

## Christian v. Christian, S16F1160

Supreme Court of Georgia, Civil Case (11/21/2016, 12/2/2016)

**Date of Valuation of Assets; Pre-Marital Assets; if your Application for Appeal is Denied, Try Again; and Watch out for your punctuation!!!!**

by: Margaret Gettle Washburn, Sr. Contributing Ed.



In the very recent and very lively case of *Christian v. Christian*, the Supreme Court, Justice David E. Nahmias for the Court, found that the trial court, Superior Court of DeKalb County, erred in concluding that the portion of husband's benefits to which wife was entitled under parties' separation agreement, which parties had signed over nine years prior to their divorce, should be based on their value as of the date parties signed the agreement, rather than the date of the divorce decree. Further, that the trial court should have found that if Paragraph VII of the Settlement Agreement had two reasonable interpretations, then the trial court should have looked beyond Paragraph VII to determine if the ambiguity was clarified when viewed in the context of the entire separation agreement, because of how a comma and the word "or" was interpreted. The Supreme Court affirmed the portion of the trial court's order deducting the premarital value from wife's share of the benefits. The premarital value of husband's benefits was not marital property and was not subject to equitable division.

In February, 2006, after 13 years of marriage, appellant Carla Graves Christian (Wife) and appellee Ben Christian, Jr. (Husband) signed a Separation Agreement. The agreement was approved by the trial court in December, 2008 in the Separate Maintenance action that was pending at that time. Subsequently, the Wife filed a complaint for divorce in March, 2013. In October, 2014, she filed a motion for partial summary judgment asking the trial court to rule that Paragraph VII of the Separation Agreement entitled her to one-half of Husband's retirement, 401(k), **and** other employment benefits as valued on the date of the divorce. (emphasis supplied.)

Paragraph VII says in full: "The parties acknowledge that should they divorce, Wife shall be entitled to one half of Husband[']s retirement, 401K or other employment benefits."



The trial court denied Wife's motion, **calling it an attempt to replace "or" with "and" in the language of the Separation Agreement.** (emphasis supplied) The court found no ambiguity in Paragraph VII and went on to say that, even if it did, it would not consider the parol evidence Wife sought to introduce purporting to be notes indicating that she was entitled to half of all three benefit categories, because the notes appeared to be made by Wife rather than Husband. After another hearing on the Wife's certificate of immediate review, the court denied Wife's request at the hearing, but it also announced that it was changing its ruling as to Paragraph VII to hold that Wife was entitled to one-half of Husband's 401(k) **and** retirement pension plan *or* one-half of his other employment benefits. However, three months later,

the court issued an order "clarifying" its prior Order and found: that Wife "is entitled to choose from the 401(k), or other employment benefits."

The trial court also found that the final decree of divorce, entered on August 21, 2015, incorporated the Separation Agreement and quoted Paragraph VII. The court held "as a matter of law . . . that the language of Paragraph VII . . . **requires that the date for valuing and dividing the retirement, 401 (k) or other employment benefits is the date of the Separation Agreement ... and not the date of the divorce.**" (emphasis supplied) The court further held that Wife was not entitled to any pre-marital value of those accounts and that she was "only entitled to choose one of the three benefits described in Paragraph VII."



The Wife filed an application to appeal to the Supreme Court, which was initially denied, but after Wife filed a motion for reconsideration, the Supreme Court granted the application. The Supreme Court reversed the trial court's judgment in part, vacate it in part, and affirm it in part, and remand the case with direction.

The Supreme Court found that the trial court erred in concluding that the Wife's portion of the benefits under Paragraph VII of the Separation Agreement should be based on their value as of the date the agreement was signed rather than the date of the divorce decree. Both parties acknowledged that the language of the Separation Agreement is plainly conditional: "*should* the parties divorce, [Wife] shall be entitled" to benefits so that Wife would actually receive the property divided by Paragraph VII only if and when the parties divorced. Husband's interpretation that the benefits Wife is entitled to receive should be valued as of the time the Separation Agreement was signed nine and a half years earlier was "unconvincing" as the assets in question were not in fact valued and segregated under each party's separate control at the time of the Separation Agreement in 2006. See, e.g., *Payson v. Payson*, 274 Ga. 231, 232 (552 SE2d 839) (2001). Nothing in Paragraph VII or the Separation Agreement indicated that this was the parties' intention or Agreement.

The Court went on the state: "In *Friedman v. Friedman*, 259 Ga. 530 (384 SE2d 641) (1989), we explained that the last date for acquiring marital assets is "the date of the final decree of separate maintenance or the date of the decree of final divorce," because such a date is certain rather than subject to manipulation by one of the parties. Id. at 532"

Further, the Supreme Court found that the trial court erred in holding that the Wife was entitled to **one-half of only one of the three benefits listed in Paragraph VII, which gives Wife one-half of Husband's "retirement, 401K or other employment benefits."** The Husband contended that this language entitled the Wife to **pick only one of the three, because the "or" separates all three.** The Wife contended that because of "the lack of a serial comma<sup>2</sup> in "401K or other," that retirement and 401K constitute one category, and thus that she may choose between one half of Husband's retirement *and* 401K *or* one-half of his other (undefined) employment benefits. Alternatively, Wife argues that the three words in the list retirement, 401K, and other all modify the final term "employment benefits." Read this way, Wife is entitled to **one-half of all of Husband's employment benefits, which are defined to include retirement, 401K, or other such benefits.** (emphasis supplied)

The Supreme Court found that the both parties' interpretation of Paragraph VII may seem "natural". Further, each of the benefits to which Paragraph VII refers is (at least in part) marital property and so is subject to equitable division. The Court found that: "And it would be strange for Wife and Husband to agree that she could choose only one of three categories and then leave one of those categories described simply as "other employment benefits," a phrase that could encompass benefits far afield from retirement or 401K accounts, like term health and life insurance. On the other hand, because Wife would be entitled to receive any of Husband's benefits only if and when they divorced at some unknown future time, which was 9 years later, therefore, "other" to accommodate future changes in the denomination of his retirement-oriented employment benefits would make sense."

Because both interpretations could be applied, then the trial court should have looked beyond Paragraph VII to determine if the ambiguity was clarified when viewed in the context of the entire Separation Agreement, and if not, should have considered parol evidence to determine the meaning of Paragraph VII. See Coppedge v. Coppedge, 298 Ga. 494, 497-498 & n.3 (783 SE2d 94) (2016).<sup>3</sup>

The Supreme Court affirmed the trial court's finding as to the Husband's premarital property as it was not specifically addressed the Separation Agreement. "In the absence of any such language, the presumption is that a settlement or separation agreement is dividing only the property subject to equitable division, meaning only the marital property. See OCGA § 19-3-9 ("The separate property of each spouse shall remain the separate property of that spouse. See also Payson, 274 Ga. at 232 ("The purpose behind the doctrine of equitable division of marital property is 'to assure that property accumulated during the marriage be fairly distributed between the parties.' Only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division." Therefore, the Supreme Court affirmed the portion of the trial court's order deducting the Husband's premarital value from Wife's share of the benefits as set out in the aforementioned Paragraph VII.