JACKSON v. SANDERS: We Had A Deal….then We Changed It- Who Need the Courts?

This case has it all: Supersedeas Bond, Determination of Self-Employment Income, Change in Parenting Plans, Attorneys Fees, and an Agreement made between the Parties, NOT incorporated in a court order, and the Court of Appeals Finds the Agreement Enforceable.

(This is a very long opinion that is worth the time to read)

By: Margaret Gettle Washburn, Sr. Contributing Ed.

Court of Appeals of Georgia.

No. A15A0127. Cite as: 773 S.E.2d 835

Doug JACKSON, herein referred to as Father, filed a petition for modification of custody, seeking additional parenting time with his then 11–year–old son. The child's mother, Lisa SANDERS, herein referred to as Mother, opposed the petition and filed a counterclaim for past-due child support. After a bench trial, the trial court denied Father's petition, awarded Mother past-due child support, increased the amount of Father's monthly child-support payment, issued a new parenting plan, awarded attorney fees to Mother, and ordered Father to pay a supersedeas bond in satisfaction of the court's judgment.

The Father appealed the trial court's ruling, arguing that the trial court erred by (1) imputing an annual income to him that was significantly higher than his actual income; (2) finding that he owed Mother past-due child support; (3) increasing his child-support obligation above the amount dictated by the relevant guidelines; (4) reducing his parenting time with his son when neither party requested such a reduction; (5) granting attorney fees to Mother as the prevailing party; and (6) ordering him to pay a $60,000 supersedeas bond.

The Court of Appeals, Judge Dillard, reversed in part; vacated in part; and remanded for further proceedings to the trial court.

The Father and Mother were divorced in Florida in 2001, when their son was less than a year old, and the final judgment incorporated an agreement regarding custody and child support. They agreed that they would both move to Atlanta in 2003, and live within a reasonable driving distance of each other so that they could co-parent the child on a rotating custody schedule.

Further, the 2001 Judgment provided that Father would pay Mother $1,005 per month in child support.

The Mother moved to Atlanta, but the Father did not move to Atlanta until three years later. During that three-year period Father visited with the child weekly.

There were modifications filed between the parties in Florida in 2005 and in Cobb County in 2007 dealing with parenting time. In that proceeding, the parties were able to successfully

resolve their disputes through mediation, and on August 28, 2007, the trial court approved their new custody agreement (the "2007 Agreement").

Under the 2007 Agreement (which remained in effect until the modification proceeding underlying this appeal), Father and Mother shared joint legal and physical custody of the child. Interestingly, the Father's monthly child-support obligation remained the same under the 2007 Agreement.

In 2012, the Father filed another petition for modification of custody, asserting that, since the time of the 2007 modification proceeding, there had been a material change in circumstances, and asserted that, due to his son's age, new school, and Mother Mother's move to a different home, a change in physical custody or parenting time was necessary so that he and Mother could "continue to share physical custody effectively."

The Mother answered the petition and later filed an amended answer and a counterclaim against Father, seeking $7,035 in past-due child support. **The Father amended his petition, asserting that he had satisfied his child-support obligation with the Mother's consent by paying N.J.'s private-school tuition. Thereafter, the Mother filed an amended counterclaim, seeking $14,070 in outstanding child support. (All bolded text in this article is "Emphasis supplied").**

The trial court conducted a bench trial on Father's petition for modification of custody, during which it heard testimony from the parties, a court-appointed guardian ad litem ("GAL"), and a child psychologist hired by Father. Thereafter, the court issued an order, finding that Father owed Mother $27,135 in past-due child support, finding that Father failed to meet his burden of showing that a change in custody was in N.J.'s best interests, granting primary physical custody to Mother, and increasing Father's child-support obligation from $1,005 to $3,994 per month. The court issued a new parenting schedule and reserved ruling on Mother's request for attorney fees.

After the court issued its order, the Mother filed a motion for a supersedeas bond, as permitted by OCGA § 5–6–46, requesting that Father post a bond in satisfaction of the court's judgment and Father opposed it and the trial court ordered Father to post a $60,000 bond. Also, in a separate order, the trial court awarded Mother $24,387.71 in attorney fees.

The Father appealed.

The Court of Appeals stated that when a supersedeas-bond order is entered after an appellant files a notice of appeal from a prior judgment, the Court of Appeals lacks jurisdiction to consider claims regarding that order unless he or she files a second notice of appeal.

