IN THE COURT OF APPEALS
STATE OF GEORGIA

TYRESE GIBSON,

Appellant,

v.

SAMANTHA GIBSON,

Appellee.

Reply Brief of Appellant

CASE NO. A24A0809

SUBMITTED BY:

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TABLE OF AUTHORITIES FOR APPELLANT'S REPLY BRIEF

Cases

Statutes

APPELLANT'S REPLY BRIEF

Pursuant to Georgia Court of Appeals Rule 23(c), this Reply Brief is being filed within 20 days from the date that the Appellee's brief was filed.

The Appellee's RESPONSE BRIEF fails to provide this Court with any significant argument regarding the three (3) key issues and arguments on appeal: (A) the Arbitrator in the underlying divorce case found the parties' PREMARITAL AGREEMENT to be valid while simultaneously invalidating specific terms of the PREMARITAL AGREEMENT, which was clearly erroneous; (B) the award of retroactive, lump sum child support in a divorce case where the Father (Appellant) had been voluntarily financially supporting the minor child since birth and during the divorce case at the highest Basic Child Support Obligation ("BCSO") was punitive and will undoubtedly send a chilling effect to other divorcees who voluntarily financially support their minor child(ren) during a divorce proceeding without the need of a temporary hearing and temporary court order, and (c) awarding child support with a high-income deviation in an amount sufficient to cover the Mother's fifty percent (50%) of the minor child's tuition and such that the Mother can buy a house and work less is *de facto* spousal support for a 3-year marriage where the trial court found that alimony was not warranted.

A. The Arbitration Award Was Clearly Erroneous

1. The Arbitration Award was Wrong.

The purpose of arbitration is to avoid the courts for dispute resolution. *Hardin Constr. Group v. Fuller Enterprises*, 265 Ga. 770, 771, 462 S.E.2d 130 (1995). The parties executed a valid PREMARITAL AGREEMENT on February 2, 2017, which resolved all issues pertaining to assets, debts, and the spousal support amount to be awarded ***if*** a trial court deemed warranted. Specifically, the parties' PREMARITAL AGREEMENT says in Section XIX. LEGAL FEES, "…if the divorce is otherwise contested (other than child support), she [Appellee herein] shall be responsible for all her legal fees, costs and expenses with respect to the divorce." (V11 51-54).

The Appellee filed her PETITION FOR DIVORCE AND OTHER RELIEF on September 21, 2020. The Appellant filed his ANSWER on or about October 5, 2020. On December 16, 2020, Appellant filed his APPELLANT'S FIRST AMENDED ANSWER AND COUNTERCLAIM TO PETITION FOR DIVORCE AND OTHER RELIEF alleging irreconcilable differences and cruel treatment by the Appellee. The Appellant also asserted in Paragraph 18 of his FIRST AMENDED ANSWER that "…[Appellee] is an able-bodied, healthy, intelligent, educated woman, who is a licensed clinical social worker, and [Appellee] is more than capable of providing for herself. Based on these facts and the relatively short length of the parties' marriage, [Appellee] should not be awarded any spousal support in this case. However, in the event that this

Honorable Court awards any spousal support to [Appellee], the parties' Pre-Marital Agreement establishes a limit for any spousal support awarded." (V3 47-54; 163-170). Thus, Appellant put Appellee on notice that the issue of spousal support would be ***contested***.

Because of the existence of the PREMARITAL AGREEMENT, the only possible issue that could be contested in the event of divorce was spousal support; child custody and child support would be resolved by the trial court; assets and liabilities were already divided by the PREMARITAL AGREEMENT. If the divorce were contested, each party would pay his or her own fees. If the divorce was contested, other than child support, then Appellant would pay all attorney's fees for an uncontested divorce pursuant to Section XIX. LEGAL FEES of the PREMARITAL AGREEMENT.

On June 28, 2021, despite the fact that the Appellant was contesting an award of spousal support to Appellee, which is "other than child support", the Arbitrator single-handedly expanded and protracted this litigation by incorrectly concluding that the underlying divorce case was uncontested. That decision was clearly the wrong conclusion based upon the specific facts of the parties' divorce case. The Arbitrator's erroneous award, in essence, nullified the parties' valid PREMARITAL AGREEMENT since the issue of spousal support, "other than child support" was contested throughout this case until the conclusion of last day of the final trial held on August 29-30, 2022. The Appellee absolutely had the right to contest the issue of

spousal support, but she was supposed to pay her own attorney's fees to do so pursuant to Section XIX. LEGAL FEES of the PREMARITAL AGREEMENT. Consequently, the Arbitrator overstepped her authority when she summarily concluded that the Appellant should pay all attorney's fees without first deciding whether the parties' divorce was contested or uncontested as required by Section XIX. LEGAL FEES of the PREMARITAL AGREEMENT.

