IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 17, 2003 Session

DIANE MARIE BIEGEN OSTHEIMER
v.
RICHARD HAROLD OSTHEIMER

An Appeal from the Chancery Court for Shelby County
No. D-17743-1 Walter L. Evans, Chancellor

No. W2002-02676-COA-R3-CV - Filed March 29, 2004

This is a child support case. The parties were divorced, and custody of their child was awarded to the mother. As child support, the father was ordered to pay a flat-amount per month plus a percentage of each commission check he earned. Eight years later, the mother filed a petition for contempt, asserting that the father was in arrears on the flat-amount monthly component of his child support payments. The petition did not mention any arrearage based on the father's commission-based child support obligation. Subsequently, the trial court entered a consent order, stating the amount of the father's child support arrearage as of the date of the order. The order did not mention the father's commission-based child support obligation. The father did not comply with the consent order. Subsequently, the mother filed an amended petition for contempt, asserting that the father was in arrears on his child support based on his failure to pay the commission-based component of his child support obligation. The trial court held that the mother's claim was barred by *res judicata*, based on the earlier consent order that addressed the father's child support arrearage. The mother now appeals. We reverse, finding that the mother's claim to commission-based child support arrearages was not barred by *res judicata*, because the language in the consent order is ambiguous, and the evidence does not show that the parties negotiated that issue or contemplated that it would be resolved in the consent order.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Reversed and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

David E. Caywood, Memphis, Tennessee, for the appellant, Diane Marie Biegen Ostheimer.

Stuart B. Breakstone, Memphis, Tennessee, for the appellee, Richard Harold Ostheimer.

OPINION

Plaintiff/Appellant Diane Marie Biegen Ostheimer ("Mother") and Defendant/Appellee Richard Harold Ostheimer ("Father") were divorced by final decree on November 29, 1990. The parties have a son, Jeffrey Bruce Ostheimer ("Jeffrey"), born October 10, 1981, who was about nine years old at the time of the divorce.[1] The parties entered into a marital dissolution agreement ("MDA"), which was incorporated into the final decree of divorce. Under the MDA, Mother received custody of Jeffrey, and Father agreed to pay child support. The MDA set out Father's child support obligation as follows:

> 10. CHILD SUPPORT. It is further agreed between the parties that Husband will pay to Wife the sum of Seven Hundred ($700.00) per month as child support payable Three Hundred Fifty Dollars ($350.00) on the fifth (5th) of each month and Three Hundred Fifty Dollars ($350.00) on the fifth (5th) of each month and Three Hundred Fifty Dollars ($350.00) on the twentieth (20th) of each month. A late charge of Twenty Five Dollars ($25.00) per payment shall be paid if said payments are not received within five (5) days of the due date.
>
> Husband shall additionally pay as child support thirty percent (30%) of all net commission checks until the minor child's class of which he is a member graduates from high school. Husband agrees to provide verification of all commission checks to Wife with original pay stubs and provide year to date commission figures on a quarterly basis. Husband agrees that the total commission payments to Wife as child support from the present date until the minor child's class graduates will total at least Twenty Thousand Dollars ($20,000.00). In the event the commission does not meet said amount, Husband agrees to make up any deficiency by prorating the deficiency over a four (4) year period and paying said deficiency towards the minor child, Jeffrey Bruce Ostheimer's, college tuition.

Thus, Father's child support obligation included a flat-amount component of $700 per month, plus a fluctuating commission-based component of 30% of all net commission checks.[2]

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[1] The parties also have a daughter, Jennifer Jo Ostheimer, who had reached majority by the time the divorce was final.

[2] Such fluctuating child support awards are considered inappropriate under the current child support guidelines and the pertinent statutes. ***See Robertson v. Robertson***, No. 03A01-9711-CV-00511, 1998 WL 783339, at *3-*4 (Tenn. Ct. App. Nov. 9, 1998); ***Smith v. Smith***, No. 01A-01-9705-CH-00216, 1997 WL 672646, at *2-*3 (Tenn. Ct. App. Oct. 29, 1997). The agreement into which the parties entered in this case was executed in 1990, when such awards were permissible.