The Court found that Father did file a timely notice of appeal after the trial court issued the supersedeas bond order, and the fact that he styled it as an "amended notice of appeal" is of "no consequence." See OCGA § 5–6–48, which provides:

"Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from or what errors

are sought to be asserted upon appeal, the appeal shall be considered in accordance therewith notwithstanding that the notice of appeal fails to specify definitely the judgment appealed from or that the enumeration of errors fails to enumerate clearly the errors sought to be reviewed."

The Father argued that the trial court erred when it applied OCGA § 19–6–15(f)(4)(B) and imputed an annual income to him that was significantly higher than his actual income based on an erroneous finding that he presented no reliable evidence of his income. The Court of Appeals disagreed with Father's position, however, vacated the child-support award and remanded for further proceedings consistent with this opinion.

The parties presented testimony and other evidence, including Domestic Relations Financial Affidavits ("DRFAs"), to establish their respective gross incomes such that the trial court could determine whether to impose an upward modification of Father's monthly child-support obligation, which had remained $1,005 per month since the 2001 Judgment was entered. It was undisputed that, at the time of their divorce, Father's annual income was $250,000, while Mother earned $85,000 per year.

At the time of trial, the Mother's 2013 W–2 was $256,817.48. Father was employed by and owned a 50% partnership interest in a marketing company, submitted his K–1 Schedules and those documents showed that Father received $172,053 in partnership income in 2012, and he stated that he had not yet received his K–1 Schedule for 2013. (His accountant declined to testify).

The trial court determined that Father had not been "forthcoming with proof of his income and did not provide sufficient information to determine his gross income." And based on this finding, the trial court calculated Father's income **under OCGA § 19–6–15(f)(4)(B), applying a four-percent increase to his salary at the time of the 2001 Judgment for each year since that judgment was entered. In doing so, the trial court imputed an annual salary of $380,000 to Father, and based partly on this annual income, the court increased his monthly child-support payment from $1,005 to $3,994.**

The evidence presented below shows that Father had other self-employment income in addition to the income reflected on his K–1 schedules, but based on his testimony and the other evidence presented at trial, including rental properties, it was difficult for the court to discern the amount of that income.

(Please read the case for the amount of income, rental properties, other children, cars, business ventures etc. that was testified to by the Father. –Sr. Ed.)

The Court of Appeals stated that "in considering the meaning of a statutory provision, we do not read it in isolation, but rather, we read it in the context of the other statutory provisions of which it is a part. All statutes relating to the same subject matter are to be construed together, and harmonized wherever possible."

Given the lack of evidentiary support for Father's testimony regarding his business's finances and income from his rental properties; the inaccuracies and omissions in his DRFA; and his seemingly disingenuous testimony, and that the CPA did not testify, the Court of Appeals could

not find that the trial court abused its discretion in finding that Father failed to produce reliable evidence of his gross income and thus, calculating his gross income under OCGA § 19–6–15(f)(4)(B).

When the trial court exercised its discretion and chose to apply OCGA § 19–6–15(f)(4)(B), it failed to calculate Father's income as mandated by that statute**. Specifically, OCGA § 19–6–15(f)(4)(B) provides that, when a parent fails to produce reliable evidence of income, the court may increase the child support of the parent failing or refusing to produce evidence of income by an increment of at least 10 percent per year of such parent's gross income for each year since the final child support order was entered or last modified and shall calculate the basic child support obligation using the increased amount as such parent's gross income**.

And as noted by Father on appeal, the trial court erred by only applying a four percent incremental increase to calculate his child-support obligation. **The application of OCGA § 19–6–15(f)(4)(B) undoubtedly results in an extremely harsh penalty for parents who fail to produce reliable evidence of their incomes.** But when the language of a statute is "plain and susceptible to only one natural and reasonable construction, courts must construe the statute accordingly."

The Court of Appeals then found that the trial court erred in finding that Father owed $27,135 in past-due child support. (This is the fun part)

The undisputed evidence shows that, from the time of the 2001 Judgment until July 2012, Father paid $1,005 per month to Mother in child support**. However, in July 2012, Father and Mother agreed that, instead of paying child support directly to Mother, Father would pay an equivalent amount to N.J.'s new private school for Mother's half of the tuition. Both parties testified that this was their agreement, and Father presented an email from July 2012, in which Mother expressly consented to this arrangement.**

In fact, the Mother signed a printed copy of the email: "okay to pay $1,005 directly to [school] for August, September, and October." Mother also refunded three months of child support to Father for the months of May, June, and July of 2012 to reimburse him for her half of tuition payments that he had already made.

