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Domestic Relations

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In this survey period, the legislature revised the step-parent adoption statute[1] four months after the Georgia Supreme Court declared it unconstitutional.[2] In a case of first impression,[3] the supreme court held that a third-party defendant in a divorce case must comply with the application-for-appeal procedure of section 5-6-35(a)(2) of the Official Code of Georgia Annotated ("O.C.G.A.").[4] In another case, the supreme court declared that even after spouses are no longer functioning as partners, the property they acquire before entry of a final decree of divorce is marital property.[5]

Section I of this Article covers cases dealing specifically with children, section II deals with divorce, and section III deals with marriage and family.

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1. Act approved Apr. 12, 1990, No. 1371, § 5, 1990 Ga. Laws 1572, 1589-90 (codified as amended at O.C.G.A. § 19-8-6 (1982) (current version at O.C.G.A. § 19-8-10 (Supp. 1990))).

2. Thorne v. Padgett, 259 Ga. 650, 386 S.E.2d 155 (1989). *See infra* text accompanying notes 22-33.

3. Horton v. Kitchens, 259 Ga. 446, 383 S.E.2d 871 (1989). *See infra* text accompanying notes 167-70.

4. O.C.G.A. § 5-6-35(a)(2) (1982 & Supp. 1990).

5. *See* Friedman v. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989); *see also infra* text accompanying notes 100-11.

I. CHILDREN

A. Custody

A third-party who is not bound by the ties of blood and family is a stranger to the child in the eyes of the law. *Brooks v. Carson*[6] involved an interlocutory appeal in a custody action filed by the child's natural father against the natural mother in January 1989. Mary Carson, who alleged that the natural mother had given her physical custody of the child in 1986, obtained an *ex parte* order to intervene in the father's action. Ms. Carson filed an answer and counterclaim wherein she sought to terminate the father's parental rights, dismiss his custody suit, and to have physical and legal custody awarded to herself. The father appealed from the trial court's order to intervene.[7] The court of appeals held that although O.C.G.A. § 19-9-50[8] required Ms. Carson to be made a party to the father's action because she had physical custody of the child, she did not have the right to challenge the father's right to custody in favor of herself, even though she had obtained custody of the child from the natural mother.[9] Because the natural mother did not appear in this case, the court of appeals found a prima facie right of custody to be in the father and held that custody must be awarded to him unless he was presently unfit.[10] "[O]nly *after* the parent has been determined unfit can the court turn to a third party . . . ."[11] The court of appeals affirmed the judgment of the trial court insofar as it permitted Ms. Carson to become a party pursuant to O.C.G.A. § 19-9-50, but reversed the judgment insofar as it permitted Ms. Carson to petition to terminate the father's rights and give evidence of her own fitness and of the best interests of the child.[12] The court of appeals held that the suit against the mother must be adjudicated first, and during this adjudication process, the third-party, Carson, had no right to challenge the father's fitness.[13]

In *Larson v. Larson*,[14] a child's paternal grandparents petitioned for custody against the child's natural mother. The eighteen-month old child was in the mother's custody pursuant to a judgment and decree of divorce entered in 1987. Because a substantial change in circumstances had occurred since the entry of the divorce decree, the trial court awarded cus-

6. 194 Ga. App. 365, 390 S.E.2d 859 (1990).
7. *Id.* at 366, 390 S.E.2d at 861-62.
8. O.C.G.A. § 19-9-50 (1982).
9. 194 Ga. App. at 367, 390 S.E.2d at 862.
10. *Id.* at 373, 390 S.E.2d at 866.
11. *Id.* (emphasis in original).
12. *Id.* at 374, 390 S.E.2d at 867.
13. *Id.*
14. 192 Ga. App. 163, 384 S.E.2d 193 (1989).

tody to the grandparents.[15] The court of appeals, however, held that the "substantial change in circumstances" standard is applicable only in custody contests between natural parents.[16] In a custody contest between a parent and a nonparent, the parent is entitled to custody of the child unless the nonparent shows by clear and convincing evidence that the parent is unfit or otherwise not entitled to custody pursuant to the criteria of O.C.G.A. §§ 19-7-1 and 19-7-4.[17]

B. Adoptions

Adoption by Step-Parent or Relative. In *Moore v. Butler*,[18] appellee, Steve Butler, brought a petition under O.C.G.A. § 19-8-6(b)[19] to adopt the son of his wife. The child was born to Butler's wife and her ex-husband, Moore, after their divorce. The decree made no award as to custody or support of the child. One year after his ex-wife's marriage to Butler, Moore was convicted of aggravated rape and sentenced to forty years in prison. The trial court found that, because Moore had not provided support for the child for a period of more than one year, adoption was in the child's best interest.[20] The court of appeals affirmed and held that the lack of a court ordered child support obligation did not excuse Moore from his legal obligation to support the child, and his incarceration did not relieve him of his natural and statutory obligation to support his child.[21]

