their limited partnership interest in the property which should have been distributed at the time the husband deeded the property away from the partnership. Therefore, the Trial Court erred in concluding the children's trust were entitled to a current ownership interest in the property rather than present compensation. That issue is remanded for determination of the value of the interest of the children's trust.

The husband also contends the Trial Court erred by finding certain security bank accounts contained funds that were the wife's separate property and not subject to equitable division. The account in question was originally established by the wife's grandfather and father for the benefit of the wife prior to the marriage of the parties. Even though the husband claims to have managed the property, he did not increase the value of the account.

The husband additionally argues that the trial court erred by determining that a total gift of $10,000.00 the wife received from her father was separate property. Husband argues that this sum became marital property because it was placed into a joint account with the husband.
The trial court found that at the time the wife received the gift, the husband would not allow her to hold an individual account and she had no other account in which to place the funds.

All other rulings by the trial court regarding dividing certificates of deposit, child support and that the trial court did not unduly focused on his extra-marital affair are affirmed.

PRENUPTIAL AGREEMENT

***Blige v. Blige*, S07F1817 (January 28, 2008)**

The parties had a child together in 1994 and were married in 2000. The day before the wedding, the husband took the wife to meet with an attorney he had hired for her to review the prenuptial agreement that the husband had drafted. The wife read through the agreement and signed it and the parties were married the following day as scheduled. The prenuptial agreement provide that the husband retain his sole and separate property of 19.5 acres of land in Bryan County that he had previously purchased together with any house or structure which may be situated upon said property. At the time of the wedding, there was no house or structure situated on the property. The husband worked as a delivery truck driver and his base pay was $10.00 per hour. The husband had hidden away $150,000.00 in cash for which he planned to use to build the

home after the wedding. The husband did not disclose the $150,000.00 cash in the prenuptial agreement, nor did he tell the wife about the $150,000.00 in cash.

In July, 2005, the wife filed a complaint for divorce and as his answer and counterclaim, the husband sought enforcement of the prenuptial agreement. The wife moved to have the prenuptial agreement set aside for failure to comply with legal requirements for prenuptial agreements and the Trial Court conducted a pretrial evidentiary hearing on the issue. In November, 2006, the Trial Court entered an Order setting aside the prenuptial agreement because the husband failed to make a fair and clear disclosure of his income, assets, and liabilities. Thereafter, a jury trial on the property division ensued. The evidence before the jury showed that the husband had used $150,000.00 in cash he had concealed from the wife toward construction of the home. The cost to complete the construction on the home was approximately $280,000.00 and by the time of trial, the property was worth $375,000.00 to $400,000.00. The jury returned a verdict awarding the house to the husband minus $160,000.00 to be paid to the wife for her equitable interest in the marital property. In February, 2007, the Trial Court entered a Final Judgment and Decree of Divorce incorporating the jury's verdict. The husband appeals and the Supreme Court affirms.

There are three prongs to determine the validity of prenuptial agreements established in Scherer. The burden of proof is on the party seeking to enforce the prenuptial agreement to show that (1) the prenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or non-disclosure of material facts, (2) the agreement is not unconscionable and (3) taking into account all relevant facts and circumstances, including changes beyond the parties' contemplation when the agreement was executed, the enforcement of the prenuptial agreement would be neither unfair nor unreasonable. The Scherer test has been redefined and clarified by later decisions and continues to govern the enforceability of prenuptial agreements.

PRENUPTIAL

Grissom v. Grissom S07F0132 (June 4, 2007)

Prior to the parties' marriage in July, 2000, the parties executed a prenuptial agreement which listed their respective separate property in Exhibits A and B, and included various provisions addressing the disposition of property in the event of termination of the parties' marriage. There were two properties at issue; the first being the home located on Fiddler Ridge valued at $2,000,000 and the second was a Merrill Lynch brokerage account valued at $4,000,000. The wife filed for divorce in May, 2005 and the Final Judgment and Decree was entered in January, 2006. The Trial Court found, pursuant to the terms of the Prenuptial Agreement, that the wife waived any interest in the Fiddler Ridge property or to the Merrill Lynch brokerage account. Neither party challenges the Court's finding that the prenuptial agreement is enforceable. The Supreme Court reverses and remands.