At the trial, Mother did not dispute that she agreed to this financial arrangement or that Father had adhered to it since July 2012, but she testified that she told Father that she would only agree to this alternative child-support arrangement if he would agree not to "take [her] back to court."

Despite Mother's concession that she and Father entered into this alternative child-support arrangement, the trial court ruled in Mother's favor as to her counterclaim for unpaid child support, finding that "the parties [could not] modify child support without a court order." Therefore, the court ordered Father to pay $27,135 in past-due child support for the months when he made payments to N.J.'s school instead of to Mother.

The Court of Appeals found: **"The trial court was indeed correct that, "[w]hile parties may enter into an agreement concerning modification of child support, the agreement becomes an enforceable agreement only when made the order of the court." Nevertheless, our Supreme Court has recognized that there are certain equitable exceptions to that general rule. And included among these "equitable exceptions" are situations where the mother has consented to the father's voluntary expenditures as an alternative to his child[-]support obligation, or where the father has been in substantial compliance with ... the divorce decree, for example, where he has discontinued child support payments while he had the care and custody of the children and supported them at the mother's request**.

Here, Father and Mother did not modify the amount of Father's child-support obligation as set forth in the 2001 Judgment. **Instead, the parties agreed that Father would pay an equivalent amount for Mother's half of N.J.'s private-school tuition as an alternative to paying her directly. "And our Supreme Court has held that such an agreement was valid under nearly identical circumstances.35 Thus, the trial court erred in ordering Father to pay $27,135 in past due child support, and we reverse its judgment in this respect."**

Father also argues that the trial court erred in deviating upward from the presumptive child-support amount without making sufficient written findings of fact and without sufficient evidentiary support. Thus, in this case, the court was authorized to consider an upward deviation from the presumptive child-support amount because Father and Mother have a combined monthly income of over $30,000.40 However, the trial court failed to make certain mandatory findings of fact in its written order to support its decision that such a deviation was warranted. See OCGA § 19–6–15(c)(2)(E).

Perhaps the trial court found that the application of the guidelines would be unjust or inappropriate because Father had a substantially higher income than Mother, but when reviewing deviations from the guidelines the General Assembly has enacted for child-support determinations, the Court of Appeals is not at liberty to "rely on implications or our own presumptions." Rather, the trial court's written findings must "connect the dots."

Next, the Father argued that the trial court erred in sua sponte reducing his parenting time with his son. Again, the Court of Appeals agreed. The trial court's decision regarding a change in custody/visitation will be upheld on appeal unless "it is shown that the court clearly abused its discretion."

Father filed his initial petition for modification of custody, seeking additional parenting time with N.J. and asserting that there had been a material change in circumstances with regard to the child's age, his new school, and Mother's move to a home farther away from Father. Mother opposed this petition, and in the pre-trial order, she indicated that she wanted the 2007 Agreement to remain unchanged, except that she be granted primary physical custody.

In its written order, the trial court found that Father failed to meet his burden of showing a material change in circumstances to warrant a modification of custody, and it granted a directed verdict in favor of Mother as to Father's petition. The trial court also granted primary physical custody to Mother, and reduced Father's parenting with his son. In addition, based on the GAL's

recommendation, the court eliminated the two "floating weeks" per year that were included in the 2007 Agreement. The court did not follow GAL's recommendation that Father be given additional time with N.J. in the summer or that N.J.'s weekends with Father last until Monday morning.

The Supreme Court of Georgia has long held that, "[w]here an award of custody of a minor child has been duly made, it is conclusive on the parties unless there are new and material conditions and circumstances substantially affecting the interest and welfare of the child." To authorize a change of custody, the court must find "(a) that there has been a change in conditions affecting the child[ ], and (b) that the welfare of the minor[ ] requires a modification of the original judgment." Finally, although the trial court is given wide discretion in such cases, it is, nevertheless, "restricted to the evidence, and hence [it] is unauthorized to change custody where there is no evidence to show new and material conditions that thus affect the welfare of the child."

In this case, the trial court expressly found that there had been no material change in circumstances to justify a change in custody, and it made no finding that N.J.'s welfare required such a modification. As there had been no material change in circumstances and no evidence suggested N. J.'s welfare required a modification of custody, the trial court was not authorized to modify the 2007 custody order by altering the parties' parenting schedule and awarding primary physical custody to Mother.