Three months later, on December 5, 1989, the supreme court declared O.C.G.A. § 19-8-6(b) unconstitutional in *Thorne v. Padgett*.[22] David Padgett filed a petition to adopt his wife's child pursuant to section 19-8-6(b). The wife's former husband and the natural father of the child was Johnny Thorne, who at the time of the action was serving a fifteen-year prison sentence for his conviction of armed robbery. The trial court found that Thorne had failed significantly for a period of one year, prior to the filing of the adoption petition, to provide support for the child. The trial court, therefore, granted Padgett's petition.[23] The court of appeals found that Thorne had sought to attend the trial court hearing and had then

15. *Id.* at 164, 384 S.E.2d at 194.
16. *Id.*
17. O.C.G.A. §§ 19-7-1, -4 (1982 & Supp. 1990).
18. 192 Ga. App. 882, 386 S.E.2d 678 (1989), *vacated*, Thompson v. Thompson, 259 Ga. 817, 388 S.E.2d 514 (1990), *on remand*, 195 Ga. App. 1, 392 S.E.2d 285 (1990) (reversing trial court in light of Thorne v. Padgett, 259 Ga. 650, 386 S.E.2d 155 (1989)).
19. O.C.G.A. § 19-8-6(b) (1982) (current version at O.C.G.A. § 19-8-10(b) (Supp. 1990)).
20. 192 Ga. App. at 883, 386 S.E.2d at 679.
21. *Id.* at 884, 386 S.E.2d at 679-80.
22. 259 Ga. 650, 386 S.E.2d 155 (1989).
23. *Id.* at 650, 386 S.E.2d at 155.

filed a petition for writ of habeas corpus *ad testificandum*.[24] The court denied the petition, and Thorne's testimony was subsequently taken by deposition. The testimony that Thorne had attempted to give *viva voce*, which he actually did give by deposition, was that there was a justifiable cause for his failure to provide support.[25] The court of appeals held that such testimony was irrelevant and immaterial to the issue to be determined under section 19-8-6(b).[26] The court of appeals affirmed the trial court's decision, and the supreme court reversed.[27]

Prior to its amendment in 1979, O.C.G.A. § 19-8-6(b) provided that the termination of parental rights was not a prerequisite to adoption by a step-parent or relative when a parent had failed significantly, "without justifiable cause," to provide support for a period of one year prior to the filing of the adoption petition.[28] The "without justifiable cause" language was deleted from the statute in 1979.[29] The supreme court stated that the due process clause of the fourteenth amendment prohibited a natural parent's rights in his child to be terminated absent a showing by clear and convincing evidence of his unfitness.[30] The supreme court held that section 19-8-6(b), as amended in 1979, circumvented this constitutional requirement by permitting a trial court to sever a parent's rights in his child even in the face of overwhelming evidence that the parent had justifiable cause for not supporting the child. The supreme court stated: "Because O.C.G.A. § 19-8-6(b) forecloses an inquiry into the reasons for a parent's failure to provide care and support, thus depriving that parent of a meaningful opportunity to be heard, it denies due process of law."[31]

The answer to the question asked in Justice Weltner's dissenting opinion ("What happens now?")[32] came rather quickly with the passage of Senate Bill 462.[33] The legislature inserted the "without justifiable cause" language back into the step-parent adoption statute.[34]

In *Shepard v. Landers*,[35] decided two months before *Thorne*, the natural father of two minor children appealed the decree of adoption granted

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24. 191 Ga. App. 814, 815, 383 S.E.2d 160, 161 (1989).
25. *Id.* at 816, 383 S.E.2d at 161.
26. *Id.* at 815, 383 S.E.2d at 160 (citing O.C.G.A. § 19-8-6(b) (1982)).
27. 259 Ga. at 650, 386 S.E.2d at 155, *rev'g* 191 Ga. App. 814, 383 S.E.2d 160 (1989).
28. Adoption Act of 1977, § 74-405, 1977 Ga. Laws 205, 211 (current version at O.C.G.A. § 19-8-10(b) (Supp. 1990)).
29. 1979 Ga. Laws 1182, 1188.
30. 259 Ga. at 651, 386 S.E.2d at 156 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).
31. *Id.* at 651-52, 386 S.E.2d at 156.
32. *Id.* at 653, 386 S.E.2d at 157 (Weltner, J., dissenting).
33. Act approved Apr. 10, 1990, No. 1247, § 1, 1990 Ga. Laws 1034, 1034-35 (codified at O.C.G.A. § 19-8-10(b) (Supp. 1990)).
34. *Id.*
35. 193 Ga. App. 392, 388 S.E.2d 12 (1989).