In May 1997, when Jeffrey was about sixteen years old, he moved from Mother's home to Father's home. At the time, no petition was filed to modify the child support or custody arrangements. Jeffrey continued to live with Father until he reached majority.

On March 27, 1998, Mother filed a petition for civil and criminal contempt in the trial court below, claiming that Father had failed to pay child support. In the petition, Mother alleged that Father had failed to pay child support as stated in the first paragraph of the child support provisions in the MDA, which described only the flat-amount component of child support of $700 per month. The petition did not allege that Father had failed to pay under the commission-based component of his child support obligation. Mother stated in her petition that the "TOTAL CHILD SUPPORT NOT PAID AS OF 3/10/98 [IS] $2,750.00." The petition for contempt also asserted that Father had failed to pay certain credit card debts and to provide life insurance.

On June 5, 1998, the trial court entered an order titled "Consent Order on Petition for Civil and Criminal Contempt" ("Consent Order"). In that order, the trial court directed Father to recommence paying the flat-amount of $700 per month as set out in the MDA and incorporated into the divorce decree. The Consent Order stated that, as of June 5, 1998, Father was "$4,975.00 in arrears on his child support payments," and ordered Father to pay Mother $1,000 each month, beginning in July 1998, to pay off the arrearage. The Consent Order also resolved the other issues unrelated to child support that were raised in Mother's petition. Finally, the Consent Order concluded with the following language:

> 7. By consent, [Mother's] Petition for Civil and Criminal Contempt shall be reset if [Father] fails to abide by the terms of this Agreement and Consent Order on [Mother's] Petition for Civil and Criminal Contempt.

The Consent Order did not mention the commission-based component of Father's child support obligation. On April 20, 1999, Father filed a satisfaction of judgment, stating that he had paid Mother the amount of the June 5, 1998 judgment. It is undisputed, however, that Father did not recommence paying the monthly child support, as ordered in the Consent Order.

In September 1998, before the debt in the Consent Order was paid, Mother filed an amendment to her petition for contempt, asserting that Father had failed to pay 30% of his net commission checks as required in the MDA and the final decree. On January 26, 1999, Mother filed a second amendment to her petition for contempt, incorporating by reference the allegations in the first amendment to the petition regarding the commission-based child support obligation. Mother acknowledged that the trial court had entered the Consent Order on June 5, 1998, but alleged that "despite the numerous Court Orders, [Father] continues to refuse to pay the child support as agreed and as ordered by the Court." Mother asserted that, since entry of the June 5, 1998 Consent Order, Father was in additional arrears of $4,400 on the flat-amount component alone.

On February 12, 1999, Father filed his answer to Mother's petition for contempt. Father admitted that as of June 5, 1998, he was in arrears on the flat-amount monthly portion of the child

support, and also admitted that he became delinquent on the flat-amount monthly child support owed after June 1998. He alleged, however, that he had paid Mother at least $20,000 in satisfaction of the commission-based component of his child support during the first few years after their divorce. Father also sought credit against his child support arrearage for necessities he had provided to Jeffrey since Jeffrey moved in with him in April 1997. On February 16, 1999, Father filed a petition for a change of custody of Jeffrey, noting that Jeffrey had moved in with him by agreement of the parties.