2. The Arbitration Award was Premature.

Appellee prematurely filed her Appellee's MOTION FOR APPOINTMENT OF ARBITRATOR pursuant to the parties' PREMARITAL AGREEMENT on December 15, 2020. The issue of spousal support was contested all the way through the final trial in this case, which was held on August 29-30, 2022. There was no way for the Arbitrator to know in the year 2021 if the parties would ultimately come to an agreement with no issues contested, or whether there would be issues contested at trial "*other than child support*". Consequently, since the issue of spousal support was contested all the way through trial, and spousal support was an issue "*other than child support*," the underlying divorce case was not an uncontested divorce, and the Appellee should be responsible for her own "*legal fees, costs and expenses with respect to the divorce*" pursuant to Section XIX. LEGAL FEES of the PREMARITAL AGREEMENT.

Pursuant to O.C.G.A. § 9-9-13(a)(5), the Arbitration Award should be vacated because of the Arbitrator's manifest disregard of the law and ***the facts in this case***. The Arbitrator's award was also premature, prior to a determination as to whether any issue in this divorce would be contested, "*other than child support*." The Arbitrator's award is contrary to the parties' valid PREMARITAL AGREEMENT because the award from the Arbitrator invalidates and nullifies Section XIX. LEGAL FEES of the PREMARITAL AGREEMENT.

Appellant's MOTION TO VACATE ARBITRATION AWARD should have been granted by the trial court pursuant to O.C.G.A. §9-9-13(b)(3) because the rights of the Appellant were highly prejudiced by an overstepping of the arbitrator's authority. (V3 250-284; 285-331)(V4 1-78; 79-82). In order for the Appellant to have to pay all of the Appellee's attorney's fees and expenses of litigation, the Arbitrator must have concluded that the instant divorce case was "uncontested," but she never succinctly stated that conclusion at all. Because the Arbitrator's decision was incorrect, premature, and solely focused upon the Appellee's ***right*** to "invoke Paragraph VII(B)(1)" for what the Arbitrator decided was "limited support", it is important to note that Appellant is not saying that Appellee did not have the right to invoke Paragraph VII(B)(1)" of the PREMARITAL AGREEMENT.

However, Appellee did not have the right to invoke Paragraph VII(B)(1)" of the PREMARITAL AGREEMENT while simultaneously ignoring Section XIX. LEGAL

FEES of the PREMARITAL AGREEMENT. The Arbitrator was not even asked to interpret Paragraph VII(B)(1)" of the PREMARITAL AGREEMENT by the Appellee. In an inexplicable fashion, the Arbitrator stated the Appellee's rights, while simultaneously ignoring the Appellant's right to have the benefit of his bargain outlined in Section XIX. LEGAL FEES of the AGREEMENT.

The Arbitrator failed to read the totality of the parties' PREMARITAL AGREEMENT. The Appellee had the absolute right to pursue spousal support; however, if the Appellee chose to do so, based upon the terms of the PREMARITAL AGREEMENT, the issue of spousal support was an issue (other than child support) that made the divorce otherwise contested according to Section XIX. LEGAL FEES of said AGREEMENT. Accordingly, the Appellee should have been responsible for all of her own legal fees, costs, and expenses with respect to the divorce because the divorce was *"otherwise contested"* per Section XIX. LEGAL FEES of said AGREEMENT.

Further, the Arbitrator's authority in the divorce case was executed in such an imperfect manner that the rights of the Appellant were prejudiced by the Arbitration Award, which incorrectly concluded that the instant case was an uncontested divorce. Moreover, the Arbitrator's failure to read and consider the entire PREMARITAL AGREEMENT, specifically Paragraph XIX, not just Paragraph VII(B)(1), demonstrated the Arbitrator's manifest disregard of the law as the Arbitrator was

required to read and interpret ***all*** of the parties' PREMARITAL AGREEMENT, not just Paragraph VII(B)(1). The Arbitration Award should be vacated because it was premature, the conclusion was erroneous, Section XIX. LEGAL FEES of the parties' PREMARITAL AGREEMENT was nullified by the Arbitrator's premature misinterpretation of the plain language of the said AGREEMENT, and the rights of Appellant have been prejudiced thereby. Pursuant to O.C.G.A. § 9-9-13(b)(5), the Arbitrator's award should have been vacated by the trial court.