to his ex-wife's new husband. The evidence in this case showed that the natural father had been ordered to pay child support and had failed to make any payments, but had given the children occasional gifts of clothes and money and had voluntarily decided to provide insurance coverage for them. Affirming the judgment of the trial court, the court of appeals held that such "sporadic and de minimis" efforts did not require a finding that there had been significant support.[36] Further, as the court stated in *Pacella v. Sanchez*,[37] a petition for adoption under O.C.G.A. § 19-8-6(b)(2) does not depend upon the entry of court ordered child support and may be sustained simply under O.C.G.A. § 19-7-2,[38] which establishes the joint and several duty of parents to provide support for their minor children.[39]

Virtual Adoption. In *Lee v. Gurley*,[40] the court restated the elements required to establish a virtual adoption:

> "Some showing of an agreement between the natural and adoptive parents, performance by the natural parents of the child in giving up custody, performance by the child by living in the home of the adoptive parents, partial performance by the foster parents in taking the child into the home and treating it as their child, and the intestacy of the foster parent."[41]

Appellant had filed a complaint in equity contending she was entitled to her intestate uncle's entire estate because he had virtually adopted her. Although there was evidence that appellant's custodial parent had given physical custody of her to her uncle, both of appellant's natural parents denied the existence of any agreement between them and the decedent. Finding a lack of evidence of an agreement "comprehending and intending an adoption," the supreme court affirmed the trial court's judgment notwithstanding the verdict.[42]

C. *Termination of Parental Rights*

In re B.J.H.[43] was an appeal from an order terminating parental rights under O.C.G.A. § 15-11-81(a).[44] This statute provides for a two-step pro-

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36. *Id.* at 392, 388 S.E.2d at 13.
37. 191 Ga. App. 611, 382 S.E.2d 371 (1989).
38. O.C.G.A. § 19-7-2 (1982).
39. 191 Ga. App. at 612-13, 382 S.E.2d at 372.
40. 260 Ga. 23, 389 S.E.2d 333 (1990).
41. *Id.* at 24, 389 S.E.2d at 334 (quoting Williams v. Murray, 239 Ga. 276, 276, 236 S.E.2d 624, 625 (1977)).
42. *Id.* (citing Anderson v. Maddox, 257 Ga. 478, 360 S.E.2d 590 (1987)).
43. 194 Ga. App. 282, 390 S.E.2d 427 (1990).
44. O.C.G.A. § 15-11-81(a) (1990).

cedure whereby the court first determines whether there is clear and convincing evidence of parental misconduct or inability, and second, whether termination is in the best interests of the child. The trial court's comprehensive findings regarding the criteria of section 15-11-81 included the finding that the causes of deprivation were likely to continue based upon the mother's mental and emotional deficiencies.[45] The mother was mentally retarded, functionally illiterate, and had an I.Q. of sixty. The mother claimed that the trial court abused its discretion and manifested a prejudice toward her because of her mental retardation. The standard of review applied was " 'whether after reviewing the evidence in the light most favorable to the appellee, any rational trier of fact could have found by clear and convincing evidence that the natural parent's rights to custody have been lost.' "[46] The court of appeals held that a mental disability that renders a parent incapable of caring for a child is a valid legal basis for terminating parental rights.[47] The mother's lack of capacity resulting from her mental condition, therefore, was properly considered by the trial court.[48]

D. Procedure

In re C.C.[49] involved a petition for permanent custody filed in the juvenile court by the children's grandparents. Prior to the filing of the grandparents' petition, the Department of Family and Children's Services was awarded emergency temporary custody pursuant to a petition alleging the children were deprived. Thereafter, the juvenile court entered an order awarding temporary custody to the grandparents. The juvenile court denied the mother's motion to dismiss for lack of jurisdiction, and the court of appeals granted the mother's application for discretionary appeal.[50] The court of appeals held that the juvenile court lacked the subject matter jurisdiction to hear the grandparents' petition for permanent custody because there was no order of a superior court transferring the petition to the juvenile court.[51] O.C.G.A. § 15-11-5(c)[52] gives the juvenile court concurrent jurisdiction to hear and determine the issue of custody and support when the issue is transferred by proper order of the superior court. Although the juvenile court has exclusive jurisdiction under O.C.G.A. §

45. 194 Ga. App. at 282, 390 S.E.2d at 428.
46. *Id.* (quoting Blackburn v. Blackburn, 249 Ga. 689, 694, 292 S.E.2d 821, 826 (1982)).
47. *Id.* at 283, 390 S.E.2d at 429.
48. *Id.*
49. 193 Ga. App. 120, 387 S.E.2d 46 (1989).
50. *Id.* at 121, 387 S.E.2d at 47.
51. *Id.*
52. O.C.G.A. § 15-11-5(c) (1990).