The husband argues that the wife waived her right to appeal by accepting the benefits of the Final Judgment and Decree, to wit: payment of $150,000.00 in lieu of alimony or equitable division of property pursuant to paragraph 14 of the prenuptial agreement; 50% interest in four (4) parcels of real property; 50% of an income tax return; and monthly child support payments. The general rule is that an appellant cannot accept the benefits of a judgment and then seek to have it set aside. However, public policy requires divorce to be treated differently because of the unique and important issues involved. Therefore, under *Curtis v. Curtis* and other cases that can be read to hold that the acceptance of any benefit under a Final Judgment and Decree of Divorce results in automatic waiver/estoppel of the right to appeal any aspect of the judgment, are overruled.

In regards to the Fiddler Ridge property and brokerage account, it was refinanced and conveyed to the parties as joint tenants with the right of survivorship. When the American Express account was opened (former Merrill Lynch account), the wife was shown as co-account holder. The wife claims these changes entitle her to ownership interest to the properties relying on the language in paragraph 11 of the prenuptial agreement providing that “the ownership of any real property or personal property acquired by the parties in the future shall be determined in reference to the legal title to said property.” Because the revisions only apply to the properties acquired in the future, the Fiddler Ridge property and the predecessor of the American Express brokerage account were acquired prior to the marriage and were established by the inclusion on Exhibit "B" of the prenuptial agreement and therefore, this language does not afford the wife an ownership interest in these assets.

The wife continues to argue pursuant to paragraph 15 of the prenuptial agreement, that “notwithstanding any other provision of the agreement, each party has a right to transfer, give or convey to any other property or interest therein and that any property so transferred shall become the separate property of the recipient.” The wife argues pursuant to *Lerch v. Lerch* ,in which the parties had a prenuptial agreement, that the wife

promised not to make any claims against the husband's property in event of divorce. Although the marital home had been purchased by the husband prior to the marriage, this Court held that the husband manifested an intent to transfer his own separate property into the marital property by transferring ownership of the home during the marriage to both himself and the wife as tenants in common. However, in the instant case, the husband claims that the change of ownership in the Fiddler Ridge property and the brokerage account occurred without his knowledge and he did not intend to convey any interest to the wife.
The Trial Court expressly declined to reach the husband's claims of accident, mistake and fraud before rendering its ruling. Without findings of facts regarding the circumstances surrounded changes at issue, it is not clear that the conveyances were legitimate. Reversed and remanded.

Justice Thompson concurs and Justices Carley and Hunstein dissent. Justice Carley states that overruling the estoppel rule is a plurality opinion, and pursuant to Supreme Court Rule 58, the plurality opinion is not controlling authority and states that the bench and the bar should be apprised that *Curtis* and all of the other cases which apply estoppel under the circumstances of this case remain controlling authority for the present and that the holding in those cases should be followed as accurate statements of applicable law of Georgia.

RETIREMENT BENIFITS

***Plachy v. Plachy*, S07F0834 (October 29, 2007)**

The incorporated settlement agreement between the parties' equally divided the husband's Civil Service Retirement System's (CSRS) retirement benefits as equitable division of property. The Wife received fifty percent of the Husband's gross annuity benefits earned as of the date of the agreement, less the amount deducted for the cost of survivor annuity benefits. The Wife was also assigned fifty percent of the maximum possible survivor annuity. However, the Court Order Acceptable for Processing (COAP) provided that the payments were to continue to the Wife for the Husband's lifetime and to the Wife's estate should she pre-decease the Husband. Pursuant to Office of Personnel Management (OPM), if there are no express provisions giving directions regarding post mortem payments, the recipient spouse share of the benefits reverts to the federal employee spouse (Husband). The Husband appeals arguing the trial court committed reversible error by entering the COAP because the COAP's provision for payment of benefits to the Wife's estate should she pre-decease the husband was not a part of the incorporated settlement agreement and should not have been included in the COAP's provisions. The Supreme Court affirms.

