2008-2009 Case Law Update

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ADOPTION

***Owen, et al. v. Watts,* No. A08A2012 2009 WL 541514 (Ga. Ct. App. March 5, 2009)**

The child, M.F.L., lived with her mother and grandmother, Watts. In 2005, the child was removed from her mother's custody by the Department of Family and Children Services ("DFCS"), and the mother was later incarcerated on drug charges. The child was placed in foster care with the Owens. On October 2, 2006, the Owens filed a petition to adopt M.F.L., who was "thriving in their care," according to the Court Appointed Special Advocate. The next day, as a result of "issues" between the Owens and DFCS, the child was removed from the Owens' custody and returned to her grandmother, Watts. In November 2006, the trial court entered a temporary custody order in favor of the Owens, finding that DFCS acted improperly by removing M.F.L. from the Owens' custody and did not follow proper procedures. However, in December 2006, the court ordered upon emergency motion for ex parte restraining order that the Owens were to be restrained from retrieving M.F.L. from Watts. IN April and May 2007, the court heard the Guardian ad Litem's Motion for Reconsideration, finding that even though there was some evidence that M.F.L. may have been abused by her brother and uncle while in Watts' care, she had resided with Watts for 7 months and the pending litigation (adoption proceedings) could again cause her to be uprooted. Further, the court found that M.F.L. had done well in the care of both Owens and Watts.

Watts filed a petition to adopt M.F.L. along with valid surrenders of parental rights from both M.F.L.'s legal mother and father in favor of Watts. The Owens intervened. The only evidence presented at trial was Watts' own testimony and two documents from DFCS records. The trial court ruled that granting Watts' adoption petition was in the best interest of the child, based upon "consideration of the physical, mental, emotional, and moral condition and needs of the minor child, especially considering the need for a secure and stable home with a biological relative."

In an adoption proceeding, the court considers whether: (1) each living parent of the child has surrendered or had terminated all his rights to the child in the manner provided by law; (2) the adopting parent is capable of assuming responsibility for the care, supervision, training and education of the child; (3) the child is suitable for adoption in a private family home; and (4) the adoption requested is for the best interest of the child. The trial court has broad discretion to determine whether an adoption is in the best interests of the child, and the decision will be affirmed if there is any evidence in support of it. The Court of Appeals reversed the trial court's approval of Watts' adoption petition because there was no evidence in the record that supported a finding that the adoption was in the child's best interest. The only evidence submitted by Watts was her testimony that she loved the child, took her to doctor visits, and that DFCS had indicated that her home was sufficient to pass a home evaluation. The best interest standard requires more, including the physical, mental, emotional and moral condition and needs of the child. In absence of such evidence, the trial court erred in granting Watt's adoption petition.

In the Interest of K.W. et al., children, 291 Ga. App. 623 (2008)

The Mother executed a surrender of parental rights for children placed with foster parents for adoption. The trial court thereafter granted the Father's request to legitimate and placed the children with the Father. Mother then filed a motion to set aside the order and an extraordinary motion for new trial alleging newly discovered evidence. Specifically, she stated that her surrenders were based upon the fraudulent misrepresentation of a DFCS case worker. Following a hearing, the trial court granted the Mother's motion and restored the Mother's parental rights to the children. Father appealed, alleging that the trial court erred because the mother presented insufficient evidence and the trial court lacked personal and subject matter jurisdiction over the matter. The Father further alleged that the mother lacked standing to challenge the trial court's original order and that the surrender of her parental rights was res judicata. Finally, Father alleged that the Mother's appeal of the order granting the Father custody was untimely filed.

Affirming the trial court's decision, the the Court asserted that there was sufficient evidence in the record to show that the mother had been unduly influenced and that the DFCS case worker had an ongoing personal relationship with the foster parents and the family of the foster parents. The Court found that the trial court had exclusive personal jurisdiction over the matter as the Mother still lived in Georgia and the trial court had exclusive jurisdiction over matters of deprivation. The Court noted that the mother had standing in this action because she was a party to the proceeding resulting in voluntary termination of her rights. Finally, the Court found that "res judicata and estoppel by judgment will not bar …a motion to set aside such [a] judgment based upon newly discovered evidence"

***Sastre, et al. v. McDaniel, et. al.*, 293 Ga. App. 671, 667 S.E.2d 896 (Ga. Ct. App. 2008)**

The adopted child's birth was on March 1, 2006. The Sastres were recognized by her biological parents as the child's godparents. The biological Mother coped with substance abuse problems, and in January of 2007, the Juvenile Court issued a written Order that the child was deprived and was removed from the biological Mother and Father and placed in DFCS custody. In August of 2007, the child remained in the custody of the Department, and the biological parents executed a separate surrender of their parental rights in favor of the Sastres. The Sastres filed a petition in the Superior Court on September 17, 2007, and DFCS filed an objection to the petition stating that they were trying to thwart any court Order terminating the biological parents' parental rights. On November 5, 2007, DFCS filed a petition for the termination of parental rights in the Juvenile Court and the Sastres moved to intervene in the termination proceeding. In addition, the child's foster parents (potential adoptive parents) also filed an answer and defenses to the Motion to intervene and to dismiss in the Superior Court petition. The Superior Court dismissed the Sastres' complaint pursuant to O.C.G.A. §19-8-3 (a)(3) finding that the Sastres were nonresidents of Georgia and all other issues pending in connection with the adoption action were moot.

The Sastres appealed and the Court of Appeals reversed. The adoption statute pursuant to O.C.G.A. §19-8-1 et seq., fails to define the words "bona fide residents", and the Sastres argue that the word "residents" should be defined as it is in O.C.G.A. §19-5-2. The Sastres filed a verified pleading that they had been residents of the State of Georgia since 2002 and had moved to Tennessee in November 2007 to permit Husband to attended seminary education, but planned

to return to Georgia after he had completed his study. The court concluded that the term "bona fide resident" for the purposes of determining eligibility to adopt has the same definition or residency requirement as divorce jurisdiction, which requires a showing of the status as a Georgia domiciliary for at least 6 months immediately before the filing for petition for adoption. A domicile refers to a single fixed place of abode with the intention of remaining there indefinitely or a single fixed place of abode where a person intends to return, even though that person may in fact, be residing elsewhere.

ALIMONY

Rivera v. Rivera, 283 Ga. 547, 661 S.E.2d 541 (Ga. 2008)

The parties were divorced in 2006 and the final divorce decree required Husband to pay Wife the sum of $500.00 per month as alimony for 60 months for a total payment of $30,000.00. This amount was based upon the jury's verdict, which left blank the portion of the verdict dealing with lump-sum and in-kind alimony. It awarded Wife periodic alimony payments by circling the word "month" and indicating an amount of $500.00 for a payment period 60 months. Husband filed a Motion for Modification of Alimony. The trial court dismissed the Motion stating that the alimony sought to be modified was lump sum, and lump sum alimony is not modifiable. Husband appeals and the Supreme Court affirms.

Husband relies on the jury's identification of the award as periodic alimony. However, it is clear that reviewing awards of the divorce judgment, the Court will ascertain the nature of the award as a matter of law and on the basis of substance rather than on labels. To determine if an award of alimony is periodic or lump sum, if the obligation states the exact number and the amount of payments without other limitations, conditions or statements of intent, then it is considered lump sum alimony and non- modifiable. Here, the jury's award has no limitation or contingency such as remarriage, death, or upon the provisions for Husband to pay Wife. Therefore, the Court was correct in dismissing the Motion for Modification.

***Vereen v. Vereen*, 284 Ga. 755, 670 S.E.2d 402 (Ga. 2008)**

At divorce trial, the evidence showed that Wife did not commit adultery, that Husband paid mortgages and other bills, and that Husband earned at least $65,000 per year. Trial court awarded child support, alimony (in the form of husband paying mortgages), and attorney's fees. Supreme Court affirmed. Evidence supported Trial court's conclusion that Husband's age and health condition did not affect his ability to earn. Trial court's failure to enforce temporary Order for psychological evaluation where there was no Motion for contempt pending at the time of trial was not in error. Further, it was proper to Order Husband to pay $27,000 tax debt where Husband and Wife filed separate tax returns and a finding that Husband incurred the tax debt on his own.

ATTORNEY'S FEES

Fort v. Rucker-Fort, **No. A09A0679, 2009 WL 765055 (Ga. Ct. App. March 25, 2009).**

Husband and Wife were divorced, and the Final Decree, which incorporated the parties' settlement agreement, obligated Husband to pay alimony, to purchase a house for Wife, and to pay $1,000 for Wife's attorneys' fees. Husband filed for bankruptcy 2 years later, and the bankruptcy court issued an injunction prohibiting creditors for pursuing contempt actions against Husband in order to collect their debts. Husband eventually failed to pay his support obligations under the divorce decree. Wife instituted a contempt action and the court found Husband in contempt for failure to uphold his obligations under the divorce decree. Due to Sheriff's inaction, Husband was not arrested, and Wife filed a second contempt action. Husband also petitioned the bankruptcy court to hold Wife in contempt for failure to abide by its injunction. Prior to any adjudication on either of the contempt claims, the parties' entered into an accord and satisfaction, which settled all remaining issues. Husband agreed to pay Wife two installments of $60,000 in exchange for Wife's assuming all payments related to the former marital home.

One month later, Wife learned that the IRS had filed a tax lien on the former marital home to collect on taxes owed by Husband. Wife moved to set aside the order that approved the accord and satisfaction, asking the court to require Husband to pay the tax lien and her attorneys' fees. The parties reached an agreement, and Wife amended her motion to request that Husband be ordered to pay her attorneys fees which she incurred in resolving the tax lien issue. The court granted her motion and ordered Husband to pay $10,000 in attorneys' fees for Wife. Even though the accord and satisfaction superseded the divorce decree, the court exercised its powers in equity to enforce the attorneys' fee provision in the divorce decree. Husband appealed.

In reversing the award, the Court of Appeals noted that an award of attorney fees is not available unless supported by statute or contract. In absence of either, the court of equity cannot under ordinary circumstances, in an adversary proceeding, allow attorney fees to the prevailing party. The generally recognized exception to this rule is that a court of equity may award attorneys fees to a party who, at his own expense, maintains a successful suit for the protection or increase of common property or a common fund. Here, the trial court had no statutory or contractual basis to award fees, since the divorce decree had been superseded.