On June 14, 1999, the trial court appointed a Special Master, Suzanne Landers, to address, among other things, the following issues:

> 1. From the execution of the Marital Dissolution Agreement and entry of the Final Decree of Absolute Divorce to the present date, how much child support should have been paid by Defendant . . . from his commission or bonus income pursuant to the terms of the Marital Dissolution Agreement and Final Decree of Absolute Divorce?
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> 2. How much has Mr. Ostheimer paid as child support from his commission or bonus income since the entry of the Final Decree of Absolute Divorce?
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> 3. What is the amount of Mr. Ostheimer's child support arrearage owed to Ms. Ostheimer attributable to child support owed from Mr. Ostheimer's commission or bonus income?
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> 4. Is Mr. Ostheimer current in his obligation to pay child support of $700.00 per month and applicable late fees pursuant to the Final Decree of Absolute Divorce incorporating the Marital Dissolution Agreement and pursuant to the Consent Order . . . .?
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> 5. How much is the amount of Mr. Ostheimer's child support arrearage on his monthly child support obligation, including applicable late fees, set forth in the Final Decree of Absolute Divorce incorporating the Marital Dissolution Agreement and as set forth in the June 5, 1998 Consent Order . . . ?

Thus, the Special Master was charged with performing an accounting of how much child support Father had paid and how much he still owed, including both the flat-amount and commission-based components of his obligation.

On November 15, 2000, the Special Master filed her Report ("the Report"). In the Report, the Special Master concluded that, for the period from 1990 through 1995, Father owed Mother $67,818.66 on the commission-based component of his child support obligation, plus interest of

$56,990.12.[3] As to the flat-amount component of the child support, the Special Master concluded that Father owed Mother $9,800 plus $1,528.80 in interest, accruing from March 1999 through May 2000, after the Consent Order was entered.[4] Noting that Father had never sought modification of the child support and custody orders, and that Mother continued to pay expenses such as Jeffrey's private school tuition, books, and clothing, the Special Master recommended that Father not receive an offset for the necessities for Jeffrey for which he paid while the child was living with him.

On November 27, 2000, Father filed objections to the Special Master's Report, asserting that the Special Master erred in calculating the amount of child support due, and that she erred in determining that Father was not entitled to an offset for the necessities provided while Jeffrey was living with him. Father also asserted other errors in the Special Master's findings of fact. On January 6, 2001, Mother filed a motion to approve the Report of the Special Master.

On February 6, 2001, Father filed an amendment and supplemental objection to the Special Master's Report, asserting that the June 5, 1998 Consent Order was a final judgment, and that, therefore, Mother's petition for contempt could not be "amended" to include a claim for commission-based support. In light of the Consent Order, Father argued that *res judicata* precluded Mother from attempting to relitigate the issue of child support. Father contended that the Special Master erred in failing to consider the intent of the parties in creating a $20,000 college fund for Jeffrey and in recommending against giving Father an offset for the expenses paid by him while Jeffrey was living with him. On the same day, Father filed a motion to strike Mother's first and second amended petitions for civil contempt, again arguing that the Consent Order was a final judgment on Father's child support arrearages and that Mother could not amend her petition post-judgment.

On February 12, 2002, Father filed an amendment to his answer to Mother's petition for contempt. In the amended answer, Father asserted the defenses of *res judicata,* collateral estoppel, laches, and mutuality of estoppel.

On September 27, 2002, the trial court entered an order approving in part and modifying in part the Report of the Special Master. The trial court declined to adopt the Special Master's recommendation that Mother be awarded a judgment for the arrearage based on the commission-based child support, noting that the accrual of the arrearage "predates the Consent Order and findings of the Court entered on June 5, 1988 [sic] wherein the Court found that the total arrearages to date up to and including June 5, 1998 for child support was $4,975.00." The trial court reasoned "[t]hat the Court cannot go behind the findings and recommendations in the Consent Order and that furthermore it would be contrary to the doctrines of *res judicata* and estoppel." The trial court adopted the remaining findings of the Special Master. From that order, Mother now appeals.

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[3] Interest was calculated based on the statutory rate. The Special Master concluded that "Wife should be granted a judgment in the amount of $67,815.66 [sic], plus 12% interest as allowed by statute, which the Special Master calculates to equal $56,990.12."

[4] The Special Master further concluded that Father also owed $700 plus $100.80 in interest for late fees on the monthly payments.