While the settlement agreement did not expressly state that the benefits were to survive the death of the Wife, retirement benefits acquired during the marriage were marital property and the Wife received a share of the retirement benefits as equitable distribution of the marital property which had the effect of awarding title to the property. The inclusion in the COAP of the express statement required by federal law to give effect

to the Georgia law, was not the addition of a new substantive provision. Also, the equitably-divided retirement benefits that are to be distributed to the wife by means of monthly installments do not make the payments alimony payments that are terminated upon death of the recipient/former spouse.

SEPARATE PROPERTY/MOBILE HOME

Johnston v. Johnston, S07A0134 (February 26, 2007)

The parties were divorced in 2004, and in relevant part, the divorce decree provided that the marital home of the parties shall be appraised by a mutual agreeable appraiser, the value established thereby, minus any sums owed for the windows of said home, shall be the equity in said home and each shall be entitled to an equal portion thereof. The husband shall have 90 days from receipt of such appraisal to pay the wife her equity therein. In 2005, the wife filed a Motion for Contempt alleging that the husband had willfully failed and refused to pay one-half equity in the marital home. Husband answered stating that he did not owe any sum of money to the wife after the calculation. The appraisal showed a negative equity taking into account the value of the mobile home, less the balance owed for the windows, but did not include the value of the real property which was owned by the husband prior to the marriage. A hearing was conducted and the Order initially concluded that the revisions of the divorce decree were unclear and proceeded to find that the husband's separate non-marital property was the real property on which the mobile home sets and the only marital property was the actual mobile home. Supreme Court affirms.

The wife argues that the principal of res judicata precludes the re-litigation of her entitlement to the property previously awarded to her by the divorce degree. However, this dispute relates to what is meant by "the marital home" as the term used in a divorce decree. Therefore, there was no re-litigation of the previously resolved issue. Instead, there was only an attempt to determine what had been litigated previously by the provision of the decree awarding the wife one-half of the equity in the marital home. A Trial Court has no authority to modify the terms of a divorce decree in a contempt proceeding. However, a Trial Court does have the authority to interpret divorce decrees in deciding contempt issues placed before it. The inquiry is whether the clarification is reasonable or whether it is so contrary to the apparent intention of the original Order as to amount to a Modification. The Trial Court concluded that the marital home was in fact a mobile home and there was no evidence that the mobile home was permanently attached to the real property on which it was situated. Except for mobile homes permanently attached to realty, mobile homes are personal property and not real property. Thus, the marital home consists entirely of personal property. In absence of a transcript, it must be assumed that the Trial Court's findings are supported by sufficient competent evidence and a judgment is thus affirmed.

STATEMENT OF FACTS

Mathis v. Mathis, S07F0312 (March 26, 2007)

The parties were married for 4 years and had no children. There were several non-marital and marital assets co-mingled during the course of the marriage. During a bench trial, the Court entered Final Judgment and equitably divided the marital assets. The Final Judgment of the Court contains no findings of facts revealing the reasons behind the Court's conclusion. Supreme Court affirms.

The equitable division of property is an allocation to the parties of the assets acquired during the marriage based on the parties' respective equitable interest. In the instant case, there was conflicting evidence concerning the values of the parties' assets as well as the premarital and marital contributions of each spouse. Therefore, the Trial Court sitting as trier of fact in a bench trial, was required to determine whether and to what extent an asset is marital or not and then exercise its discretion in dividing the marital property equitably. The Final Judgment and Decree of Divorce entered in the case at bar contains the results of the process, but does not contain any findings of facts that clarify the rationality used by the Trial Court to reach its result. As stated in prior opinions, findings of fact are an aid to the Appellate Court on review and enable parties to complain on appeal from judgments rendered. However, Superior Court Judges are not required to making findings of fact in a non-Jury trial unless requested to do so by one of the parties prior to entry of the written judgment. Here, neither party asked the Trial Court to make findings of fact and therefore, this Court is unable to conclude that the Trial Court's equitable distribution of marital property was improper as a matter of law or as a matter of fact.