***Ruth v. Herrmann,* 291 Ga. App. 399, 662 S.E.2d 726 (Ga. Ct. App. 2008)**

Wife filed a divorce action in Clayton County against her Husband, who was represented by Scott Herrmann. In March of 2006, Mr. Herrmann served a Notice of Withdrawal from Representation during the divorce action because Husband failed to pay his attorney's fees and to cooperate in the defense of his case. Herrmann then filed an attorney's lien against the marital property owned by both parties and served notice of the filing of this lien on Wife in March of 2006. In April, 2006, the Court signed the Order granting Herrmann's request to withdraw as counsel for Husband in the divorce. In June of 2006, Ruth filed an emergency Motion to remove the lien, noting therein that the marital residence had been awarded to her in the final divorce decree. In August, 2006, the trial court issued an Order finding the lien was properly filed and that Wife had received notice of the lien, thus denying Wife's Motion. Wife did not appeal the ruling.

In September, 2006, Wife filed the underlying action in Dekalb County Superior Court seeking an Order removing the attorney's lien as well as punitive damages and attorney's fees. Herrmann filed an answer and counterclaim for attorney's fees in November of 2006. The case was transferred to Clayton County Superior Court and Herrmann moved for Summary Judgment arguing that this claim to remove attorney's lien was precluded by the doctrine of res judicata and/or collateral estoppel. Wife also responded and file a cross Motion for summary judgment arguing that his claim was for money he had received. The case was set for oral arguments, but Wife did not appear at the hearing. The trial court denied Wife's Motion and granted Herrmann's Motion finding that the August, 2006 Order was a final judgment of this Court and could not be re-litigated by Wife under the legal principles of res judicata and/or collateral estoppel. Wife appealed and Court of Appeals affirms.

Wife argues that the trial court erred in applying the doctrines of res judicata and collateral estoppel because there was no identity of parties or causes of action between Wife and Herrmann. However, pursuant to O.C.G.A. §9-12-40, a judgment of the court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put at issue or which under rules of law might have been put at issue.

Collateral estoppel, or issue preclusion, precludes re-litigation of an issue that was previously litigated and was decided on the merits in another action between the same parties or their privies. The propriety of Herrmann's attorney's lien was litigated and decided in the divorce action. Wife filed an Emergency Motion to Remove the Lien and a Brief in Support of her Motion, in which a hearing was held and Wife's Motion to Remove the Lien was denied. Wife did not appeal that Order or move the Court to reconsider its decision. Instead, she filed the instant action.

In making its decision, the Court opined, “It is a well established principle that an attorney has the same right over an action, judgment or decree as his client has or might have had for the amount due the attorney. Therefore, Herrmann had the same rights as Husband, [whom he represented].”

Wife also argued that the trial court erroneously ruled by implication that Herrmann's lien was valid. Pursuant to O.C.G.A. §15-19-14(b), his lien was valid. The statute provides that “upon any action, judgment, or decree for money, attorneys at law shall have a lien superior to all liens except tax liens; and no person shall be at liberty to satisfy such action, judgment or decree until the lien or claim of the attorney for fees is fully satisfied.” At the time of the settlement between Wife and Husband, an attorney's lien on the property co-owned by the Ruths had been filed and Wife had received notice thereof. Therefore, the trial court's implicit ruling that the lien was valid is correct.

CHILD SUPPORT

Whitehead vs. Peavy 291 Ga. App. 391 May 2, 2008

The Father appealed trial court’s decision denying his request to be reimbursed for overpayments in child support made to the Mother by the Social Security Administration. In the

action, Husband's original amount of child support was modified upward. Until the modification was finalized by the Social Security system, the Father was to pay the increase directly to the Mother. However, once the modification was processed through social security the Father was entitled to any reimbursements for any overpayment made directly to Mother. The order required that any reimbursement to the Father was to be made by either the Wife or by the Social Security Administration

Reversing the trial Court, the Court held that the order requiring repayment was consented to by all parties, had not be modified or vacated, or found unenforceable. Therefore the Husband was entitled to reimbursement.

Hamlin v. Ramey, 291 Ga. App. 222 (2008)

Father and mother were unmarried. Father filed a petition to legitimate the minor child. A consent order was entered legitimating the minor child. This same order contained provisions addressing custody and other visitation related matters. Subsequent to this order, the trial court entered an order determining support for the minor child, including findings as required pursuant to O.C.G.A § 19-6-15. Father appealed, alleging that the trial court failed to grant him a deviation from the presumptive amount based on his parenting time. He also alleged that the trial court failed to explain why he was not entitled to such deviation.

Affirming the lower court , the Court held that the Father had failed to prove that his proportional amount of parenting time constituted a special circumstance making the presumptive amount of child support excessive. The Court further held that the Father failed to prove that the child's best interest would be served by deviation from the presumptive amount.

The Court further noted on appeal that it would review any findings based on disputed facts or witness credibility under the clearly erroneous standard and review the decision to deviate or not to deviate from the presumptive amount of child support under the abuse of discretion standard.

Finally, the Court found that if no deviation applies " and the court or jury decides not to deviate from the presumptive amount of child support, then the order need not explain how the court or jury reached that decision", and "OCGA §19-6-15 does not require the court to issue findings to explain its reasoning in reaching that decision."

***Appling v. Tatum*, 295 Ga. App. 78, 670 S.E.2d 795 (Ga. Ct. App. 2008)**

In 2006, Father filed a Petition for Legitimation. Mother filed an Answer and a Counterclaim to establish custody, visitation, and child support. Father filed a Motion for Continuance which was denied, and a bench trial was held without Father's presence. The court awarded joint legal custody to the parents, child support in the amount of $2,200.00 per month to Mother, and visitation rights to Father. In addition, the trial court awarded Mother $10,000 in attorney's fees pursuant to O.C.G.A. §19-6-2. Among other things, Father appeals the denial of his Motion for Continuance, Child Support, and Attorney's Fees. The Court of Appeals affirms in part and reverses in part.

Prior to the hearing, Father filed a Motion for Continuance, which included a letter from a physician stating that he had extensive surgery on August 15, 2007, and could not be available for trial until November 6, 2007. Father's attorney appeared and said it was necessary for Father to appear to explain his income and how it might be affected by the outcome of surgery. In support, counsel for Father argued and relied on O.C.G.A. §9-10-154, that if either party is prevented from attending the trial of the case, then counsel for the absent party will state that he cannot go safely to trial without the presence of the absent party and the case shall be continued, provided that the continuance of the party has not been exhausted. In this case, there have been 5 continuances that were filed on behalf of Father. In addition, the court noted that the hearing date had been set in consideration of Father's surgery and there had been several continuances due to his illness. Therefore, the trial court did not abuse its discretion in denying the continuance.

Father argues that the trial court was in error in including his K-1 schedule (or pass through partnership income) in its calculation of child support. Testimony by Father's accounted stated that Father's original 2005 tax return showing the K-1 income was at $900,000. The amended 2005 tax return showed K-1 income of $400,000. Even Father's accountant conceded that the K-1 income is treated as ordinary income by the IRS. Furthermore, O.C.G.A. §19-6-5 (f) (2) outlines those items that are excluded from gross income, and income reflected on a K-1 is not included on that list. Partnerships are not separately taxable entities, and partnerships incomes and expenses pass through to the individual partners. Therefore, the trial court was correct in including Father's K-1 income in the calculation of child support.

Father also argues that the Court did not take into consideration his present diminished earning capacity from the illness while establishing the child support obligation. There was no documentation evidence other than the Domestic Relations Financial Affidavit and 2005 tax return. There was no oral testimony or any other evidence that would show Father's present earning capacity. However, there was evidence that Father built a $1,000,000 home on Lake Lanier in 2007 and there was no mortgage owed on the house, and that his February 27, 2007, Domestic Relations Financial Affidavit showed monthly income of $94,308.

Husband also argues that the trial court erred in awarding attorney's fees without any findings of fact as to the parties' present financial status and without a hearing. However, the award is reversed on different reasons. The trial court premised the award of attorney's fees upon O.C.G.A. §19-6-2, which governs the grant and enforcement of attorney's fees in alimony and divorce cases. Here, this is a case regarding legitimation. Therefore, the award of attorney's fees is not applicable and is reversed.

***Garcia v. Garcia,* 284 Ga. 152, 663 S.E.2d 709 (Ga. 2008)**

The parties were divorced and the Court ordered Husband to make weekly child support payments for support of Wife's child, who was not the biological or adopted child of Husband. Husband appeals and the Supreme Court reverses.

A man who is the biological father of a child has a statutory obligation to pay and provide support for the child. A person, who is not the biological father or the adoptive father of a child,

can be obligated to make child support payments if that person executes a written agreement promising to provide support for a child and therefore is bound by the terms of the Agreement. Here, the trial court applied the doctrine of promissory estoppel as set forth in O.C.G.A. §13-3-44(a). It was undisputed that Husband is not the biological father or adoptive father, nor has he executed a written contract to support the child. Wife knew the identity of the biological father and that he was living in Carroll County.

Wife argues that Husband applied for an amended birth certificate to add his name as "Father" because he wanted the three of them to be a family, and he promised that he would take care of the child. Wife makes reference to the holding in Wright v. Newman to support her claim that the trial court properly applied the doctrine of promissory estoppel in establishing a child support obligation. However, this case differs significantly from Wright in that Wife and her child did not rely upon Husband's promise to their detriment.

In Wright, the trial court found the child's mother relied upon the husband's promise of support and had foregone a source of financial support for the child by refraining from identifying and seeking support from the child's biological father. This Court has upheld the application of promissory estoppel in other cases, such as in Mooney v. Mooney (where wife relied on husband's promise to financially support the grandchild when wife accepted custody of the grandchild). In the instant case, Wife identified the child's biological Father, and the reason why she never sought support from the biological Father was that he did not want anything to do with the child. Therefore, there is no evidence that Wife relied on Husband's promise to her detriment.

***Hampton v. Nesmith*, 294 Ga. App. 514, 669 S.E.2d 489 (Ga. Ct. App. 2008)**

Father sought downward modification of a prior child support order, and Mother counterclaimed for contempt and upward modification of child support. After a hearing, Trial court found Father in contempt and ordered him to pay the arrearage over time. In addition, the trial court found Father's income had increased and ordered an upward modification of child support, but delayed the increased support amount by 15 months to give Father an opportunity to pay off arrearage.

Court of Appeals affirmed in part and vacated in part, finding no authority under O.C.G.A. § 19-6-15 for a complete delay of the increased payments. In modification actions, OCGA § 19-6-15 (k)(3)(B) provides for a *phase in* of the new child support award over a period of up to two years. The phase-in should be evenly distributed over that period, with at least an initial immediate adjustment of not less that 25 percent of the difference [between the original and modified amount of support] and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period. In this case, an initial immediate adjustment was not made. Thus, the Court of Appeals vacated that part of the judgment and remanded.