B. The Award Of Retroactive, Lump Sum Child Support In A Divorce Case Was An Abuse Of Discretion And Punitive, Which Will Undoubtedly Send A Chilling Effect To Other Divorcees Who Voluntarily Financially Support Their Minor Child(ren)

1. <u>The Award Of Retroactive, Lump Sum Child Support In This Case Was Punitive And An Abuse Of Discretion.</u>

The award of retroactive, lump sum child support in the underlying divorce case was punitive and will undoubtedly send a chilling effect to other divorcees who voluntarily financially support their minor child(ren) during a divorce proceeding. In the case before this Court, without the need of a temporary hearing, the Father (Appellant) voluntarily began financially supporting the parties' minor child in October, 2020. The Appellant had already been financially supporting the parties' minor child *in utero* and since the minor child's birth.

The Appellant paid the highest Basic Child Support Obligation ("BCSO") to Appellee as child support without prompting. Based upon the Appellee's two (2)

Domestic Relations Financial Affidavits presented in 2020 and again at trial in 2022 (V9 98-157; 167-213)(V10 22-40)(V11 146-155), the Appellant was paying over and above the needs for the parties' minor child. Additionally, even though there was a PREMARITAL AGREEMENT which specifically gave the Appellant the right to all of his assets, the Appellant continued to allow Appellee to drive his non-marital vehicle throughout the divorce case, and the Appellant continued to pay the installment note and the insurance for said non-marital vehicle drive by the Appellee. In fact, the trial court thought that the payments for the installment note and insurance for the vehicle driven by the Appellee was so significant, that the trial court gave the Appellant *"credit"* for those payments when awarding the retroactive, lump sum child support to the Appellee. While the trial court applying that *"credit"* was notable, that does not excuse the incomprehensible award of retroactive, lump sum child support in a divorce case when the Father (Appellant) is consistently without fail providing more than ample child support for the parties' minor child.

If the Appellee thought for a moment that the child support paid by the Appellant during the underlying divorce case was insufficient, she could have easily petitioned the trial court for another temporary hearing since she abandoned her initial request for a temporary hearing. (V3 12-16). The Appellee never asked the Appellant for anything for the minor child that he did not give while the case was pending, and the Appellee never sought a temporary hearing. One can conclude that

the reason therefor is because the Appellant was taking great care of the parties' minor child.

Ordering a divorcee to pay retroactive, lump sum child support presumes that financial support was not paid by the Appellate (hence, the retroactive amount), and that the Appellant did pay consistently (hence, the lump sum). Neither factor was present in this case. Consequently, the trial court's order in this case was punitive and will undoubtedly send a chilling effect to other divorcees who voluntarily financially support their minor child(ren) during a divorce proceeding without the need of a temporary hearing and temporary court order.

The Appellant was penalized by the trial court for voluntarily paying child support to Appellee throughout the entire duration of the parties' divorce case. Specifically, *Daniel* v. *Daniel,* 358 Ga. App. 880 (2021) is not applicable to the case at bar. The *Daniel* case held that because there was no Order in place prior to the entry of the parties' Temporary Consent Order, the trial court could not order the husband in *Daniel* to reimburse the wife for expenditures for the minor child before the entry of said Consent Order. *Id.*

The *Daniel* case further concluded that when a divorce action is pending, and a spouse subsequently seeks temporary support for a minor child, "the trial court ***may*** consider and award such support covering the period from the time the divorce is filed until a temporary order or final hearing is held, and it may exercise its

discretion in determining the amount of that support, which will not be disturbed absent an abuse of that discretion" (*Emphasis added*).

The husband in *Daniel* did ***not*** pay for certain expenses for the parties' minor children before the entry of the Temporary Consent Order. To justify the award in *Daniel*, the trial court cited *Murray v. Murray,* 206 Ga. 702 (1950). In the *Murray* case, the husband did not financially support his minor child from the time of the parties' divorce on March 5, 1946[1] at all for several months. Subsequently, the trial court ordered the husband to pay $450, payable at the rate of $10 per month, for past support and covering the period from the date the original divorce suit was filed until the final hearing in the child support petition that the wife filed on January 11, 1947.