TEMPORARY PROTECTIVE ORDER/JURISDICTION

Loiten v. Loiten, A07A1092 (November 29. 2007)

The wife initiated divorce proceedings in Alabama, but filed a Petition for a Temporary Protective Order (TPO) in Clayton County stating jurisdiction was proper in Clayton County because the alleged acts committed by the husband happened in Clayton County. An *ex parte* protective order was entered on June 7, 2006, and on July 1, 2007. The husband was served in Alabama with a copy of the order as well as a June 30, 2006 order extending TPO Protective order pending service. The order directed him to appear in Clayton County on July 5, 2006. The husband retained counsel and appeared at the July 5th hearing and filed a motion to dismiss alleging insufficient notice and lack of service since he was not served with the petition setting out the allegations against him. The court asked the husband to waive service of the petition but he refused. The sheriff served the husband with a copy of the petition in the parking lot of the courthouse as he was leaving the hearing.

The husband filed another motion to dismiss arguing that service upon him in the parking lot was inadequate. At the July 7th hearing, the court announced that it would tentatively deny both motions to dismiss. The Trial Court proceeded with the hearing

and granted the wife a 1-year Protective Order. The husband appeals. The Court of Appeals reverses.

The original service by the Sheriff in this case was insufficient because the document served on the husband provided no notice of the allegations against him and the order extending the Protective Order was merely form documents with no explanation of the underlying allegations.

The husband also asserts that service of the petition in the court's parking lot was also insufficient. Generally, a witness in attendance upon trial of any case in court is privileged from arrest under any civil process and is exempt from the service of any writ or summons upon him while in the attendance upon such court or in going or returning there from. Over a period of time, the courts have recognized several exceptions. The exception to the rule does not apply to criminal defendants or non-residents who are in the state temporarily for some purpose other than to appear in court as a party or witness. The privilege rule was intended to insulate a party in attendance upon the trial of the case from service of process in a new action. In the instant case, service of petition in the courthouse parking lot was the initial service providing the husband with first notice of an action against him. Since this was a new action, the husband could not be served while he was attending the noticed hearing in this case or when he was going to or from those proceedings.

TPO/JURISDICTION

***Loiten v. Loiten,* A07A1092 (November 29, 2007)**

The Wife, now a Georgia Resident, initiated divorce proceedings in Alabama where the Husband resided, but the Wife filed her Petition for Protective Order in Clayton County Superior Court under the Georgia Family Violence Act asserting that jurisdiction was proper in this State because the Husband had committed acts at issue in Clayton County. The Trial entered a temporary Ex-Parte Order on June 7, 2006 and on July 1, 2006, the Father was served in Alabama with a copy of that Order as well as a June 30, 2006 Order extending temporary Protective Order pending service, which directed him to appear in the Clayton County Superior Court on July 25, 2006. The Father was not served a copy of the Wife's Petition seeking the Protective Order.

The Husband appeared at the July 5th hearing and counsel for Husband filed a Motion to Dismiss alleging insufficient notice and lack of service as he was not served with the Petition setting out the allegations against him. At the hearing, the Trial Court asked the Husband to waive service of the Petition, but he refused and the Judge indicated that he would be served in court, but the Husband's attorney objected to the service. In response to the Husband's attorney's objection, the Trial Court reset the hearing for July 7, 2006 to take the Motion to Dismiss under advisement. The Sheriff served the Husband with a copy of the Petition in the parking lot of the Courthouse as he

was leaving the hearing. The Father filed another Motion to Dismiss arguing that service on him in the parking lot was inadequate.