***Johnson v. Johnson*, 284 Ga. 366, 667 S.E.2d 350 (Ga. 2008)**

The Final Judgment and Decree of Divorce was entered in November of 2007, which awarded Wife primary custody of the two minor children. Child support was set at $935.31 per

month, with an extra $100 per month to be applied towards the arrearage pursuant to the Temporary Order. The child support calculation did not include the children's private school tuition or any findings of fact why such was not included. Wife appeals and the Supreme Court affirms.

Extraordinary educational expenses may be factored in as a deviation to the presumptive amount of child support but are not required to be factored into the child support calculation. A Trial court is only required to make findings of fact if a deviation is applied that diverges from the presumptive amount of child support. Here, the trial court adhered to the child support obligation table and enforced the presumptive amount of child support. Therefore, the Court is not required to make any findings or explanations in its decision to forego applying the children's private school tuition to the child support calculation.

***Sebby v. Costco,* 290 Ga. App. 61, 658 S.E.2d 830 (Ga. Ct. App. 2008)**

After the parties' hearing, Father was awarded visitation rights and a child support obligation was established. Among other things, Father appeals the trial court's failure to apply the revised child support guidelines provided in O.C.G.A. §19-6-15, et seq. It appears the trial court's Order was issued on 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 Father did not attach a transcript to the appeal, it is presumed the trial court's judgment is correct. Judgment affirmed.

CONTEMPT

***Brochin v. Brochin,* 294 Ga. App. 406, 669 S.E.2d 203 (Ga. Ct. App. 2008)**

A divorce decree was entered in 2002 in the Superior Court of Fulton County which set out the custody arrangement for the parties' children. Subsequently, Mother moved to Dekalb County and Father filed an action in the Superior Court of Dekalb County to modify child custody provisions. In 2005, the Dekalb court issued an Order in Father's action, granting Father sole physical and legal custody of the children, set forth Mother's visitation rights, and prohibited Mother from personally, or through others, encouraging the minor children to contact legal counsel for the purpose of custody modification or facilitating contact between the children and counsel. Even though one of the children at the time was 14 years of age and wished to live with Mother, the Court found that Mother was not a fit and proper person for the purposes of any election by the older child to live with her.

During Mother's visitation with the children in early July of 2007, she filed a custody modification action in the Superior Court of Fulton County, the county of Father's residence. This time, both children were 14 years of age and attached affidavits of election to Mother's petition. Mother did not return the children to Father at the end of her summer visitation. Later in July of 2007, Father filed a contempt petition in Dekalb County that Mother had violated the court's ruling. In Father's petition for contempt, he also asked that Mother's visitation rights

with the children be modified as a result of the contempt. Mother filed a limited appearance in Dekalb County arguing that jurisdiction should be in Fulton County, therefore, Father's later filed contempt action was barred.

At the hearing, Mother admitted to taking the children to an attorney in June of 2007 to sign the election affidavits and also admitted not returning the children as scheduled at the end of the summer visitation period. Mother moved the court to stay the contempt hearing until a resolution in the Fulton County case was reached, but Dekalb County denied the Motion, and found Mother in willful contempt for violating the 2005 Order. The court suspended her overnight visitation rights with the children for 6 months, ordered her to serve 72 hours in jail, and to pay Father's attorney's fees in connection with the contempt proceeding. Mother appealed, and the Court of Appeals affirmed.

With regards to attorney's fees, where a finding of contempt is authorized, an award of attorney's fees pursuant to O.C.G.A. §19-6-2 is also authorized. With regards to jurisdiction, a contempt action generally must be filed in the allegedly offended court. Mother argues that Father could have filed a contempt petition in the form of a counterclaim to Mother's pending modification action. However, Father could not have filed a petition for contempt as a counterclaim to the Fulton modification action because he included in his prayer a modification of visitation rights premises upon Mother's alleged contempt. Therefore, O.C.G.A. §19-9-23 (b) precludes a party from bringing a request for modification of visitation rights as a counterclaim to a modification action. Therefore, separate action had to be filed in Dekalb County, where Mother resided.

Mother also contends that the provisions barring her from facilitating contact between her children and legal counsel was unenforceable on the grounds that it effectively denied the children their right to access to the courts to seek a change in their custodial parent under the predecessor to O.C.G.A. §19-9-3 (a)(5). However, Mother did not raise this challenge below and thus the trial court did not rule on it, and therefore Mother waived this argument on appeal.

***Carlson v. Carlson*, 284 Ga. 143, 663 S.E.2d 673 (Ga. 2008)**

The parties were divorced in 2005 and Husband was awarded primary custody of two (2) minor children. Wife was awarded supervised visitation, and the parties would equally divide any cost associated with the supervised visits. Husband filed several contempt Motions and on the third Motion, alleged that Wife failed to commence and continue competent mental health therapy. The trial court found Wife in willful contempt, ordered her to immediately commence mental health therapy, and held Wife now responsible for 100% of the cost associated with the supervised visitation. Wife appeals, stating the Court impermissibly modified the Final Judgment and Decree. Supreme Court affirms.

Wife asserts on appeal that Trial court did not have the power to increase the amount of visitation costs that she was required to pay. It has been a long-held rule that the trial court cannot modify the terms of a divorce in a contempt proceeding. However, exceptions have been made regarding visitation rights and the Court is expressly authorized to modify visitation rights even on its own Motion during a contempt proceeding. Here, the costs were directly associated

with Wife's visitation privileges. Therefore, the Court is empowered to increase the amount of visitation costs to be paid by Wife in the contempt proceeding.

***Hall v. Doyle-Hall,* 284 Ga. 325, 667 S.E.2d 81 (Ga. 2008)**

Wife filed a Motion for Contempt for the Husband's failure to pay funds awarded as alimony, child support and property division. The Superior Court found Husband in willful contempt and ordered him to purge himself of the contempt by paying, among other things, $18,383.81 of arrearage. In addition, the contempt order also provided that in the event Husband failed to pay the arrearage as specified, upon affidavit of noncompliance executed by counsel for Wife, an Order would issue directing that Husband be incarcerated until such time as he purges himself of contempt by paying the arrearage. Husband appeals and the Supreme Court reverses.

The fact that an incarceration order for failing to pay support arrearages is self-executing is not, in and of itself, problematic. Therefore, ordering incarceration at a later time unless payment of a support arrearage has been made is not violative of due process. In *Moccia*, a similar type of contempt order was issued that allowed the arrest order to take effect upon affidavit of Mother. It was held in *Moccia* that this was erroneous because it placed the keys to the jail in Mother's hands and there was no mechanism providing whereby an officer of the court would possess objective information as to whether the order at issue had been complied with. In other words, the incarceration of the contemptuous party being dependent upon merely the averment of an interested party is erroneous.

In the present case, incarceration does not depend upon the averment of the Wife as to noncompliance, but rather upon the affidavit executed by her attorney. However, the Wife's attorney is an interested party. Therefore, to be a valid arrest order, the affidavit containing such information must come from a neutral and disinterested court official or other officer based upon objective information. In as much as the present provision fails to provide a mechanism by which such an officer of the court would provide an affidavit regarding the Husband's noncompliance with the directives at issue, it must be stricken from the judgment.

***Shirley v. Ashire,* 288 Ga. App. 819, 655 S.E.2d 694 (Ga. Ct. App. 2007)**

Father and Mother were divorced in 2003. The parties were given joint legal custody of the two (2) minor children with Mother being awarded primary physical custody of both children. Under the divorce decree, visitation generally began at 6:00 p.m. 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 November 16, 2006, providing that visitation would begin at 6:00 a.m. on the designated days.

In February, 2007, 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 nunc 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 Father. The Court Ordered Father to pay Mother's travel expenses for December, 2006, visitation as well as her attorney's fees. Father appeals and the Court of Appeals reverses.

The 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 erred in holding Father in contempt of a verbal modification Order which had not been reduced to writing, signed by the Judge and filed with the Clerk.

***Walker v. Conway*, 673 S.E.2d 231 (Ga. 2009)**

The Georgia Department of Human Resources filed a petition for contempt against Walker for failure to pay child support. The trial court found Walker in willful contempt for failure to pay $84, 175 in child support, and ordered him incarcerated until he purged himself of his contempt by paying $30,000. Walker did not appeal the contempt order, but filed a petition for writ of habeas corpus. After an evidentiary hearing, the habeas court denied the petition. Walker appealed the denial. Since he did not appeal the initial contempt order, the only matters of state law that may be reached in this action are (1) whether the initial contempt order is void, e.g. for lack of jurisdiction; or (2) whether his current or continued restraint is unlawful. Walker failed to raise either issue in his brief, nor to cite any errors, argument, citation to authority or specific request for relief. A claim that he is unable to pay the amount required by the contempt order is not a basis for reversing the habeas ruling. Since Walker failed to show that the initial contempt order is void or that the restraint is unlawful, the Georgia Court of Appeals affirmed the habeas court's order denying relief.

CUSTODY

***In re. B.H., a child*, 671 S.E.2d 303 (Ga. Ct. App. 2008)**

The Union County Department of Family and Children Services ("DFCS") filed a deprivation petition seeking temporary custody of the nine-year-old child, B.H, who was the adopted child of the parents. At the hearing, M.G., a foster child who had resided with the parents and B.H., testified that she had witnessed the father abuse B.H. and had been abused herself by the father. M.G. testified at the hearing, but the father was removed from the courtroom during her testimony and allowed to watch her testimony on a television. The trial court found that B.H. was deprived because she was abused by her father, that the mother failed to protect B.H., and that the mother attempted to "coach" the child's answers to the forensic interviewer by telling her to answer "no" to any questions involving "touching of private parts" and that "daddy will bring her a kitten." The parents appealed on multiple grounds.

First, the parents claim that the trial court erred in excluding testimony of the Court Appointed Special Advocate ("CASA"), which could have been used to impeach the testimony of M.G. The Court of Appeals found that such a role is contradictory to the purpose of the CASA, and that disclosures between a child and a CASA are confidential and should not be revealed except by order of the court. Second, the parents claim that the trial court erred in

denying their discovery request, which they submitted in the form of interrogatory asking for a statement as to how the mother had spoken to the child in an attempt to coach the child. Juvenile Court Rule 7.2 provides that a party may request answers to written interrogatories from DFCS, and so to the extent that the demand was an interrogatory, the request was not improper. However, the trial court denied the request "additionally" in light of its having required all existing witness statements be provided to the parents. Third, the parents claim the trial court erred in requiring the father to view M.G.'s testimony from a television monitor in a separate room. The right to confrontation extends to termination cases and deprivation cases. However, a juvenile court judge may take steps to accommodate a child's fear of testifying, which may include removing a party from the room, upon a finding that the child would otherwise be substantially traumatized by the event. Since a psychologist testified that the court requiring M.G. to testify in front of the father would cause her high anxiety and an inability to communicate, the trial court did not err in finding that M.G. needed protection from testifying in front of the father. The father's rights were further protected because M.G. testified in front of the finder of fact and was subject to cross-examination.