15-11-5(a)(1)(C),[53] pertaining to petitions concerning children alleged to be deprived, the grandparents' complaint for permanent custody was not in the nature of a deprivation petition.[54]

Shelor v. Shelor[55] involved a motion to stay under section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940.[56] Mrs. Shelor brought an action to modify child support. After being served, Captain Shelor received orders to report to Cuba for a thirty-month tour of duty commencing on January 3, 1989. On December 28, 1988, the trial court held a hearing on Captain Shelor's motion to stay and Mrs. Shelor's motion for temporary modification of child support. Captain Shelor did not attend the hearing because he had been ordered to direct the movers who were dispatched that day. In March of 1989, the trial court granted the stay and denied the motion for temporary modification.[57] The supreme court decided that the trial court properly stayed further proceedings until Captain Shelor left Cuba, but abused its discretion with regard to the motion for temporary modification.[58] A trial court "should grant a stay unless something appears sufficient to show that the rights of the serviceman, as a litigant, will not be materially affected by a determination of the pending litigation."[59] As a general rule, however, given the lesser evidentiary burdens upon the party seeking temporary relief and the temporary nature of such relief, a serviceman's rights as a litigant will not be materially affected by a determination of a motion for such relief. A serviceman's ability to conduct his defense to an action for modification of child support is generally not affected materially by a determination of the interlocutory relief sought.[60] The supreme court held it was error for the trial court not to consider Mrs. Shelor's motion for temporary increase in child support.[61]

Roderiquez v. Saylor[62] reminds us of the considerable discretion a trial court has to deal with a party who fails to obey an order to provide or permit discovery. Pursuant to O.C.G.A. § 19-7-45,[63] the trial court ordered the parties to submit to a human leucocyte antigen (HLA) blood

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53. *Id.* § 15-11-5(a)(1)(C).

54. 193 Ga. App. at 121, 387 S.E.2d at 47.

55. 259 Ga. 462, 383 S.E.2d 895 (1989).

56. Ch. 888, § 201, 54 Stat. 1178, 1181 (codified as amended at 50 U.S.C. app. § 521 (1988)).

57. 259 Ga. at 462, 383 S.E.2d at 895-96.

58. *Id.*, 383 S.E.2d at 896.

59. *Id.* (citing Parker v. Parker, 207 Ga. 588, 63 S.E.2d 366 (1951)).

60. *Id.*

61. *Id.* at 463, 383 S.E.2d at 896-97.

62. 190 Ga. App. 742, 380 S.E.2d 339 (1989).

63. O.C.G.A. § 19-7-45 (1982).

test to determine paternity.[64] After being held in contempt for refusing to comply with the court's order regarding the blood tests, appellant persisted in her refusal to be tested and was incarcerated for ten days. After a second hearing concerning appellant's continued refusal to be tested, the court ordered her answer stricken and a default judgment entered against her pursuant to O.C.G.A. § 9-11-37(b)(2)(C).[65] The court of appeals affirmed.[66]

E. Modification

In *Livesay v. Hilley*,[67] about one month after the parties were divorced and custody of the minor child was awarded to the mother, the father petitioned for a change in custody contending there had been a material change in circumstances affecting the welfare of their child. The father's contention was based on the fact that the mother was living with Tommy Livesay, a man to whom she was not married. Prior to the hearing on the father's petition, the mother and Mr. Livesay were married. The trial court found that the minor child had been adversely affected by the mother's living arrangements and transferred custody to the natural father.[68] Despite the mother's arguments otherwise, the trial court found that at the time the mother and Livesay began living together, a common-law marriage did not exist because the present intent to marry was not shown.[69]

Noting that the evidence at the hearing related primarily to the parents and that the period of cohabitation was relatively brief, the court of appeals reversed on the ground that the evidence failed to show any material change of circumstances or conditions affecting the welfare of the child.[70] The court of appeals held that the trial court had abused its discretion in awarding custody to the father because the evidence failed to show any change in the mother's fitness or ability to care for the child.[71] This case represents a departure from the deference generally given by appellate courts to the trial court's exercise of discretion in custody cases under O.C.G.A. §§ 19-9-1(a) and 19-9-3(a).[72]

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64. 190 Ga. App. at 742, 380 S.E.2d at 339.

65. *Id.* at 743, 380 S.E.2d at 340 (citing O.C.G.A. § 9-11-37(b)(2)(C) (1982 & Supp. 1989)).

66. *Id.* at 745, 380 S.E.2d at 341.

67. 190 Ga. App. 655, 379 S.E.2d 557 (1989).

68. *Id.* at 656, 379 S.E.2d at 557-58.

69. *Id.*, 379 S.E.2d at 558.

70. *Id.*

71. *Id.* at 657, 379 S.E.2d at 559.