On appeal, Mother argues that the trial court erred in failing to adopt the Special Master's Report *in toto* and, in particular, in determining that her claim for the commission-based child support arrearage was barred by the doctrine of *res judicata*. She asserts that equitable defenses are not available in child support cases, and that the doctrine of *res judicata* should not be applied on the facts of this case. Mother also argues that Father waived his *res judicata* defense because the defense was not raised as an affirmative defense in his original answer. Finally, Mother contends that the Consent Order was not a final order according to its own terms, and that issues raised subsequent to the date of that order were properly before the trial court.

The trial court's findings of fact are reviewed *de novo* on the record with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***Hass v. Knighton***, 676 S.W.2d 554, 555 (Tenn. 1984). Questions of law are reviewed *de novo*, with no such presumption of correctness. ***Jahn v. Jahn***, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996).

The main issue in this appeal is whether the trial court erred in applying the doctrine of *res judicata* to Mother's request for commission-based child support arrearages that accrued prior to the Consent Order entered on June 5, 1998.[5] It is well-settled that equitable defenses generally do not apply in child support arrearage cases. ***Rutledge v. Barrett***, 802 S.W.2d 604, 607 (Tenn. 1991). Nonetheless, the equitable defense of *res judicata* has been applied by Tennessee courts in child support arrearage cases in some situations.

Generally, there are two types of *res judicata* preclusion, claim preclusion and issue preclusion. The two types have been described as follows:

> The principle of *res judicata* encompasses two forms of preclusion: claim preclusion and issue preclusion. The doctrine of claim preclusion bars a second suit between the same parties or their privies *on the same cause of action* with respect to all issues of fact or law which were or could have been litigated in the concluded suit. ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987).
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> In contrast, the doctrine of issue preclusion, or "collateral estoppel," bars parties or their privies from relitigating issues of fact or law which were actually and necessarily

[5] Mother argues that *res judicata* does not apply because the Consent Order was not a final order. The Consent Order provided that Mother's petition for contempt "shall be reset if [Father] fails to abide by the terms of this Agreement and Consent Order . . . ." Because Father did not abide by the Order, Mother argues, the petition was subject to being "reset" and, therefore, the Order was not final. Father argues, on the other hand, that the Consent Order was a final judgment, and that, therefore, Mother was not at liberty to "amend" her petition. Father maintains that the "shall be reset" language "does not in any way prevent the agreement and determination of the child support arrearages from being a final judgment." Though the resolution of this issue is unclear, we assume that the Consent Order was a final judgment, subject to the principles of *res judicata*. Mother's "amendment" to her petition, therefore, can be considered in this appeal to be a separate petition for civil and criminal contempt based on the commission-based component of Father's child support obligation.

> determined in a former action between them. ***King v. Brooks***, 562 S.W.2d 422 (Tenn. 1978). Thus, where the two causes of action are different, the first judgment is binding as estoppel only as to matters in issue which were actually litigated and determined and is not a bar to issues which might have been litigated, but were not. ***Dickerson v. Godfrey***, 825 S.W.2d 692, 694 (Tenn. 1992).

Cheatham County Rail Auth. v. McCormick Ashland City, No. 01-A-01-9402-CH00054, 1994 WL 388273, at *3 (Tenn. July 27, 1994). Thus, claim preclusion bars any claims that "were or could have been litigated" in a second suit between the same or related parties involving the same subject matter. Issue preclusion, on the other hand, bars parties from relitigating issues of fact or law that were actually litigated and resolved in a former proceeding. ***Id.***

In this case, we must determine not only whether *res judicata* applies, but also the *type* of *res judicata* preclusion that may be applicable in a child support arrearage case, i.e., whether claim preclusion as well as issue preclusion is applicable. We will examine Tennessee cases to ascertain if claim preclusion or issue preclusion is permitted.