Finally, the parents contend that the trial court erred in allowing hearsay testimony over their objections. The forensic interviewers testified regarding statements made by B.H. and statements made by M.G. reporting B.H.'s statements in the past, specifically what the mother had told B.H. before her forensic interviews. The Child Hearsay Statute applies to "a statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another." In *Gibby v. State,* the court held that testimony by witnesses as to statements of a child regarding "what the mother said to the child was not hearsay (beyond permissible hearsay under the Child Hearsay Statute) because it was not offered to show the truth of the matters asserted. The parents argue that the testimony as to B.H.'s statements were not admissible under the Child Hearsay Statute because the B.H., who did not testify at trial, was not available to testify. Availability to testify for purposes of the Child Hearsay Statute means competency to testify under O.C.G.A. § 24-9-5. However, §24-9-5 contemplates that any child is competent to testify in deprivation cases, so B.H. was "available to testify" as long as she was able to physically appear at trial. Since at the time of trial B.H. had not yet been removed from mother's custody, the child was physically available to the parents to testify and was available for the purposes of the Child Hearsay Statute. The parents also argue that B.H.'s statements to the interviewer were not admissible because they did not describe an act of abuse. Even though the child's statements did not mention an act of abuse, the statements are taken in context to show the circumstances under which the child failed to make any disclosure in light of the allegations of sexual abuse and that her mother told her to say "no" to any question involving "touching of private parts." The trial court did not err in admitting these statements.

***Galtieri v. O'Dell*, 673 S.E.2d 300 (Ga. Ct. App. 2009)**

Mother and Father (Galtieri) had a child out of wedlock. The child resided with Mother and the child's maternal grandmother (O'Dell), and when Mother moved to New York to seek treatment for alcohol abuse, she relinquished custody of the child to O'Dell. Galtieri lived in Kentucky and had never legitimated the child, but occasionally provided child support. When he learned of Mother's seeking rehabilitation, Galtiere petitioned the court for legitimation and then sought custody of the child. By consent of the parties, O'Dell intervened in the custody case.

The trial court granted custody to O'Dell because "in the personal experience of the court, it would be detrimental to remove the child from Georgia." The court made no other findings as to Galtieri's fitness as a parent.

The Court of Appeals reversed, finding that custody disputes between biological parents and third parties are governing under O.C.G.A. § 19-7-1(b.1), which presents a two-step process for a third party to gain custody over a biological parent. Since the statute creates presumptions as to the fitness of the biological parent and that the best interests of the child are served by the biological parent having custody, the third party must show by clear and convincing evidence that parental custody would harm the child. This harm must be either "physical harm or significant long-term emotional harm, not merely social or economic disadvantages." Once this promotion is overcome, the third-party relative must prove that an award of custody to him or her will best promote the child's welfare, health and happiness. Since the trial court did not make any findings, nor did the record contain a transcript of the hearing, and the trial court's order did not make any factual findings that Galtieri was unfit or that the child would suffer harm in her father's custody, the custody award to O'Dell must be reversed.

***King v. King,* 284 Ga. 364, 667 S.E.2d 30 (Ga. 2008)**

Trial Court awarded physical custody to Husband in divorce proceeding even though Wife accused him of sexually molesting the child. This decision was made after hearing testimony from not only the parties, various family members and neighbors but also from the Guardian ad Litem (who recommended Mother be awarded custody with supervised visitation to Husband), a school official, the child's therapist, a forensic interviewer, an expert in criminal psychology, and a licensed psychologist appointed by the trial court to provide a psychological evaluation of Wife. The trial judge viewed two videotaped forensic interviews of the child conducted in response to the allegations of sexual abuse and heard testimony from the child herself. The trial court found Wife's claim of abuse was unfounded and that her actions negatively affected the child's relationship with the Husband. Wife's claim that the change in custody was made merely to punish her for failing to comply with the holiday visitation order was not supported by the record. Trial court's order expressly stated it was relying on best interest standard. Supreme Court affirmed.

***Rembert v. Rembert,* No. S08F1582, 2009 WL 735585 (Ga. March 23, 2009)**

Husband and Wife were divorced, and the trial court awarded the parties joint legal custody, with Husband having primary physical custody of the parties' two children. In the final judgment and decree, the trial court awarded Husband "final decision-making authority on all matters involving the children, including the school they attend, membership in organizations, and other extracurricular activities." Wife moved for new trial, and the trial court amended its order, specifying that the parties were to participate equally in making major decisions pursuant to O.C.G.A. § 19-9-6(2). The court further stated that Husband was not allowed to exercise his authority to make final decisions on major issues without discussing them with Wife in good faith.

In her appeal, Wife argues that the court purported to award joint legal custody, but that is not what she received in actuality since "full" decision-making authority was awarded to husband. The Court of Appeals corrected her, stating that Husband was awarded "final" decision-making authority, not "full." Furthermore, O.C.G.A. § 19-9-6(2) defines "joint legal custody" as "both parents hav[ing] equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training." However, the same provision allows the judge to designate one parent to have sole power to make certain decisions while both parents retain equal rights for other decisions, and this language gives the trial court the discretion to decide which parent should have final decision-making authority if the parents are unable to agree. The trial court did not abuse its discretion in giving Husband the final say.

Wife also argues that the trial court did not act in the best interest of the children in making Husband the primary physical custodian because she was at least as equally fit to be the primary physical custodian. In upholding the award, the Court of Appeals found that the trial court has broad discretion in a contest between parents over custody, and that it may award custody to one parent despite the fitness of the other. The appellate court will not interfere unless the evidence shows a clear abuse of discretion. Where there is any evidence supporting the trial court's award, the appellate court will not find an abuse of discretion. Since evidence in the record showed that Wife planned to attend law school full-time, borrowed money from Husband to buy a car, had an affair with a married man, and threatened the life of a neighbor, the trial court did not abuse its discretion in analyzing the best interest of the children and awarding primary physical custody to Husband.

***Rumley-Miawama v. Miawama*, 284 Ga. 811, 671 S.E.2d 827 (Ga. 2009)**

After divorce trial, Husband and Wife were awarded joint legal custody of the parties' minor child, with Husband having primary physical custody and Wife having visitation. Wife was required to pay $1597.22 in child support per month and awarded visitation on alternating weeks so that each parent would spend equal amounts of time with the child. The Divorce Decree contained a self-executing provision whereby if Wife moved from Georgia, her visitation would automatically change from every other week to three-day federal holiday weekends, Thanksgiving, the second half of the child's winter break, and two months during the summer. Wife appeals on 2 grounds: (1) the trial court failed to apply a deviation to the presumptive amount of child support based on equal parenting time, and that (2) the trial court erred in imposing the self-executing provision which would penalize her for moving out of the state.

The Supreme Court held that the trial court did not err in failing to apply a deviation. Additionally, the trial court did not abuse its discretion in failing to cite a reason for not applying a deviation. The guidelines require the trial court to give findings of fact where it applies a deviation, but does not require similar findings of fact where the court does *not* apply a deviation. With regard to the visitation provision, the Supreme Court found that self-executing material changes in visitation violate the public policy of the State which favors the best interest of the child. Such provisions should only be implemented where parties have already committed to a given course of action, the court has heard evidence on how that course of action will affect the child, and the provision is carefully crafted to address the effects on the child. In recognizing

this public policy favoring the best interests of the child, the Supreme Court found that the visitation provision is material because it caused an extreme reduction in Wife's visitation privileges. Since evidence at trial did not establish that Wife had committed to move out of the State, and the provision contained no limiting language as to the time of its application, the Supreme Court found that the provision failed to reflect an individualized consideration of the child's best interests and "lacked the flexibility necessary to adapt to unique variables that rise in every case, which must be assessed in order to determine what serves the best interests of the child." The Court stated that the provision "improperly authorized an open-ended, automatic, material change in visitation without providing for a determination whether such a change is in the best interests of the child," and struck the provision from the Divorce Decree.

DECLARATORY JUDGMENT

Acevedo v. Kim, 284 Ga. 629, 669 S.E.2d 127 (Ga. 2008)

The divorce decree set forth a formula where Father's child support obligation would increase at the same rate that Father's income had increased in the prior two years. After eight years, a dispute arose regarding application of the formula. Mother claimed that Father owed approximately $35,000 in past child support. Father claimed that he overpaid by $5,000. IN response to Mother's threat to file a contempt action, Father filed a Declaratory Judgment action. Mother counterclaimed for back child support in the amount of $56,153.66. The trial court granted declaratory judgment and ordered father to pay $54,464.48, without interest, at the rate of $1,000 per month until the debt was paid in full.

The Supreme Court accepted discretionary appeal and upheld the trial court. It did not matter that Mother could bring a contempt action. "A declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce….notwithstanding the fact that the complaining party has any other adequate legal or equitable remedy or remedies." Justice Sears, writing for the majority, opined that it "seems unwise to create a rule that would require…non-custodial parents…to risk the very real possibility of being publicly accused of contempt…[or] to force parents having a disagreement over money matters to hurl public charges of contempt of court at each other, along with its attendant risk of imprisonment, in order to secure an authoritative construction of a confusing child support provision in a divorce decree." Justice Hines wrote a dissenting opinion stating this opinion unnecessarily opens up the declaratory judgment statute to all debt actions.

EQUITABLE DIVISION

Smith v. Smith, 284 Ga. 815, 671 S.E.2d 835 (Ga. 2009)

Husband and Wife first married in 1979 and divorced in California in 1988. They remarried in 1999 and divorced a second time in Georgia in February, 2008. Since the parties' two children were grown and the trial court found that an alimony obligation would impose a hardship on either party, the only issue at trial was property division. The trial court awarded the

marital home and furnishings, a timeshare, a car, and $1,300 of Wife's 401(k) to Husband. The trial court awarded Wife one-third of Husband's 401(k) account balance and $275 per month from his military retirement pay, but no interest in his military disability benefits. Husband appealed, arguing that his military retirement was not marital property for the second marriage because the parties were first divorced in 1988 and he retired in 1995, before the parties' remarriage.