72. O.C.G.A. §§ 19-9-1(a), -3(a) (1982 & Supp. 1990).

Lane v. Titus[73] involved the modification of a 1983 decree. By an agreement incorporated into the 1983 decree, Mr. Titus had voluntarily obligated himself to maintain life insurance for the benefit of the wife and child and to pay the child's college expenses.[74] The supreme court held that the trial court erred in permitting the jury to modify these obligations: "[S]ince the trial court could not, absent Titus' consent by contract, impose the obligations referred to, neither can it modify them."[75] The contract provided that " 'neither of the parties hereto waives any legal rights they may have to bring any type of modification procedure *as provided by law*.' "[76] The court in *Lane* distinguished this case from *Katz v. Katz*,[77] in which such a modification was permitted when the parties expressly provided for the right to modify their contractual obligations.

F. Visitation

Brassell v. State[78] was an interlocutory appeal from the trial court's refusal to dismiss a misdemeanor charge of interference with custody under O.C.G.A. § 16-5-45.[79] Brassell had been exercising his visitation rights granted under a judgment and decree of divorce which awarded Brassell " 'the right of reasonable visitation, which shall include, but not be limited to, every weekend from 6:00 p.m. Friday until 6:00 p.m. on Sunday . . . .' "[80] During a weekend visitation with his child, Brassell asked his ex-wife for permission to keep the child several extra days. The ex-wife refused, and two days following the weekend visitation she swore out a warrant against Brassell for interference with custody. Brassell argued that section 16-5-45 is unconstitutionally vague and violates equal protection. Brassell argued that when a decree provides for "reasonable visitation," it is unconstitutional to allow the custodial parent to declare unilaterally that visitation has been unreasonably exercised and criminally prosecute the other parent. Brassell also contended that the statute is vague if it can be applied so as to make two extra days of visitation unreasonable. Brassell contended further that the statute violates equal protection by making it a crime to retain a child beyond visitation, but not making it a crime to fail to deliver the child for visitation.[81]

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73. 259 Ga. 264, 379 S.E.2d 521 (1989).
74. *Id.* at 264, 379 S.E.2d at 521.
75. *Id.*, 379 S.E.2d at 521-22.
76. *Id.* at 264 n.1, 379 S.E.2d at 522 n.1 (emphasis in original).
77. 258 Ga. 184, 366 S.E.2d 766 (1988).
78. 259 Ga. 590, 385 S.E.2d 665 (1989).
79. O.C.G.A. § 16-5-45 (1988).
80. 259 Ga. at 590, 385 S.E.2d at 665.
81. *Id.* at 591, 385 S.E.2d at 665.

Without reaching the constitutional arguments, the supreme court held that Brassell's conduct was not prohibited by the statute because the visitation under the decree represented the minimum amount of visitation which Brassell could enjoy with his child.[82] O.C.G.A. § 16-5-45(b)(1)(C) provides that a person commits the offense of interference with custody when he "intentionally and willfully retains possession within this state of the child . . . upon the expiration of a lawful period of visitation with the child . . . ."[83] The supreme court stated that one cannot be in violation of the statute unless the terms of the custody order are so clear that the parties have exact notice of the "line which may not be transgressed."[84] The supreme court reversed the trial court's denial of Brassell's motion to dismiss the charges against him.[85]

G. Uniform Reciprocal Enforcement of Support Act

In *Brookins v. Brookins*[86] the court of appeals considered the applicability of O.C.G.A. § 9-3-20[87] to an action for child support arrearages pursuant to the Uniform Reciprocal Enforcement of Support Act ("URESA").[88] Section 9-3-20 provides that all actions upon judgments obtained outside the state must be brought within five years. In this case, appellee wife instituted a URESA action to recover arrearages awarded by a 1974 Ohio judgment. Relying on O.C.G.A. § 9-3-20, appellant moved to dismiss the petition. The court held that section 9-3-20 does not provide a statute of limitations defense to URESA actions.[89] To hold otherwise would frustrate the purposes of URESA and impair, rather than improve, enforcement of the duty of support.

Tomlinson v. State[90] was a URESA action in which the trial court entered judgment on a verdict requiring appellant to pay $160 per month as child support, to provide accident and sickness insurance covering the child, and to maintain a $25,000 life insurance policy with the child as beneficiary. Appellant contended that the trial court had exceeded its authority in ordering him to maintain the life insurance policy.[91]

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82. *Id.*, 385 S.E.2d at 666.
83. O.C.G.A. § 16-5-45(b)(1)(C) (1988).
84. 259 Ga. at 591, 385 S.E.2d at 666.
85. *Id.*
86. 190 Ga. App. 852, 380 S.E.2d 494 (1989).
87. O.C.G.A. § 9-3-20 (1982).
88. 1958 Ga. Laws 34 (codified as amended at O.C.G.A. §§ 19-11-40 to -81 (1982 & Supp. 1990)).
89. 190 Ga. App. at 853, 380 S.E.2d at 495.
90. 193 Ga. App. 123, 387 S.E.2d 49 (1989).
91. *Id.* at 123, 387 S.E.2d at 49.