Res judicata principles were applied in ***Thomas v. Thomas***, No. E2001-00191-COA-R3-CV, 2001 WL 1268514 (Tenn. Ct. App. Oct. 23, 2001). In ***Thomas***, the parties were divorced in 1993, and the mother received custody of the parties' three children. In May 1999, the trial court entered an order establishing the father's child support arrearage to be $6,678.70 as of that date. In December 1999, the mother filed a petition to increase child support and for a judgment against the father for child support arrearages. The father argued that the May 1999 order entered by the trial court conclusively determined that the arrearage up to that date was $6,678.70, that the father had paid the mother a lump sum for that amount, and that the mother was barred by *res judicata* from relitigating the amount of any arrears that accrued prior to May 1999, the date of the order. The mother argued that the $6,678.70 found to have been due in the May 1999 order resulted from a miscalculation, and that the father actually owed her $3,252.82 more. ***Thomas***, 2001 WL 1268514, at *2. The trial court agreed with the father and held that the arrearage prior to May 1999 was settled by the previous order, and that the mother was precluded from asserting any further arrearage up to that point. This Court affirmed, finding that the issue had been resolved by the prior order, and that the mother was barred from relitigating the matter. ***Id.*** at *3.

In its discussion of the doctrine of *res judicata*, the ***Thomas*** court referred to "claim preclusion," stating that "[t]he doctrine of *res judicata* bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or *could have been* litigated in the former suit." ***Id.*** (emphasis added) (quoting ***Geoke v. Woods***, 777 S.W.2d 347, 349 (Tenn. 1989) (quoting ***Massengill v. Scott***, 738 S.W.2d 629, 631 (Tenn. 1987))). In effect, however, the trial court applied "issue preclusion" principles, since its ruling was based on the fact that the amount of child support due as of May 1999 had been actually litigated in the prior proceeding. Thus, in barring the mother's attempt to seek additional pre-May 1999 child support, the trial court concluded that the "issue was determined in the prior proceeding. . . . This issue has already been resolved adversely to Mother, and she is barred from re-litigating it now." ***Id***. at *3.

The doctrine of *res judicata* was also raised as a defense in ***McPherson v. Bridges***, No. 02A01-9302-GS-00030, 1993 WL 516255 (Tenn. Ct. App. Dec. 14, 1993). In ***McPherson***, the parties were divorced in 1978, and the mother received custody of their two children. The father was ordered to pay $160 per month in child support. In 1987, the mother filed a petition to increase the child support payments and to require the father to pay $6,800 in child support arrears. ***McPherson***, 1993 WL 516255, at *1. Subsequently, in December 1987, the trial court entered a consent order in which the father agreed to increase his child support payments to $200 per month. The December 1997 order mentioned nothing about the alleged $6,800 child support arrearage. In February 1992, the mother filed a petition for past due support claiming, among other things, that the father still owed the same $6,800 in arrears that was claimed in the earlier 1987 petition. The proof showed that the mother did not "remember if the arrearage issue was mentioned or not" when she agreed to the consent order increasing support. ***Id.*** at *3. The father testified that he had shown to his own lawyer that the arrearage had been paid, and that the matter was dropped from negotiations. The trial court rejected the father's *res judicata* defense and awarded the mother the full amount of child support found to be in arrears. The appellate court affirmed the decision of the trial court, stating that the intended effect of the 1987 consent order was not entirely clear from the evidence or from the language of the consent order. The appellate court reasoned:

> We are not unmindful of the general rule in [Tennessee] which says that a judgment in a previous action between the same parties concludes all facts litigated and which *might* have been litigated. However, this rule does not apply in every case where *res judicata* is involved. . . . Clearly, the consent order entered into by the parties fails to show with reasonable certainty that all of the elements making up the plea of *res judicata* were present.
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> Taking all of this proof together, we are of the opinion that the record in the trial court leaves the intention of the parties and the effect of the consent order both uncertain and conjectural.