The Supreme Court found that all contributions to a military retirement account that pre-date a marriage are part of the contributing spouse's separate property, and are not subject to equitable division. Marital property awarded to a spouse on divorce becomes his or her separate property and remains that spouse's separate property even if the parties subsequently remarry. Since there is no indication that Wife was awarded part of Husband's military retirement account after their first divorce, and there is no evidence that marital funds were contributed to the account, then it was part of Husband's separate property and was not properly subject to equitable division.

***Taylor v. Taylor*, 283 Ga. 63, 656 S.E.2d 828 (Ga. 2008)**

The parties filed for divorce and entered into a partial Settlement Agreement. The only two issues for consideration were equitable division of 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. The Court made an equitable division award to Wife based upon her and her husband's pension contributions as employees and ruled that each party shall be responsible for their own attorney's fees. Wife appeals and the Supreme Court affirms.

The trial court awarded Wife one-half of the difference between her own pension contributions and the greater amount of Husband's pension contributions. Wife contended that the trial court abused its discretion in failing to classify the employer contributions to the parties' pension accounts as marital property and failing to equitably divide the parties' entire pension benefits. The law is well settled that retirement benefits acquired during the marriage are marital property subject to equitable division whether they are vested or unvested benefits. Here, the Final Decree of Divorce entered contains the results of the process, but doesn't contain any findings of facts to clarify the rationale used by the trial court to reach its results. Neither party asked the trial court 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 required to award Wife any of Husband's retirement account. Therefore, the Court could not conclude that the trial court made an erroneous finding or improperly applied the law to its findings.

EVIDENCE

***Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (Ga. 2008)**

Husband claims that during his cross-examination a the divorce trial, the trial court erred by permitting Wife to question him regarding checks he had not deposited into his bank account but kept in his safe. He had received the checks for work as an anesthetist. He testified that, although he had not disclosed all of the checks, the line of questioning unfairly and incorrectly implied that he was concealing income from Wife. Although he objected to the line of questioning, the judge did not rule initially. After further questioning, Husband objected again, and trial judge overruled the objection. The Supreme Court affirmed, finding Husband's failure to obtain initial ruling barred further objection and Wife was entitled to inquire about his checks; there was no abuse of discretion. However, the Supreme Court reversed and remanded award to Wife of $28,423.25 in attorney's fees because trial court failed to make necessary findings or cite a basis for the award.

EXPERT TESTIMONY

***Hamilton-King,et al. v. HNTB Georgia, Inc., et al.*, No. A08A2246, 2009 WL 737044 (Ga. Ct. App. March 23, 2009)**

Defendants contracted with Georgia DOT to perform a construction project along I-95. Plaintiff was traveling over a bridge with her two brothers, which was part of the construction project, when another car moved into her lane and she ran into the median. There was no shoulder on the bridge due to the construction project and it was nighttime. When the Plaintiff and her brothers got out of the car, a van struck their car and killed her two brothers. Plaintiff sued the contractors for negligence in failing to maintain proper precautions on the roadway for emergency situations.

At trial, Plaintiff presented an expert witness to testify as to the standards of care regarding highway construction, and who opined that Defendants had failed to maintain the standard of care. Specifically, Defendants failed to provide a shoulder for emergencies, failing to provide lighting in the construction zone at night. The trial court excluded the expert witness' testimony and then granted Defendant's Motion for Summary Judgment on the basis that Plaintiff's could not provide expert testimony to show the standard of care. The Court of Appeals reversed, finding that the trial court erred in excluding Plaintiff's expert witness testimony.

The Court of Appeals found that the expert's extensive engineering background and specialty in the highway engineering field qualified him as an expert. The Court further found that the trial court erred in applying O.C.G.A. § 24-9-67 (f) by interpreting the provision "courts may draw upon *Daubert v. Merrell Dow* and *Kumho Tire*" to mean that expert's opinions are not admissible unless they meet all of the *Daubert* factors. However, the Georgia Supreme Court interprets the language "merely as a permissive suggestion" that courts may consider these federal cases, on which O.C.G.A. § 24-9-67(f) was based, noting that the statute "contains no words of command." In reversing the decision of the trial court, the Court of Appeals noted that "disputes as to an expert's credentials go to the weight of credibility, not admissibility, and are properly explored through cross-examination."

FAMILY VIOLENCE

Williams v. Jones, 291 Ga. App. 395 (2008)

Williams and Jones were the unmarried parents of a child who resided in the same household. Williams petitioned the court under the Family Violence Act, alleging that Jones had physically and verbally abuse her by holding her down, beating her and pouring a bottle of bleach into her nose, mouth and eyes. She also admitted that she destroyed the windows in his car. As a result of her actions, Jones complained to the police. Williams was arrested. Williams thereafter filed her Family Violence Petition.

The Superior Court entered a mutual protective order restraining and enjoining Williams as well as Jones from harassing or interfering with each other, The order further ordered **both parties** to undergo a batterer's intervention program and procure a alcohol/drug abuse evaluation.

Reversing in part, affirming in part and remanding for the entry of a new order, the Court held that the record showed that Jones did not file a verified counter petition to Williams's petition for family violence, therefore,the Superior Court was without legal authority to include the mutual protective provisions in the order. The Court noted that such provisions have been criticized as they appear to blame the victim rather than the accused. The Court further noted that such provisions violate the due process rights of the victim when the victim is not served with such allegations prior to a hearing on the matter. The Court held that the due process rights of Williams were violated "because Jones filed nothing to put her on notice that she would have to defend against a claim that a protective order be issued against her". It held that she was entitled "to notice and an opportunity to prepare a defense before appearing at the hearing." The Court affirmed the remainder of the order and remanded the matter to the trial court for entry of an order consistent with the Court's opinion.

GARNISHMENT

***Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (Ga. Ct. App. 2008)**

Mother filed a garnishment action in the state court that Father was indebted to her in the principal amount of $8,886.21 which represented Husband's arrearage pursuant to the 1999 Divorce Decree as modified in 2002 Consent Order. Of the alleged indebtedness, one month or $2,350.00 was attributed to one month's past due period child support, and the $6,536.21 was attributed to Husband's share of health care expenses and extracurricular activity costs. At the time of the hearing, Father had paid the child support arrearage amount and as a result, there was no remaining unpaid periodic child support. The trial court granted Husbands traverse and dismissed the garnishment action. Wife appealed and the Court of Appeals affirmed.

Under Georgia law, a judgment for periodic child support that fixes the amount of the installments and when they are due is a money judgment subject to collection by post-judgment garnishment. This is because the court can determine the amount due from the terms of the

decree and with no more than a mathematical computation. The Georgia debtor and creditor code expansively provides for the collection of debts through the process of garnishment and all cases where the money judgment shall have been obtained in a court of this state. The remaining $6,536.21, which Wife identified as representing Husband's share of the health care expenses and extra curricular activities, have not been reduced to a money judgment against Husband, and therefore Mother's attempt to garnish Husband's property for this amount is governed by the prejudgment garnishment procedure at O.C.G.A. §18-4-40 et seq.

The law regarding prejudgment garnishment proceedings must be strictly construed to permit garnishment for the collection of a debt which has not been reduced to a money judgment only where the action is pending against the Defendant, and the court finds one of the other conditions specified in O.C.G.A. §18-4-40: 1) when the Defendant resides outside the limits of the state; 2) when the Defendant is actually removing, or about to remove, outside the limits of the county; 3) when the Defendant is causing his property to be removed beyond the limits of the state; 4) when the Defendant has transferred, has threatened to transfer, or is about to transfer property to defraud or delay his creditor; or 5) when the Defendant is insolvent.

Here, Mother failed to show that any of the conditions precedent to a prejudgment garnishment exist, including that an action must be pending against the Defendant. Therefore, because Wife's claim against Husband for healthcare and extracurricular activities expenses had not been reduced to a money judgment and Wife failed to show that she was entitled to the process of prejudgment garnishment under O.C.G.A. §18-4-40 et seq., the trial court was required to grant Husband's traverse to the extent of the amount claimed for those expenses.

INDEMNIFICATION

Stone v. Stone, 673 S.E.2d 283 (Ga. Ct. App. 2009)

Husband and Wife separated on August 28, 2005 and one month later, Husband filed for divorce. While the divorce was pending, Wife withdrew cash advances from a home equity line of credit secured by the couple's marital home. She deposited money in her individual bank account and used it for personal expenses. Husband later learned about the advances at Wife's deposition in March, 2006. The parties negotiated a settlement agreement and announced the terms at a hearing in April, 2006, and the transcript was incorporated into the final decree. The final decree stated that Husband would be responsible for and pay all debts incurred by him, and all marital debts incurred by either him or Wife prior to the date of separation. Wife would be responsible to pay all debts incurred by her since the date of separation and to indeminify Husband against any loss or expenses arising out of any claims, demands, etc. that may be instituted against him arising out of such debts. Husband later sued Wife for indemnification, breach of fiduciary duty, and fraud, arguing that the cash withdrawals had encumbered the home. Wife argued that his claims were barred by *res judicata*, and the trial court granted her motion to dismiss.

Under *res judicata*, a prior action bars a second suit if: (1) the first action involved an adjudication by a court of competent jurisdiction; (2) the two actions must have an identity of parties and subject matter; (3) and the party against whom the doctrine of *res judicata* is raised

must have had a full and fair opportunity to litigate the issues in the first action. The Court of Appeals agreed with Husband that the second action was not barred by *res judicata*, as that action was a separate contract action based upon Wife's breach of the settlement agreement. In the settlement agreement, she agreed to indemnify him against losses she may have incurred, and failed to do so by not indemnifying him against the withdrawals from the home equity credit line. In this type of case, Georgia permits a separate contract action. Husband's contract claims could not have been adjudicated in the divorce proceedings, which concluded the case and incorporated the settlement agreement into a court order. The trial court erred in dismissing his indemnification claim. Since Husband did not argue against the dismissal of his breach of fiduciary duty and fraud claims, they were deemed abandoned and the Court of Appeals did not address them.

INSURANCE BENEFITS

Sparks v. Jackson, 658 S.E.2d 456 (Ga. Ct. App. 2008)

The parties were married in 1988 and were divorced in 1998. As part of the divorce decree, Husband agreed to maintain his current level of life insurance through his employment with death benefits of $220,000.00 with Wife (Jackson) named as an irrevocable beneficiary for the benefit of the children. Husband remarried, and in June, 2005, designated his new wife (Sparks) as the beneficiary of his life insurance policy. In November, 2005, Husband died. Both Jackson (Ex-Wife) and Sparks (Widow) filed a petition against the life insurance company for payment. The insurance company interplead the funds into the Superior Court Clerk's office for determination of division of the proceeds. The total proceeds including interest deposited into the registry of the Court totaled $238,644.00. Both parties filed motions for summary judgment and the trial court granted summary judgment to Ex-Wife, awarding all of the funds to her. Court of Appeals affirmed in part, reversed in part and remanded.