The court of appeals cited *Clavin v. Clavin*[92] for the proposition that a father is not required, by law, to create an estate for his minor child, and a provision in a divorce decree requiring a parent to provide a life insurance policy for the benefit of a minor child is invalid unless the parent has agreed to it.[93] The court of appeals also cited *Ritchea v. Ritchea*[94] which upheld a verdict in a divorce case requiring the husband to maintain a life insurance policy for the benefit of his wife as an element of alimony.[95] Finally, the court cited *Coker v. Coker*,[96] in which the supreme court acknowledged the conflict in these two cases but held that " 'even if the trial judge made . . . a mistake of law by including the life-insurance provision into the divorce decree, this does not constitute a ground for setting aside the decree.' "[97] The decision in *Coker* was based on the proposition that a complaint seeking to set aside a judgment on the ground that it resulted from a contested decisional error fails to state a claim upon which relief may be granted.[98]

The court in *Tomlinson* held that appellant had waived the right to object to the validity of the life insurance requirement on appeal. *Tomlinson* was based on two factors: the supreme court's decision in *Coker*, and appellant's failure to object at trial either to the jury's inclusion of life insurance in its verdict or to the trial court's charge authorizing the imposition of such a requirement.[99]

II. DIVORCE

A. *Division of Property*

In *Friedman v. Friedman*,[100] the supreme court held that the cut-off date for defining property as marital property is the date of the entry of the final decree of divorce.[101] After a jury verdict, which awarded the wife almost one-half of six million dollars in assets, the husband moved for a new trial on the ground that the award of marital property to his wife

92. 238 Ga. 421, 233 S.E.2d 151 (1977).
93. 193 Ga. App. at 123, 387 S.E.2d at 49 (citing *Clavin*, 238 Ga. at 421, 233 S.E.2d at 151).
94. 244 Ga. 476, 260 S.E.2d 871 (1979).
95. 193 Ga. App. at 123-24, 387 S.E.2d at 49-50 (citing *Ritchea*, 244 Ga. at 476, 260 S.E.2d at 871).
96. 251 Ga. 542, 307 S.E.2d 921 (1983).
97. 193 Ga. App. at 124, 387 S.E.2d at 50 (quoting *Coker*, 251 Ga. at 542, 307 S.E.2d at 921).
98. 251 Ga. at 543, 307 S.E.2d at 923.
99. 193 Ga. App. at 124, 387 S.E.2d at 50.
100. 259 Ga. 530, 384 S.E.2d 641 (1989).
101. *Id.* at 532, 384 S.E.2d at 642.

included property he had acquired after the parties separated.[102] The trial court determined that, under *Goodman v. Goodman* ("*Goodman III*")[103] assets acquired after an action for divorce is filed are not part of marital property. The court then granted the husband's motion.[104] The wife applied for interlocutory review. The supreme court reversed the grant of a new trial.[105]

The parties proposed four possible cut-off dates for the acquisition of marital property. First, the court considered the date of actual separation. Relying on *Goodman III*, the husband argued that because equitable division is based upon the partnership theory of marriage, any asset acquired after the parties cease to function as a partnership is separate property.[106] The supreme court disagreed and determined that the date of separation was unsatisfactory because it is uncertain and subject to manipulation.[107] Second, the court considered the date the complaint for divorce was filed. The supreme court determined that this date, as well, suffers from the defect of being subject to manipulation.[108] Third, the court considered the date the order for temporary support was filed. The court distinguished the instant case from *Goodman III*, a separate maintenance action, wherein the court held that property acquired after a decree of separate maintenance is not marital property.[109] The court found that the temporary nature of a temporary order makes it unsatisfactory as well as distinguishable from a final decree in a separate maintenance action.[110] Finally, the date adopted by the court was the date of the final decree, which is a certain date and one that the parties do not have the power to select at will. "[T]he last date on which assets may be acquired so as to be marital assets is the date of the final decree of separate-maintenance or the date of the decree of final divorce."[111] Imagine the manipulation to which the word "acquire" will be subject.

Six months before *Friedman*, the supreme court decided *Dees v. Dees*,[112] a case of first impression in Georgia. In *Dees* the supreme court adopted the "analytical approach" for determining what portion of an unpaid workers' compensation lump-sum settlement for injuries sustained

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102. *Id.* at 530, 384 S.E.2d at 641.
103. 257 Ga. 63, 355 S.E.2d 62 (1987).
104. 259 Ga. at 531, 384 S.E.2d at 642.
105. *Id.* at 533, 384 S.E.2d at 643.
106. *Id.* at 531, 384 S.E.2d at 642.
107. *Id.*
108. *Id.*
109. *Id.* at 532, 384 S.E.2d at 642.
110. *Id.*
111. *Id.*
112. 259 Ga. 177, 377 S.E.2d 845 (1989).