The facts of the parties' underlying divorce case are distinctly and fundamentally distinguishable from the facts in both the 1950 *Murray* case and the 2021 *Daniel* case. In both of those cases, the husband did not financially support their children for extended periods relating back to the filing of the divorce case. The Appellant in this case, on the contrary, voluntarily paid the highest amount of child support pursuant to the statutory child support guidelines codified in O.C.G.A. §19-6-15 from October 1, 2020, through and beyond the final trial in this case in August, 2022.

[1] Parties were allowed to divorce without resolving all issues relative to the marriage when *Murray v. Murray,* 206 Ga. 702 (1950) was decided.

The Appellant in this case is, in effect, being punished for voluntarily supporting his minor child from the onset of the divorce case, which can have a chilling effect on future litigants. Both parties in this case were initially applauded by the trial court for resolving all of their parenting time issues pertaining to their minor child voluntarily, without court intervention. However, the Appellant in this same case is penalized for exercising that same cooperative spirit by paying child support without court intervention. If this award stands, future litigants will insist on having formal court hearings to establish monthly child support, thereby taking up precious court time and expanding litigation, instead of paying child support voluntarily for fear of being charged with a retroactive, lump sum child support amount. The retroactive child support award in this case does not comport with the notions of judicial economy.

2. The Retroactive Award Of Child Support To September 2020 Did Not Consider The Appellant's Income Throughout The Divorce Case.

The award of child support retroactive to 2020 based upon Appellant's income in August 2022 is contrary to Georgia law. The Appellant, whose income fluctuates wildly as so noted in the Preamble of the parties' February 2, 2017 PREMARITAL AGREEMENT, was also penalized for updating his Domestic Relations Financial Affidavit ("DRFA") each time his income changed during the pendency of the underlying divorce case, which was started during the heart of the Coronavirus Pandemic. (V9 38-97)(V10 263-353)(V11 201-209; 210-218; 219-227; 228-236;

237-245; 246-254). Appellant is an actor and a singer, and he was not working much at all in 2020 during the Pandemic.

The Appellant voluntarily updated his DRFA during the divorce case every time his income increased. In the Spring of 2022, he received payment for a franchise movie in which he is one of the co-stars. The Appellant testified at trial, and his tax returns prove, that he earns his highest income in the years in which he is paid for his work during that franchise film so, the Appellant's income at trial was the highest it had been since 2019.

Had a temporary hearing been held in October, 2020 as originally scheduled, the Appellee would not and could not have been awarded child support based upon Appellant's 2022 income. Based upon the DRFA's filed in this case, the Appellant's fluctuating income was 14% of his income at the final trial. The retroactive child support award in this case is clearly punitive.

C. Awarding A Child Support With A High-Income Deviation In An Amount Sufficient For The Mother To Work Less Is *De Facto* Spousal Support

A high-income deviation of $8,520 per month, which was awarded in the case, is *de facto* spousal support, and does not benefit the minor child. First, the trial court completely ignored the fact that the Respondent's income fluctuates wildly despite the Appellant's testimony at trial and six (6) years of federal tax returns being presented at trial. Appellant pays $10,690.00 per month as child

support for his older minor child who lives in the state of California. The child support in that case was awarded based upon California law to a spouse who was virtually unemployed. The trial court did have the benefit of the California child support Order at trial. In the underlying divorce case, the Appellee was earning almost $100,000 per year at the time of the final trial. The trial court was simply trying to match the exact amount of child support amount that the Appellant pays for his older daughter who lives in California, which is why the language used on Schedule E of the trial court's Child Support Worksheet is insufficient to support the reasons for such a high deviation. *See, Anderson v. Cribbs,* 367 Ga.App. 355, 363, 883 S.E.2d 153 (2023).

Second, the Final Judgment and Decree, awarded a high-income deviation in the amount of $8,520 per month because it would "likely allow Wife to pull back from working one (1) full-time job and three (3) 'side hustles'" which is *de facto* spousal support. Unlike the former spouse in California, the Appellee herein earned a Master's Degree during the parties' marriage and was able to earn a substantial income in less than two (2) years after vacating Appellant's home. At trial, the Appellee's so-called "side hustles" were pertaining to being a social media influencer, which the Appellee never testified would stop once the parties' divorced. Nonetheless, the reason for the high-income deviation had nothing to do with the best interests of the parties' minor child, and the language on Schedule E

of the Child Support Worksheet in this case fails to satisfy the statutory requirements of O.C.G.A. § 19-6-15(c)(2)(E)(iii). *See also, Fladger v. Fladger,* 296 Ga. 145, 147(2), 765 S.E.2d 354 (2014).