Widow argued that she was the only beneficiary named on the life insurance policy and that the Court also erred by awarding Ex-Wife more than $220,000.00 that was stated in the divorce decree. 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 the 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 Husband to name his children or his former wife as beneficiary of his life insurance policy and to keep the policy in effect, the children or the former wife obtain a vested interest in the policy proceeds.

Widow also argued that the record does not show that the policy was the same insurance policy that was in effect at the time the deceased divorced his Ex-Wife. However, where one insurance policy replaces the policy of another specified in such Settlement 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 requirements for a change of the beneficiary designation. However, the widow did not make this

claim to the trial court. Further, the appellate court will not consider arguments raised for the first time on appeal, except in special circumstances which may include: jurisdictional challenges, claim of sovereign immunity, serious issues of public policy, a change in the law, or errors that work manifest injustice. Here, Widow fails to show the existence of any special circumstances. However, the trial court did err in awarding all of the policy proceeds to Ex-Wife. The Settlement Agreement gave the children a vested right of $220,000.00. Therefore, Widow is entitled to the remainder of the proceeds and division of any interest thereof.

***Stanton v. Fisher*, 290 Ga. App. 274, 659 S.E.2d 692 (Ga. Ct. App. 2008)**

The parties were divorced in 1998 and there were three children born as issue of the marriage. In 2003, Father remarried and obtained an accidental death and dismemberment insurance policy where Father designated his new wife as beneficiary. Father divorced his new wife in 2004. In 2006, Father died as a result of multiple traumatic injuries sustained in a motorcycle accident. The first wife and Father's children made a claim to the insurance proceeds. The first wife claimed that Father showed her a letter that Father sent 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 first wife did not produce a copy of the letter that Father allegedly sent. Father's second wife claimed an interest as the designated beneficiary of the insurance proceeds. The insurance company showed the second wife as the designated beneficiary. Because of the conflicting claims, the insurance company deposited funds into the registry of the Court and was discharged from the case. Both parties filed motions for summary judgment and the trial court granted the second wife's motion. The Court of Appeals affirmed.

Georgia law with regards to the 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 a vested 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 effect 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 that he allegedly sent stating he was changing the beneficiary, said statement 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 Father did substantially all that he could do to affect the change of beneficiary.

***Young v. Stump*, 294 Ga. App. 351, 669 S.E.2d 148 (Ga. Ct. App. 2008)**

The appellant, Young, divorced her husband, Rowland, in 2000. The Settlement Agreement, which was incorporated into the Final Judgment and Decree of Divorce, contained a section governing retirement, IRAs, profit sharing plans and so forth. Section IX (b) provided that Husband shall have all right, title, and equity in and to any retirement accounts which are

presently titled in his name or which were established for his benefit including, but not limited to IRAs, retirement accounts, etc… Wife shall make no claim to or against any such account as herein specified and waives and relinquishes any and all claims which she may have to the same. Section IX (c) is identical to Section IX (b), except Wife replaces husband as the pronoun.

During the marriage, Rowland maintained the IRA accounts in his name and designated Young as the beneficiary. Rowland died in November of 2006, without changing the beneficiary. In February of 2007, Young sent the IRA fund manager a letter of instruction requesting that the funds in Roland's IRA be transferred into an account in her name. The funds totaling approximately $34,838.29 were transferred into three funds all on February 27, 2007. The executor of Rowland's estate, Stump, demanded that Young pay the proceeds of the IRA to Rowland's estate, but Young refused. Stump filed a Motion for partial summary judgment to all legal claims and Young moved for summary judgment on all claims. Following the hearing, the trial court granted Stump's Motion and denied Young's. Young appeals and the Court of Appeals affirms.

Young argues that the agreement was ambiguous and that Section IX (c) creates the ambiguity which cannot be resolved with application of the rules of contract construction, and because Rowland designated her as the beneficiary, Rowland's IRA was established for her benefit so that she is entitled to all rights, title, and equity in and to that retirement account. All contracts must be interpreted to give the greatest effect possible to all provisions rather than leave any part of the contract unreasonable or having no effect. Here the phrase "established for her benefit" in Section IX (c) of the Agreement is ambiguous. An IRA may be established for the benefit of a beneficiary, thus the first sentence of Section IX (c) could be interpreted to mean that by designating Young as the beneficiary, and Rowland established his IRA for her benefit entitling her the proceeds thereof. But, this interpretation of Section IX (c) would render the wavier clause of Section IX (b) meaningless. As stated earlier, the court should uphold a contract in whole and in every part, and the whole contract should be looked to in arriving at the construction of any part. Under the construction urged by Young, she would receive the proceeds of Rowland's IRA even though she agreed to make no claim to it, in Section IX(b). That is not a reasonable interpretation of the agreement. Therefore, construing subsections (b) and (c) of Section IX together as such to give a reasonable meaning and effect to each part, we find that Young intended to disclaim any and all interests in Rowland's retirement accounts.

Young further argues that the ambiguity in the retirement provision should be constructed against Rowland because his attorney drafted the agreement. While the general rule is an ambiguity is construed against the drafter, the rule does not apply in this case. The agreement contained a clause which provides "because this Settlement Agreement is a joint effort of the parties, it should be construed with fairness as between the parties and not more strictly enforced against one or the other party." Therefore, public policy is in favor of enforcing contracts as written and agreed upon.

Young also argues that the trial court erred in ruling that the Settlement Agreement encompasses her expectancy interests in Rowland's IRA. The Supreme Court in *Kruse* held that the release language at issue in that case was broad enough to include the former wife's expectancy interests in her former husband's IRA. Therefore, following *Kruse*, the former

wife's expectancy interests were extinguished by the release language in the parties Settlement Agreement. The language "Wife shall make no claim to Rowland's IRA and herewith specifically waives and relinquishes any and all claims which she may have to the same" is sufficiently broad to release her expectancy interest in the IRA.

JURISDICTION

***Amerson v. Vandiver,* 285 Ga. 49, 673 S.E.2d 850 (Ga. 2009)**

Husband and Wife were divorced in March 2004. The final decree incorporated a settlement agreement in which Husband granted sole custody to Wife and the parties agreed to the termination of Husband's parental rights, thereby relieving him of his child support obligations. In 2008, Husband filed a motion to set aside the judgment of the Superior Court on the grounds that it lacked subject matter jurisdiction to terminate his rights. Georgia law authorizes judicial approval of a parent's voluntary agreement for the termination of his rights when it is in the best interest of the child. However, under O.C.G.A. § 15-11-28(a)(2)(C), except in connection with adoption proceedings which haven't occurred here, the juvenile court is the sole court for initiating an action involving termination of parental rights. A superior court judge, upon hearing a divorce and child custody case, does not have jurisdiction to terminate parental rights. Further, parties cannot confer subject matter jurisdiction upon a court by agreement or waive the defense by failing to raise it at trial. However, in limited cases, equitable defenses of laches may bar a party from later asserting the defense. The Supreme Court of Georgia held that Husband failed to exercise "utmost promptness" in bringing his motion to set aside, and that coupled with his "acts and omissions prior to the divorce decree" constitute behavior which estops him from attacking the judgment.

***Morris v. Morris,* 284 Ga. 748, 670 S.E.2d 84 (Ga. 2008)**

Former wife filed contempt action against former husband for failing to transfer investment funds to her by December 15, 2007 as Ordered by the divorce decree. Husband refused the transfer as a set-off for Wife's failure to give him all of the personal property items he was awarded in the decree. The decree set forth a procedure to resolve disputes regarding any missing items, including arbitration. Trial court held him in contempt. Husband filed discretionary appeal with Supreme Court, which was granted. Supreme Court held that jurisdiction over the appeal rested with the Supreme Court. However, there was no transcript of the contempt proceeding. Judgment affirmed.

LEGITIMATION

Binnis v. Fairnot , 292 Ga. App.336 (2008)

The parents of the minor child were unmarried. TheFather filed a petition to legitimate the minor child and visitation rights. The trial court denied Father's petition, determining that the Father had abandoned his opportunity interest in the minor child.
Reversing and remanding the case to the lower court, the Court held that while the father had no contact with the child since 2004, the Mother had moved to another state and did not provide

information regarding her whereabouts. Nor did she notify the Father upon her return to Georgia. The Court found the Father's continued and consistent payment of child support mitigated against a finding of abandonment. The Court further found that the lower court failed to determine whether the legitimation would be in the child best interest and remanded the matter for a determination of this issue.

MODIFICATION

***Pineres v. George,* 284 Ga. 483, 668 S.E.2d 727 (Ga. 2008)**

Wife filed a petition for modification of the psychological expenses, among other things. However, Wife had filed a previous contempt and child support modification action less than two years earlier. It is undisputed that medical expenses constitute a form of child support. Therefore, Wife's complaint constituted a petition for modification of child support and was barred pursuant to O.C.G.A. §19-6-19 (a). Based upon Wife's improper filing of the petition to modify, the trial court awarded attorney's fees pursuant to O.C.G.A. §19-15-14. Here, the record establishes that Husband introduced evidence regarding attorney's fees incurred in response to the improper modification petition was admitted without objection, which was neither challenged nor rebutted by Wife. Therefore, the award of attorney's fees under either section (a) or (b) of O.C.G.A. §19-15-14 was warranted.

With regards to the contempt action, the trial court changed the final decision-making authority regarding their minor son's health care to their co-parenting counselor. Therefore, the trial court's contempt judgment to the extent that grants final decision making authority to the parenting counselor is reversed. The trial court improperly modified the parties' divorce decree by shifting the decision-making authority

***Shepherd v. Collins,* 283 Ga. 124, 657 S.E.2d 197 (Ga. 2008)**

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

In September, 2005, 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 Husband's child support obligation from $2,092.50 to $1,150.00 per month, but refused to modify 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 paid in installments 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 document 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 Wife's survival and therefore the amount of 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.

MONEY HAD AND RECEIVED

***McGonigal v. McGonigal,* 294 Ga. App. 427, 669 S.E.2d 446 (Ga. Ct. App. 2008)**

The parties were divorced and pursuant to the parties' Settlement Agreement, Husband alleged that he over paid Wife by mistake. Husband filed an action against Wife for money had and received based upon the mistaken payments made under the divorce Settlement Agreement in State Court. After the complaint was filed, Wife filed an Answer, and after discovery was completed, Wife moved for summary judgment. After hearing on the motion, the State Court agreed and dismissed Husband's action, holding that an action for contempt was the appropriate remedy. Husband appealed and the Court of Appeals reversed.