At the July 7th hearing, the Trial Court announced that it would tentatively deny both Motions and stated that the Court would reserve ruling on the matter until the Court had an opportunity to review it. The Trial Court continued with the hearing and entered a 1-year Protective Order. The Father filed a timely Application for Discretionary Appeal on September 6, 2006. Six (6) months later, on January 2, 2007, the Trial Court entered a written Order expressly denying the Husband's Petition to Dismiss. Court of Appeals reverses.

The Husband asserts on his appeal that the Trial Court erred in denying his Petition to Dismiss on the grounds that service was insufficient and the Court agrees. The original service by Sheriff in this case was insufficient as the documents served on the Husband provided no notice of the allegations against him. Both the Protective Order and the Order Extending the Protective Order merely formed documents with no explanation of the underlying allegations. The Court attempted to rectify this deficiency by directing the Husband to be served as he left the July 5th hearing. The Husband contends that the service in this parking lot was also sufficient. Georgia has a long standing rule that a suitor or a witness in attendance on a trial on any case in Court, is privileged from arrest under any civil process, and is exempt from service of any writ or summons upon him or them while in attendance on such Court or any going to or returning therefrom. Certain exceptions have been carved out to the general rule. This rule does not apply to criminal defendants or nonresidents who are in the State temporarily for some purpose other than to appear in Court as a party or a witness. The Courts have also indicated that the rule is intended to insulate a party in attendance upon the trial of a case from service of process in a new action. The above outlined exceptions have no application in this case where service issue was the initial service providing the Husband with further notice of an action against him. Therefore, the Husband cannot be served while he was attending the noticed hearings in this case or when he was going to and from those proceedings. Service upon the Husband in the parking lot was insufficient to confer jurisdiction over his person.

Even though the Husband personally appeared with counsel at the noticed hearings, he raised the issue of insufficiency of service at both hearings and proceeded with the merits only after his Motions were "tentatively denied". Therefore, his appearances were made subject to these Motions and it cannot be deemed to have waived the service issue for appeal.

Judgment reversed.

UCCJEA/CONTEMPT

***Daniels v. Barnes, et al.*, A07A1719 (March 4, 2008)**

During the marriage, the mother and the father had two children born as issue of the marriage. The parties were divorced in December, 2001 in the Eastern Judicial Circuit and awarded custody of the children to the mother and prohibited the father from having any contact with the children. The father had already entered a plea of nolo contendere to one count of child molestation of one of the two children and was already on probation for three counts of child molestation and six counts of public indecency with other victims. The order did not terminate the father's rights and also awarded grandparent visitation rights. In August, 2006, the grandparents filed a petition for modification of custody and for contempt in the Superior Court of Chatham County. In October, 2006, the mother was personally served with a copy of the summons and petition in Rhode Island. The mother did not file an answer but filed a motion to dismiss the contempt action on the grounds that the Court lacked personal jurisdiction over her.

In November, 2006 the hearing was held for which the mother did not appear and the Trial Court Judge denied the motion to dismiss basing its decision that Georgia was not an inconvenient forum. Among other things, the Court ordered a temporary modification of visitation which required the mother to fly the children to Savannah for their grandparent visitation and required her to pay the grandparents $2500.00 and their attorney's fees. On December, 2006 the grandparents filed another contempt stating the mother had failed to send the children to Savannah. The Trial Court held the mother in criminal contempt and ordered her to pay $500.00 for each of the ten visitation failures for a total of $5,000.00 and ordered her to be incarcerated for 20 days and for civil contempt for a total of 200 days incarceration and entered a warrant for her arrest. Affirmed in part, reversed in part.