Id. (citation omitted). The ***McPherson*** court did not reject the father's *res judicata* defense based on the general rule that equitable defenses are unavailable in child support cases. Rather, the court analyzed whether the evidence showed that the parties had intended to resolve the arrearage issue in the 1987 consent order. ***Id.*** If the record of the former proceeding is unclear, ***McPherson*** states, the burden is on the defendant to show that the issue was resolved in the former proceeding. Because the father in ***McPherson*** could not prove this, the mother was permitted to litigate the issue of child support arrears pre-dating the consent order.

The ***McPherson*** court cited with approval ***Gregory v. Gregory***, 803 S.W.2d 242 (Tenn. Ct. App. 1990). In ***Gregory***, in February 1988, the mother filed a petition in Tennessee state court for $6,800 in child support arrears. The case was transferred to Alabama for further proceedings under the Uniform Reciprocal Enforcement of Support Act, formerly codified at Tennessee Code Annotated

§ 36-5-201.[6] Later, the Alabama court entered a judgment in favor of the mother, finding that the amount of arrears for the period from April 1981 through June 1987 was $1,325. ***Gregory***, 803 S.W.2d at 243. In July 1988, the mother sought to collect on the father's child support arrearage through a federal income tax intercept procedure. Under that procedure, the mother claimed that the father was $6,775 in arrears for the period from April 1981 through June 1988. In support of that claim, she attached the same affidavit that she had used in the Alabama proceeding along with a supplemental affidavit to support the alleged arrears claimed between July 1987 through June 1988. As a result, the father's income tax refund for 1988 was seized by the Internal Revenue Service ("IRS") and was offset by the $6,775 in alleged past due support. ***Id.*** The father filed administrative appeals of the IRS action, but the decision to offset his income tax refund was upheld on appeal.

In May 1989, the father appealed the administrative decision in Tennessee chancery court , arguing that offset was improper because the Alabama judgment established that the arrearage due was $1,325, not $6,775. ***Id.*** The Tennessee trial court held that the doctrine of *res judicata* applied, and that the judgment in the Alabama court was conclusive on the issue of the amount of the father's child support arrearage between April 1981 and June 1987. The Tennessee appellate court reversed, finding that the record did not clearly show that the matter was resolved in the Alabama proceeding. Noting that the father had the burden to prove that the particular issue was litigated in the Alabama proceeding, the appellate court concluded that the evidence was insufficient to show that there was a judgment of record covering the subject of the child support arrearage at issue in the tax intercept proceedings. ***Id.*** at 244. The ***Gregory*** court reasoned that "[i]f the record does not conclusively show that a particular matter was determined in the former proceeding, the party relying on *res judicata* as a defense must supplement the record by other proof." ***Id.*** As noted in ***McPherson***, the ***Gregory*** court stated that, although the doctrine of *res judicata* bars claims that "might have been litigated," the doctrine may not apply in every case. The ***Gregory*** court clearly placed the burden on the father "to prove with certainty that the [Alabama] judgment covered the entire period for which the arrearage was sought." ***Id.*** at 245.

From these cases, it appears that, in cases involving child support arrearages, *res judicata* in the form of issue preclusion has been permitted as a defense, requiring the party asserting the defense to show that the issue was actually resolved in the former proceeding. Father has cited no child support arrearage case in which *res judicata* in the form of claim preclusion has been applied, barring claims that "might have been brought" in the former proceeding. Thus, in order to assert a *res judicata* defense in a child support case, the defendant must "prove with certainty" that the former proceeding actually addressed and resolved the issue. ***See id.*** at 245.

Applying this principle in the instant case, Father must submit sufficient evidence to show that the parties intended for the June 1998 Consent Order to resolve the issue of Father's commission-

[6] That statute was repealed effective January 1, 1998.

based child support obligation prior to June 1998.[7] The trial court below did not expressly address whether the commission-based component of Father's child support obligation was actually litigated or resolved by the Consent Order. Rather, the trial court made the general determination that the doctrine of *res judicata* prevented it from going behind the findings in the Consent Order. To the extent that the trial court implicitly concluded that the issue of Father's commission-based child support obligation was encompassed in the Consent Order, we must determine whether the evidence preponderates against that conclusion.