The State Court relied on *Baghdady* in that the theory of money had and received applies only when there is no actual legal contract. *Baghdady* stands for the proposition that a party may not resort to the theory of money had and received to alter the terms of their contract. In other words, if there was a provision relating to the return of money paid by mistake or any other provision that would govern the situation, then an action for money had a received would not be appropriate. Under the common law doctrine of money had and received, recovery is authorized against one who holds unspecified sums of money of another which he ought, in equity and good conscience, to refund. Here, Husband alleged an overpayment and demanded repayment, but Wife refused.

In addition, Husband claims that even though he relies on the Settlement Agreement to prove that his payment was mistaken, the money had and received was the only remedy. In absence of the plain unmistakable language in the Agreement, Husband had no grounds for contempt. As reviewed, there are no provisions in the Settlement Agreement that govern the return of overpayment of money, and Wife has not identified any provisions, and the Court has not found any. Therefore, the trial court erred by dismissing Husband's complaint for money had and received.

NOTICE

***Arkwright v. Arkwright,* 284 Ga. 545, 668 S.E.2d 709 (Ga. 2008)**

In January, 2007, Wife filed for divorce in the Superior Court of Dekalb County. A bench trial was set on October 10, 2007, at which Husband and his attorney failed to appear. The Superior Trial court awarded Wife alimony, title to the marital residence, ownership of the Italian condo, 50% of Husband's retirement account, and attorney's fees. Husband moved to set aside the judgment, but the trial court denied the motion. Husband appealed and the Supreme Court affirmed.

Husband contends that the trial court erred in denying his Motion to set aside because he did not have notice of the final trial date. However, Husband concedes that his attorney had actual notice of the trial date but simply failed to notify him about the date of trial. Therefore, neither Husband nor his counsel appeared at the trial. Even though Husband's attorney failed to appear at the hearing because he was under the mistaken impression that Wife was going to seek a continuance, the failure of a party to appear in consequence of a misunderstanding between him and/or counsel, does not afford a meritorious reason for granting a motion to set aside a judgment. The award of attorney's fees and alimony was upheld.

PARTITION

Harvey v. Sessoms, 284 Ga. 75, 663 S.E.2d 210 (Ga. 2008)

The parties divorced in 1970. Wife was awarded permanent possession of the marital home and was required to pay the mortgage payments with the title to the property remaining in both Husband and Wife's names. Wife lived in the home until 2004 when she left to care for her elderly mother. She rented the home to a third party and retained the rental income. In October, 2006, Husband filed a Petition for Statutory Partition claiming Wife had given up the possession of the marital home and was seeking an accounting of the rental income and half of the profits earned from the lease of the property. Wife moved for summary judgment arguing that the Court placed the property of the tenants in common in the exclusive possession of one tenant, burdening the interest of the non-possessing tenant, and therefore, the property is not subject to partition. The trial court granted wife's Motion for Summary Judgment. The Supreme Court reversed.

Pursuant to the divorce decree, the parties are tenants in common giving Husband one-half undivided interest in the property. A tenant in common can surrender his or her statutory right to partition when the requesting party has expressed or impliedly agreed to relinquish the right to partition. If a non-possessing tenant in common has not agreed to give up his right to partition, then that right is not extinguished. Therefore, since Husband did not contractually relinquish his right to partition, the trial court erred in the granting summary judgment. Justice Hunstein dissents.

PRENUPTIAL AGREEMENT

Blige v. Blige, 283 Ga. 65, 656 S.E.2d 822 (Ga. 2008)

The parties had a child together in 1994 and were married in 2000. The day before the wedding, Husband took Wife to meet with an attorney he had hired for her to review the

prenuptial agreement that Husband had drafted. Wife read through the agreement and signed it and the parties were married the following day as scheduled. The prenuptial agreement provided that 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. Husband worked as a delivery truck driver and his base pay was $10.00 per hour. Husband had hidden away $150,000.00 in cash for which he planned to use to build the home after the wedding. Husband did not disclose the $150,000.00 in cash in the prenuptial agreement, nor did he tell Wife about the $150,000.00.

In July, 2005, Wife filed a Complaint for Divorce and in his Answer and Counterclaim, Husband sought enforcement of the prenuptial agreement. Wife moved to have the prenuptial agreement set aside for failure to comply with legal requirements for prenuptial agreements. The trial court conducted a pretrial evidentiary hearing on the issue, and in November, 2006, the trial court entered an order setting aside the prenuptial agreement because 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 Husband had used $150,000.00 in cash he had concealed from 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 Husband minus $160,000.00 to be paid to 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. Husband appealed and the Supreme Court affirmed.

There are three prongs to determine the validity of prenuptial agreements as 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.

Husband contended that the trial court erred by setting aside the prenuptial agreement under the first prong of Scherer. The trial court specifically found that Husband did not make a fair and clear disclosure of his income, assets, and liabilities before the parties signed the prenuptial agreement. The evidence presented at the pretrial hearing showed that at the time of the parties' marriage, Husband made a living as a vending and delivery person, his base pay was $10.00 an hour. One year prior to the marriage, Husband purchased 19.5 acres of land in rural Bryan County for $85,000.00. He owned no other property, and Wife did not live with Husband prior to the marriage. The evidence is also undisputed that he never told her prior to the execution of the prenuptial agreement that he had $150,000.00 cash in his possession. Therefore, the indications are that Husband actively hid his true financial status from Wife before the marriage and for some time thereafter. Therefore, the trial court was correct in setting aside the prenuptial agreement for not making a full and fair disclosure of his financial status before signing the prenuptial agreement under the first prong of Scherer.

Husband also argued that the trial court should have upheld the prenuptial agreement pursuant to Mallen. However, Mallen is distinguishable from this case in that (1) the trial court in Mallen upheld the prenuptial agreement; (2) the parties attached financial disclosure statements to the prenuptial agreement; and (3) the parties lived together for 4 years prior to the signing of the prenuptial agreement, and Wife was aware of the standard of living that the parties enjoyed and that Husband received significant income from his business. Therefore, the failure of Husband in Mallen to disclose his income was not material given the unique circumstances of the case.

Husband argued that Mallen establishes a general duty to inquire into the financial status of one's prospective spouse and if such inquiry is not made, a challenge to the enforceability of prenuptial agreement is barred. Husband's reading of Mallen turns Scherer's requirements on its head. Mallen did not overrule Scherer and this Court has repeatedly recognized that Scherer imposes an affirmative duty of full and fair disclosure of all material facts on the parties entering into a prenuptial agreement and therefore, Mallen does not create a duty of inquiry. Judgment Affirmed.

PROMISSORY NOTE

***Cawley v. Bennett*, 293 Ga. App. 46, 666 S.E.2d 438 (Ga. Ct. App. 2008)**

Prior to the parties divorce on April 13, 1993, Husband and wife met at Husband's divorce attorney's office and signed a document which stated in pertinent part: "I, Buddy Cawley, do agree to pay Kim Cawley the sum of Thirty Thousand Dollars ($30,000.00) to be paid in full by our daughter's 10th birthday." Shortly afterwards, the parties signed a Settlement Agreement which was incorporated into the Divorce Decree the following month. The daughter's 10th birthday came, but Husband did not pay the $30,000.00 promissory note (Note). Mother assigned the Note to her Father, but Husband still refused to pay. Husband moved for a summary judgment in that Settlement Agreement resolved all of the issues arising from the divorce and neither the Settlement Agreement nor the Divorce Decree incorporated the Note. Therefore, Mother was barred from enforcing the Note against him. Mother claimed that the Note was a legally enforceable contract separate from the Settlement Agreement. The trial court agreed and denied Father's summary judgment Motion. Father did not file an interlocutory appeal, and at the jury trial, did not move for a directed verdict. A jury verdict was entered for Mother and Husband appealed. Court of Appeals reversed with direction.

Father argues that denial of summary judgment motion was in error, but the appellate court does not review a denial of summary judgment once the case has been tried. Instead, the appellate court reviews the case under the sufficiency of the evidence in the light most favorable to the jury's verdict. Mother argued that the Note concerned a child support obligation; however, the Settlement Agreement made no mention of the Note, but obligated Father to pay monthly child support payments of $250.00 and half of the child's reasonable daycare expenses. Wife stated that $250.00 a month was inadequate and she only signed the Settlement Agreement accepting $250.00 a month because of the $30,000.00 Note. The Settlement Agreement had language which, in pertinent part, stated that this Settlement Agreement constitutes the entire

agreement between the parties and supersedes any and all other Agreements previously made by the parties.

Even though Mother assigned the Note to her Father, it is well established that an assignee takes the assignment subject to any defenses against the assignor, but in light of the Settlement Agreement, there is no evidence that the Note thereafter was enforceable by Wife. In addition, the only remedy supplementing a Divorce Decree requiring a non-custodial parent to pay is by modification pursuant to O.C.G.A. §19-6-19. Therefore, the Settlement Agreement is an enforceable agreement until it is modified by separate proceeding instituted by Petitioner for modification. As stated above, Father did not move for a directed verdict, and the Supreme Court has instructed that failure to move for a directed verdict bars the party from contending on appeal that he is entitled to a judgment as a matter of law because of the insufficiency of the evidence, but it does not bar him from contending that he is entitled to a new trial on that ground. Therefore, the trial court is reversed and Father is entitled to a new trial.

RETIREMENT BENEFITS

***Shell v. Teachers Retirement System of Georgia, et al.*, 291 Ga. App. 571, 662 S.E.2d 345 (Ga. Ct. App. 2008)**

Husband, Mr. Shell, was a former teacher employed by the Atlanta Board of Education. He had a retirement account with the Teachers Retirement System (TRS) and died in August of 2000. His current wife, Mrs. Shell, requested that TRS pay her the funds remaining in her late husband's retirement account. TRS refused on the basis that her husband's former wife was listed as his beneficiary. The current wife filed a Declaratory Action against TRS and Mr. Shell's former wife alleging that Shell should be the beneficiary of her late husband's retirement account. Shell argued that the first wife ceased being the beneficiary pursuant to the divorce decree which provided that Mr. Shell would retain all funds in his TRS retirement account. TRS responded with a Motion to Dismiss arguing that TRS was legally required to pay Mr. Shell's retirement benefits to the last filed beneficiary designation. The trial court granted the motion dismissing Shell's complaint. The Court of Appeals affirmed.