Father next argues that the trial court erred in awarding $24,384.71 in attorney fees to Mother as the "prevailing party." In light of the Court of Appeals' holdings, which reversed several portions of the trial court's judgment, the Court of Appeals also vacated the trial court's fee award and remanded the case so that the court may reconsider whether Mother is still entitled to attorney fees as the prevailing party, and if so, in what amount.

And, to what extent the trial court finds that an award of attorney fees to Mother is still warranted, it is instructed to articulate the evidentiary basis for the amount awarded, as the Mother's attorney did not present billing records or other evidence of the fees incurred.

Lastly, Father argues that the trial court erred in requiring him to pay a $60,000 supersedeas bond in satisfaction of past-due and future child-support payments. Once again, the Court of Appeals agreed with the Father, relying upon OCGA § 5–6–46(a). Here, the trial court ordered Father to post a $60,000 supersedeas bond in satisfaction of the court's "judgment in full, together with costs, and interests, and damages for delay, if for any reason the appeal is dismissed or is found to be frivolous." However, the only monetary judgment against Father was the court's award of $27,135 in past-due child support to Mother. And given the Court of Appeals holding, the trial court also erred in ordering a Father to pay a supersedeas bond in satisfaction of that judgment. Thus, the trial court's grant of Mother's motion for a supersedeas bond was also reversed.

For all of the foregoing reasons, the Court of Appeals reversed the trial court's award of past-due child support, its sua sponte modification of the parties' then-current custody agreement, and its order requiring Father to pay a supersedeas bond; and vacate the child-support award, as well the

award of attorney fees to Mother. Judgment reversed in part; vacated in part; and case remanded with direction.

RAY, ELLINGTON and MCMILLIAN concurred. BARNES, P.J., PHIPPS, P.J., and McFADDEN, J., concur in part and dissent in part.

PLEASE READ McFADDEN, Judge, concurring in part and dissenting opinion re: the child support computation.

Sr. Ed: See OCGA § 19–6–15(f)(4)(B); Brogdon v. Brogdon, 290 Ga. 618, 619–20(1), (2), 723 S.E.2d 421 (2012)); Banciu v. Banciu, 282 Ga. 616, 617–18(1), 652 S.E.2d 552 (2007) (affirming the trial court's finding that a husband, who claimed to make $48,000, had a gross income of at least $90,000 per year based, in part, on his ownership interest in a profitable company, his ownership of rental properties, and his history of high spending); see also Vereen v. Vereen, 284 Ga. 755, 756(1), 670 S.E.2d 402 (2008) ("[I]n the absence of any mathematical formula, fact-finders are given a wide latitude in fixing the amount of alimony and child support under the evidence as disclosed by the record and all the facts and circumstances of the case."

Sr. Ed. See also: Pearson v. Pearson, 265 Ga. 100, 100, 454 S.E.2d 124 (1995) (citation omitted) (emphasis in original); see also Robertson v. Robertson, 266 Ga. 516, 517(1), 467 S.E.2d 556 (1996) ("It is well-settled that a modification action under OCGA § 19–6–19 is the sole means by which a child support award included in a divorce decree may be modified. While the parties are free to enter into an agreement purporting to modify the child[-]support obligation, that agreement becomes enforceable only when incorporated in an order of the court ...." (citation omitted)).

And **Daniel v. Daniel, 239 Ga. 466, 468(2), 238 S.E.2d 108 (1977) ("Several jurisdictions, including many which support the above general rule [that parents may not modify a child-support obligation without approval from the court], have held that a father may be given credit if equity would so dictate under the particular circumstances involved, provided that such an allowance would not do an injustice to the mother."). see also Skinner v. Skinner, 252 Ga. 512, 514(2), 314 S.E.2d 897 (1984) (distinguishing Daniel, but acknowledging that "credit for the father's voluntary expenditures c**onsented to by the mother as alternatives to child support, or excusal for nonpayment of support obligations where the mother has requested that the father have custody of the children and he supported them during such period, may be appropriate so that the father is not required to pay child support twice when there is no resulting unfairness to the mother or children").

Sr. Ed. See also Fox v. Korucu, 315 Ga.App. 851, 854, 729 S.E.2d 16 (2012) ("A trial court is authorized to modify a custody award upon a showing of new and material changes in the conditions and circumstances substantially affecting the interest and welfare of the child. The proof must show both a change in conditions and an adverse effect on the child."

Weickert v. Weickert, 268 Ga.App. 624, 627(1), 602 S.E.2d 337 (2004) (noting that "a change of custody may be granted only if a new and material change in circumstances affects the child"