The mother contends the lower Court lacked personal jurisdiction over her for contempt under UCCJEA. The Court retains exclusive continued jurisdiction of the case so long as either child or parent resides in the State or either the child, the parents or person acting as a parent has a connection with Georgia and substantial evidence regarding the child is still available here. Under the provisions of O.C.G.A. §19-9-61(c) personal jurisdiction of the parties for a modification of custody is not required. Here, the mother is not challenging the modification of visitation, but the court's ability to assert personal jurisdiction over her for contempt. Cases under the UCCJA states that a non-resident parent alleged to be in contempt of visitation provisions of a Georgia divorce judgment who was served outside of Georgia may divest the Court of its power to enforce the judgment by timely asserting a defense for lack of personal jurisdiction. The Court also held that Georgia Long Arm statute does not apply authority for obtaining personal jurisdiction for custody issues although it did for alimony, child support or provision of property. The Court held that personal jurisdiction for contempt upon the non-resident mother required personal service or waiver of personal service and that personal service outside of Georgia was invalid. Therefore, under the UCCJA, the Supreme Court has held that Georgia courts did not have personal jurisdiction of the non-resident mother in contempt actions pursuant to the Long Arm statute.

The grandparents argue that the UCCJEA has provisions not found in the UCCJA and that it has its own long arm provision. However, the UCCJEA and UCCJA specifically address continuing jurisdiction of custody issues. There was no specific provision in the UCCJEA regarding jurisdiction over contempt nor appeal of the statutory provisions covering divorce, custody, alimony and child support procedures. Therefore, the Trial Court lacked personal jurisdiction over the mother for contempt and personal service outside of Georgia was invalid under the circumstances.

VISITATION

Taylor v. Taylor S07F0358 (June 4, 2007)

The parties were married in 2001, and during the marriage, the husband adopted the wife's minor child who was born in 1996. The wife filed for divorce in April, 2005. The case was tried without a jury and in the final decree, the Court awarded the marital home, other property and sole custody of the child to the wife. The court denied the husband any visitation and awarded attorney's fees to the wife but did not award her any child support. The Supreme Court affirms.

With regards to visitation, the express policy of this state is to allow visitation rights to divorce parents who have demonstrated the ability to act in their minor children's best interests. Therefore, only under exceptional circumstances should the non-custodial parent be denied the right of access to his child. However, in the present case, the Trial Court made extensive findings regarding conduct of the husband related to his fitness as a parent. Among other things,
the husband and members of his family had a history of chronic use of illegal drugs sometimes in the presence of children; complete lack of parenting skills exemplified by having the children spend the night with him in an apartment he shared with an unmarried man who brought home intoxicated women who spent the night; abuse of religion to defame the wife and frighten the children; and recommendations of the child's therapist and Guardian Ad Litem that the child have no contact with the husband. Since the Trial Court's finding regarding the husband's fitness as a parent was supported by some evidence, the Supreme Court concludes that denial of visitation rights to the husband was not abuse of discretion. Other issues regarding contempt and attorney's fees are affirmed. Justice Sears and Hunstein dissent.

YEAR'S SUPPORT

Booker v. Booker A07A0110 (June 20, 2007)

The husband filed a Complaint for Divorce. The parties reached a settlement agreement in contemplation of its incorporation into a final decree of divorce. Under the agreement, the wife, among other things, released all of her right, title, and interest she

may have in the husband's estate. Prior to the entry of the final decree , the husband died and the wife petitioned the Probate Court for year's support. The Probate Court granted the petition without objection upon notice and publication service as required by law. The husband's mother appealed the ruling to the Superior Court. The Superior Court dismissed the mother's appeal finding she has no standing to object to the award of year's support since she has no property right claim or interest in or against the estate of her son. The Court of Appeals affirms.

The mother contends that the Probate Court's award of year's support to Ms. Brooker was foreclosed in light of the settlement agreement by which the wife had released all interest in the husband's estate. The Trial Court was correct in that the mother had no standing to make such a claim. An appeal from a decision in the Probate Court under O.C.G.A. §5-3-2 must be taken by the party Plaintiff or the party Defendant. The mother was not a party in the Probate Court despite publication of notice and service and, therefore, lacks standing to appeal its decision.