Father argues that the evidence is sufficient to show that the June 1998 Consent Order was intended to resolve all aspects of his child support obligation, including the commission-based support. Father argues that Mother's initial petition for contempt evidenced her entire claim for support, because she admitted at a hearing before the Special Master that she was aware Father owed her commissions at the time she filed her initial petition. Even though she was aware that Father owed her commissions, Father contends, Mother's petition was all-encompassing, stating that Father "is $4,975.00 in arrears on his child support payments," without distinguishing between the two components of his obligation. Furthermore, Father notes that the Consent Order addresses matters other than child support, such as credit card debts and the provision of life insurance. Therefore, he claims, the order necessarily resolved all disputed issues between the parties, including the commission-based child support arrearage.

From our review of the record, Mother's contempt petition sought child support based only on the flat-amount paragraph in the parties' MDA. The other requests in the petition were very specific, seeking payments on credit cards and proof of life insurance. In addition, the Consent Order entered into between the parties addressed only the items raised in the petition, and did not include any language indicating that it resolved the parties' dispute over Father's commission-based obligation. The amount awarded in the Consent Order, $4,975, undisputedly included only arrearages based on the flat-amount component of the child support obligation.

This situation is analogous to that in ***McPherson***, in which the mother initially petitioned the court for a child support arrearage, but later negotiated a consent order that did not address the issue. Though the father claimed that the issue was resolved by implication, the appellate court disagreed. Instead, because the record left "the intention of the parties and the effect of the consent order both uncertain and conjectural," the court refused to apply the doctrine of *res judicata* to bar the mother's recovery. ***McPherson***, 1993 WL 516255, at *3. In the instant case, there is simply no evidence that the trial court resolved the commission issue, because Mother did not request that relief in her initial

[7] Ordinarily, application of issue preclusion principles require inquiry into what was actually litigated. In this case, however, the parties agreed to provisions in a consent order, and nothing was litigated. In such a case, the relevant inquiry is whether the parties intended for the order to resolve the issue at hand. ***See McPherson***, 1993 WL 516255, at *3.

petition for contempt.[8] Moreover, Father has not submitted extrinsic evidence to indicate that the Consent Order was intended to resolve any dispute regarding the commission-based child support due Mother. Had Father intended the Consent Order to resolve any issues regarding the commission-based child support, he could have inserted language in the Consent Order absolving himself from that liability. This he did not do. Consequently, we must conclude that the evidence preponderates against the trial court's determination that Mother's claim to commission-based child support is barred by the doctrine of *res judicata*. ***See Strzelecki v. McGriff,*** No. M1999-00057-COA-R3-CV, 2000 WL 48501, at *1 (Tenn. Ct. App. Jan. 21, 2000) ("Where there is any uncertainty, the doctrine of *res judicata* does not apply. . . . As the appellant has failed to supplement the record with sufficient proof indicating which issues were determined at the former proceeding, the doctrine of *res judicata* is not applicable in the case at bar . . . ."). Therefore, the decision of the trial court must be reversed and the cause is remanded. This decision pretermits any other issues raised in this appeal.

The decision of the trial court is reversed and the cause is remanded for further proceedings consistent with this Opinion. Costs are to be taxed to Appellee Richard Harold Ostheimer, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE

[8] Father emphasizes that Mother stated in her petition that his "total child support not paid" was $2,700 as of March 10, 1978. From even a liberal reading of the petition, however, it is patently clear that the child support requested related only to the flat-fee monthly component, which was quoted in the petition, and did not mention the commission-based component to which she was also due. Therefore, we find it insignificant that Mother characterized her request as one for the "total child support not paid."