Georgia law requires that upon the death of a TRS member, TRS is required to pay the applicable retirement benefits to the beneficiary nominated by the member by means of a written designation duly executed and filed with the Board of Trustees. Retirement benefits from TRS are generally exempt from attachment and are not assignable. Therefore, the trial court was correct in dismissing Shell's complaint.

SETTLEMENT AGREEMENT

***Ford v. Hanna,* 293 Ga. App. 863, 668 S.E.2d 271 (Ga. Ct. App. 2008)**

In June of 2005, the parties were divorced. Mother had physical custody of the parties' two minor children with visitation, child support and other obligations established. In July 2007, one of the children reached the age of 14 and expressed a desire to live with Father. Father filed

a petition and sought physical custody of the 14 year old. Mother filed a pro se response and counterclaim seeking an order requiring Father to make certain payments due under the divorce decree. Both parties appeared in September, 2008 for hearing on the petition and both were accompanied by an attorney. The case was called, Mother's attorney made an oral statement of appearance along with Father's attorney. Both asked and received permission to meet before the hearing to determine if the parties could reach a Settlement Agreement. About two and a half hours later, they jointly announced to the Court that they had reached a Settlement Agreement on all issues and that Wife's attorney would prepare an order for the court incorporating the Settlement Agreement. There was no evidence presented at the hearing.

After no Settlement Agreement was presented to the trial court, the court signed an order setting the petition for another hearing in October, 2007. On or about the same day, the attorney who appeared for Mother at the hearing petitioned the court to withdraw from the case as her attorney and that Mother is seeking other counsel. Mother hired another attorney to represent her at the subsequent hearing. At the hearing, Mother's attorney filed a motion for continuance and a motion to dismiss the petition. Father countered with a motion to enforce the Settlement Agreement previously announced to the court. The trial court denied the request for continuance and the motion to dismiss. The attorney who appeared with Mother at the first hearing testified to what the parties had orally agreed. With Mother's express permission, the attorney announced to the court that the case was settled and he would prepare the order. Wife's first attorney had to withdraw because Wife would not authorize him to release the Settlement Agreement to Husband or to court.

On the evidence presented, the trial court entered an Order enforcing and incorporating all of the provisions in the agreement between the parties. The trial court also found Mother was required to pay Husband's attorney's fees he incurred to enforce Settlement Agreement in the amount of $1,000 because Mother unreasonably extended litigation by denying she was represented by her former attorney and refusing to acknowledge the attorney's authority to enter into a Settlement Agreement. Mother appeals, the Court of Appeals affirmed in part and reversed in part.

Mother did not contest the existence of the terms of the agreement, rather, she contends that the attorney who appeared for her at the first hearing date and was with her during the settlement negotiations, did not have the authority to bind her to the announced agreement. Mother raised Uniform Superior Court Rule (USCR) 4.2 which provides that no attorney shall appear in a capacity before a superior court until the attorney has entered an appearance by filing a signed entry of appearance form or by filing a signed pleading in the pending action. The rule further provides that within 48 hours of being retained, an attorney shall mail to the court and opposing counsel or file with the court an entry of appearance in the pending matter, and that failure to timely file shall not prohibit the appearance and representation by said counsel. Contrary to Mother's position, we find the evidence was sufficient to show that the attorney who announced his appearance at her first hearing had the attorney client relationship with her, acted as her agent and was within the scope of his authority when he and Mother met with Father and his attorney and agreed to the settlement of the issues and announced a settlement to the court with Mother's express permission. Under these circumstances, we find that Mother's attorney complied with the substance of USCR 4.2 and became the attorney of record by making the oral

appearance for her in open court. Accordingly, Mother's attorney at the initial hearing had apparent authority to enter into a Settlement Agreement that was enforceable against Mother by Father.

The agreement also settled the issue of child support, including health insurance and medical expenses. The parties simply agreed because each party had physical custody of one child, neither party owed child support to the other. Even though the parties may enter into an enforceable agreement concerning the modification of child support, a trial court has an obligation to consider whether the agreed upon support is sufficient in light of the requirements contained in the statutory Child Support Guidelines. Therefore, the trial court erred by entering an order ratifying and incorporating the parties' agreement with respect to modification of child support (including medical expenses and health insurance for the children) without reviewing the agreement in light of the requirements in the Child Support Guidelines. Therefore, this part of the Order is vacated and remanded for consideration of the agreement in light of the Child Support Guidelines.

Mother also raises contention that the trial court erred by denying her motion to dismiss the modification petition on the basis that she was not properly served. The record shows that Mother filed a timely response to modification petition without raising the service issue and appeared at the hearing on the petition represented by counsel without raising this issue. Therefore, she waived any claim as to service.

Mother also contends that trial court erred by awarding attorney's fees pursuant to O.C.G.A. §9-15-14. However in the trial court's order, it awarded attorney's fees to Father because it found that Mother unnecessarily expanded the litigation without justification by denying she was represented by an attorney who accompanied her to the initial hearing and announced the Settlement Agreement, and by refusing on this basis to recognize the agreement. Therefore, because the trial court set forth finding clearly sufficient to support the award, attorney's fees awarded pursuant to O.C.G.A. §9-15-14 are affirmed.

UCCJEA/CONTEMPT

***Daniels v. Barnes, et al.*, 289 Ga. App. 897, 658 S.E.2d 472 (Ga. Ct. App. 2008)**

The parties had two children born as issue of the marriage and were divorced in December, 2001 in the Eastern Judicial Circuit. Mother was awarded custody of the children and prohibited Father from having any contact with the children. 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 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, Mother was personally served with a copy of the summons and petition in Rhode Island. 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 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 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. In December, 2006, the grandparents filed another contempt stating Mother had failed to send the children to Savannah. The trial court held 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 a total of 200 days and entered a warrant for her arrest. Court of Appeals affirmed in part, reversed in part.

Mother contends the lower Court lacked personal jurisdiction over her for contempt under UCCJEA. Under the 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. Father still remained in Georgia. Under the provisions of O.C.G.A. §19-9-61(c), personal jurisdiction over the parties for a modification of custody is not required. Here, Mother is not challenging the modification of visitation, but the court's ability to assert personal jurisdiction over her for contempt. Cases under the old UCCJA stated 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 of lack of personal jurisdiction. 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 UCCJA or 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 or appeal of the statutory provisions covering divorce, custody, alimony and child support procedures. Therefore, the trial court lacked personal jurisdiction over Mother for contempt and personal service outside of Georgia was invalid under the circumstances.

***Hall v. Wellborn,* No. A08A1800, 2009 WL 311305 (Ga.Ct.App. Feb. 10, 2009)**

Hall was divorced from her husband in December of 2003 in Bibb County Georgia. At the divorce trial, Hall was awarded custody of the child, J.H., and the trial judge ordered paternity testing. In May 2004, the test results revealed that Hall's ex-husband was not the father of J.H.; the order was modified, relieving Hall's ex-husband from any child support obligation to the child. Wellborn, who was neither a party to nor served with notice in the prior custody proceeding, was determined to be the father of J.H. In April of 2004, Hall had already moved with J.H. to Walton County, Florida. In July 2006, Wellborn filed a paternity action in Walton County, Florida seeking sole custody of J.H. In December 2006, the Florida court awarded Wellborn custody of J.H. with visitation rights to Hall. In October 2007, Hall moved the Florida

court to vacate its December order, challenging Florida's jurisdiction in light of the original Bibb County, Georgia custody order. The Florida court denied her motion in January 2008, and Hall filed the instant action in Stewart County, Georgia seeking to enforce the original Bibb County, Georgia custody award, claiming that the Florida court lacked jurisdiction since the original Georgia custody award gave the Bibb County court continuing, exclusive jurisdiction. The Stewart County, Georgia court found that, since the Florida Court determined that both of J.H.'s parents resided in Florida (and not Georgia) that the Bibb County, Georgia court lost continuing exclusive jurisdiction. Hall appealed.

Georgia's earlier child custody statute often created concurrent jurisdiction in custody matters, and in 2001, Georgia attempted to remedy these problems by establishing continuing, exclusive jurisdiction in the state in which the original custody decree was entered. However, the Act provides two exceptions to the original court's retention of continuing, exclusive jurisdiction: (1) where a court of this state determines that neither the child nor the child's parents…has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or (2) A court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.

The record shows that both parents admitted in the Florida action that they and the child resided in Florida, and based on this, the Florida court determined that it had jurisdiction over the matter (i.e. that Georgia had lost continuing, exclusive jurisdiction). Since "a court of another state determine[d] that neither the child nor the child's parents…presently resided in" Georgia, the Stewart County, Georgia court did not err in dismissing Hall's petition alleging that Florida lacked jurisdiction under UCCJEA. Hall's remedy was to appeal the Florida court's custody determination, and she did not do so. The court also notes that it is irrelevant

UIFSA

***Kean v. Marshall*, 294 Ga. App. 459, 669 S.E.2d 463 (Ga. Ct. App. 2008)**

Mother filed action to record an Alabama Order for child support under UIFSA and to increase the amount of support. Father filed Motion to dismiss based upon lack of jurisdiction. Father was born and raised in Alabama, attended school in Alabama, and enlisted in the Army in Alabama. Also, he is registered to vote in Alabama, has always paid Alabama income taxes, has an Alabama driver's license, and cares for his elderly Father in Alabama. His vehicles are registered in Alabama. While on tour of duty, he requested a compassionate change of station after his Mother died so he could take care of his Father who was ill; the closest duty station where he could perform his specialty was Fort Gillem, south of Atlanta. He entered a six-month lease for an apartment in Stockbridge for any time he had to work overtime and weekends, and he received mail at that apartment, e.g. bank statements and credit card bills. He worked four ten-hour days each week, commuted on those days from Alabama to Fort Gillem, and spent his three-day weekends in Alabama. At the hearing on his Motion to dismiss, Father testified that he never intended to move to Georgia, that he intends to "remain" in the State of Alabama, that he is domiciled in Alabama and calls Alabama "home."

The trial court recognized that jurisdiction depended on whether Father resided in Georgia, that UIFSA did not define "resides," but found that Father resided in Georgia. After the trial court denied Father's Motion to dismiss, the parties agreed on the amount of child support and Father reserved the right to appeal.

The Court of Appeals reversed. Based on the evidence on record, the Court of Appeals held that Father did not reside in Georgia for purposes of UIFSA. Rather, his domicile continued to be in Alabama because there was no evidence that he intended to stay in Georgia. "To acquire a domicile in a particular jurisdiction, one must actually reside there with the intention of remaining permanently or for an indefinite time, and a domicile once established continues until a new domicile is acquired." See O.C.G.A. § 19-2-1.