Third, the trial court awarded its high-income deviation of $8,520 per month so that the Appellee could have the "ability to buy a home rather than be faced with the prospect of continuing to rent and move whenever Wife's lease ends" despite the Appellee earning almost $100,000.00/year herself. The Court discussed the minor child's "standard of living," but the Appellee moved out of Appellant's residence before the minor child was two (2) years old. There was no significant standard of living that the parties' minor child had grown accustomed to at less than two (2) years old when the Appellee moved out. The trial court was simply trying to match the exact amount of child support amount that the Appellant pays for his older child in California. The Appellant having to help fund the purchase of Appellee's house sounds a lot more like spousal support, which was specifically denied in the Final Judgment and Decree. *Id.; see also, Anderson* at 367 Ga.App. 363.

Finally, it was stipulated by the parties prior to trial that each party would pay fifty percent (50%) of the costs associated with the minor child's current daycare and any private school. The trial court awarded Appellee a substantial high income deviation of $8,520 per month so that the Appellee could afford her 50%

portion of the minor child's private school costs, thereby forcing the Appellant to pay one hundred percent (100%) of the minor child's private school costs and in effect, terminating the parties' pre-trial agreement to share in the costs of the minor child's education. Clearly, the trial court stretched its ruling to mirror the $10,690 per month exact child support amount that Appellant pays for his older child in California, which is impermissible and reversible error according to *Parker v. Parker,* 293 Ga. 300, 307, 745 S.E.2d 605 (2013).

In this case, the trial court was so interested in matching, exactly, the $10,690 per month child support amount that Appellant pays for his older daughter in California, that the trial court failed to conduct a full analysis of what is in the best interests of the parties' minor child. Instead of its superficial, hasty, and ill-conceived high-income deviation of $8,520 per month in this case, the trial should have done a quantitative and qualitative analysis, based upon evidence presented at trial to determine a calculable high-income deviation necessary to serve the best interests of the parties' minor child. Instead, the trial court decided to match the $10,690 paid for monthly support for Appellant's minor child in California, and then the trial court gave reasons in the Decree that differ from the Child Support worksheet.

In her RESPONSE BRIEF, Appellee failed to address any points raised or the authorities cited by the Brief of the Amicus Curiae on this child support issue.

Consequently, herein, Appellant would like to restate and incorporate by reference the arguments and citations of authority set forth in the Brief of the Amicus Curiae.

This Honorable Court should reverse and remand the $8,520 per month high-income deviation awarded by the trial court and remand this case to the trial court to award child support based upon the law which does not penalize the Appellant, but which supports the best interests of the parties' minor child.

CONCLUSION

For the foregoing reasons, among other things, the arbitration award issued in this case should be vacated because the Arbitrator clearly overstepped her authority. Moreover, the Arbitrator misinterpreted the parties' PREMARITAL AGREEMENT when she concluded that the parties' PREMARITAL AGREEMENT was valid while simultaneously invalidating specific terms of the PREMARITAL AGREEMENT dealing with Attorney's Fees. Additionally, the award of retroactive, lump sum child support in this divorce case was erroneous where the Father (Appellant) had been voluntarily financially supporting the minor child since birth and during the divorce case. Instead of applauding the Appellant for doing what he was supposed to do voluntarily by financially supporting the minor child without court intervention, the Appellant was punished for doing what was right. Such an award will undoubtedly send a chilling effect to other divorcees who would voluntarily financially support their minor child(ren), but do not because they fear being ordered to pay a retroactive

lump sum. Said retroactive lump sum child support awarded herein, was over-reaching and punitive. Finally, the high-income deviation of $8,520 should also be vacated in this case. Said award was arbitrary, capricious, and not grounded in law of fact, but simply made to match a California child support order.

This submission does not exceed the 4,200-word count limit imposed by Rule 24.

Respectfully submitted, this 13th day of May, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have this date served the opposing party in the foregoing matter with a copy of the REPLY BRIEF. Pursuant to Court of Appeals Rule 6(d), I certify that there is a prior agreement with Mr. Adam Gleklen and Mr. William Alexander to allow documents in a .pdf format sent via e-mail to service for service.

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This 15th day of May, 2024.

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