during the marriage is a marital asset subject to equitable distribution.[113] In 1982, while the parties were married, Mr. Dees sustained a job-related back injury. From 1982 until 1987, when the parties separated, Mr. Dees' sole source of income was his workers' compensation benefits. At the time of the divorce trial, Mr. Dees imminently expected to receive a lump-sum settlement of his workers' compensation claim.[114] Given that under California workers' compensation law, the major, if not the sole, factor in determining compensation is the wages lost during the period of disability, the trial court held that the unpaid settlement was a marital asset.[115] The trial court awarded Mrs. Dees twenty percent of the settlement, and Mr. Dees appealed.[116] The supreme court vacated and remanded.[117]

Citing *Campbell v. Campbell*,[118] the supreme court described the analytical approach as follows:

> "[W]hether the award is marital property does not depend on a formalistic view which looks only to the timing of the acquisition of the award. Instead, the inquiry focuses on the elements of damages the particular award was intended to remedy or, stated another way, the purpose of the award . . . . States subscribing to this approach acknowledge that damage awards may be separated into three different components: (1) compensation for the injured spouse for pain and suffering, disability, and disfigurement, (2) compensation for the injured spouse for lost wages, lost earning capacity, and medical and hospital expenses, and (3) compensation for the uninjured spouse for loss of consortium . . . . Compensation paid to a spouse for non-economic and strictly personal loss under (1) and (3) is considered that spouse's personal property, while the portion of damages paid to the injured spouse under (2) as compensation for economic loss during the marriage is marital property."[119]

The court noted that in *Campbell* the analytical approach was applied to a personal injury award.[120] The court also cited *Courtney v. Courtney*,[121] which held that unvested retirement benefits were marital property. "The unvested retirement benefits may be analogized to the element of compensation for lost wages, lost earning capacity, and medical and hospital

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113. *Id.* at 179, 377 S.E.2d at 847.
114. *Id.* at 177, 377 S.E.2d at 846.
115. *Id.*
116. *Id.*
117. *Id.*
118. 255 Ga. 461, 339 S.E.2d 591 (1986).
119. 259 Ga. at 177-78, 377 S.E.2d at 846-47 (quoting Weisfeld v. Weisfeld, 513 So. 2d 1278, 1281 (Fla. Dist. Ct. App.)).
120. *Id.* at 178, 377 S.E.2d at 847.
121. 256 Ga. 97, 344 S.E.2d 421 (1986).

expenses, which has been held to be marital property under the 'analytical approach.' "[122]

Finding that the trial court's decision assumed that the *only* factor of the settlement was lost wages, and having no transcript to reference, the supreme court vacated the order and remanded the case to the trial court. The trial court was instructed to establish, in accordance with the analytical approach, what portion of the award was marital property subject to equitable distribution.[123] In his dissenting opinion in *Campbell*, Justice Weltner stated: "That is simply too complex."[124] Will the trial courts agree?

Is it consistent with *Friedman* to classify as marital property that portion of a workers' compensation or personal injury award, whether it be paid or unpaid, that represents the present value of lost *future* wages? The court in *Dees* stated that the rationale for classifying unvested retirement benefits as marital property in *Courtney* included the notion that the wife's " 'efforts toward the furtherance of her husband's career contributed to the accumulation of these retirement benefits, and . . . these efforts were made with the expectation that these retirement benefits would provide her with some measure of personal security and future well-being . . . .' "[125] Is this notion relevant in the context of personal injury or workers' compensation awards?

In *Johnson v. Johnson*,[126] decided after *Dees* and *Friedman*, the court considered the allocation of a personal injury award and the liability for mortgages encumbering jointly held property that was awarded by the jury to one of the parties. Prior to their separation, the parties filed a suit as coplaintiffs against Georgia Power based on appellee's involvement in a motor vehicle collision with a Georgia Power Company truck. The collision rendered appellee comatose for approximately three weeks and totally disabled for a period of approximately nine months, after which he returned to full employment. As coplaintiffs, appellee sought recovery for personal injuries, and appellant sought recovery for her loss of consortium. Approximately one year after the divorce action was instituted, appellee and counsel for the parties signed a settlement agreement with Georgia Power. Appellant refused to sign this agreement because of her objection to the agreement's designation of the recipients of various mon-

122. 259 Ga. at 178, 377 S.E.2d at 847.

123. *Id.* at 179, 377 S.E.2d at 847.

124. Campbell v. Campbell, 255 Ga. 461, 463, 339 S.E.2d 591, 593 (1986) (Weltner, J., dissenting).

125. 259 Ga. at 178, 377 S.E.2d at 847 (quoting Courtney v. Courtney, 256 Ga. 97, 98-99, 344 S.E.2d 421, 422 (1986)).

126. 259 Ga. 658, 386 S.E.2d 136 (1989).

etary payments.[127] Ruling on a motion *in limine* filed by appellee, the trial court held that because the settlement agreement expressly designated certain portions of the settlement as jointly awarded and other portions as awarded solely to appellee, in the trial of the case appellant would be permitted to assert a claim for equitable division only against the portions jointly awarded.[128]

On appeal, appellee contended that notwithstanding the settlement's designation of the respective payees, the allocation of individual and marital assets within the settlement and the determination of the parties' respective entitlements to those payments constituting marital assets are questions of fact.[129] The supreme court agreed and held that by removing the jury's power to allocate the settlement award, the trial court cast serious doubt upon the entire jury verdict.[130] The supreme court remanded the case for a new trial.[131]

> [T]he finder of fact must determine the portion of the award constituting compensation for pain and suffering and award such sums to the appellee. The finder of fact must also determine the portion of the award constituting compensation for loss of consortium and award such sums to the appellant. And, the finder of fact must determine the portion of the award constituting compensation for lost wages and medical expenses, and divide those sums in an equitable manner under the facts and circumstances of this case.[132]

The second issue in *Johnson* involved the liability for mortgages encumbering two parcels of income-producing rental property acquired by the parties during the marriage. In its verdict, the jury awarded the income-producing properties to appellant, but made no specific verdict concerning the parties' respective liabilities for the mortgage payments.[133] Because the court ordered a new trial, it did not resolve this question, but pointed out the danger of failing to examine carefully jury verdicts, at publication, with "an eye to clarifying to exactitude the intention of the jury."[134]

In *Yates v. Yates*,[135] the supreme court held that the trial court erred in equitably dividing the husband's separate property.[136] The wife argued

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127. *Id.* at 659, 386 S.E.2d at 137.
128. *Id.* at 659-60, 386 S.E.2d at 137-38.
129. *Id.* at 661, 386 S.E.2d at 138.
130. *Id.*
131. *Id.*
132. *Id.* at 661 n.3, 386 S.E.2d at 139 n.3.
133. *Id.* at 662, 386 S.E.2d at 139.
134. *Id.* at 662-63, 386 S.E.2d at 139-40.
135. 259 Ga. 131, 377 S.E.2d 677 (1989).
136. *Id.* at 132, 377 S.E.2d at 678.

that any error was harmless because the trial court could have allocated the same property to her as alimony. Citing *Stokes v. Stokes*[137] and its progeny, the supreme court disagreed and, therefore, reversed and remanded.[138]

B. *Alimony*

In *Sapp v. Sapp*,[139] the husband appealed from a judgment entered on a jury verdict. As equitable division, the jury awarded the wife an insurance policy on the husband's life and required the husband to pay the premiums. The trial court further obligated the husband to continue premium payments beyond the wife's remarriage or death. The jury obligated the husband to pay the wife's hospitalization insurance for the rest of her life. The court deleted the provision that the husband would pay for hospitalization insurance for the wife's life, and added the requirement that the husband pay the wife's medical insurance premiums as equitable division that would not cease upon the wife's remarriage. The jury also awarded the wife periodic alimony of $5,000 per month until her death or remarriage.[140]

Agreeing with the husband's claim that the equitable division awards were actually periodic alimony, the supreme court reversed and remanded for a new trial.[141] The supreme court held that the husband's obligation to pay the life, medical, and hospitalization insurance premiums constituted periodic alimony rather than equitable division because they were payable for an indefinite period.[142] The supreme court refused, however, to revise the judgment because of the substantial possibility that to do so would change the substance of the jury's allocation of resources between the parties.[143]

C. *Property Settlement*

In *Spivey v. McClellan*,[144] pursuant to a settlement agreement incorporated into the divorce decree, Ms. Spivey was entitled to live in the marital residence for two years after the divorce or until her remarriage. Thereafter, the house was to be sold and the proceeds divided equally. After two years, the house was not sold, and Ms. Spivey continued to live

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137. 246 Ga. 765, 273 S.E.2d 169 (1980).
138. 259 Ga. at 131-32, 377 S.E.2d at 678.
139. 259 Ga. 238, 378 S.E.2d 674 (1989).
140. *Id.* at 238, 378 S.E.2d at 675.
141. *Id.* at 241, 378 S.E.2d at 676.
142. *Id.* at 240, 378 S.E.2d at 676.
143. *Id.*
144. 259 Ga. 181, 378 S.E.2d 123 (1989).

there until 1986 when she moved out and Mr. McClellan moved in. When Mr. McClellan refused to pay rent pursuant to the lease signed between the parties, Ms. Spivey brought an action for past-due rent and a declaration of rights to the property. The trial court decided that the property settlement could not be modified without court approval. The trial court held that Ms. Spivey's interest in the property was one-half of the appraised value as of July 1981, two years after the decree was entered, and that the lease was void because Ms. Spivey had no possessory interest in the property.[145]

The supreme court reversed and began by noting that the procedure set out in O.C.G.A. §§ 19-6-18 through 19-6-27[146] is the exclusive method for modifying the alimony provisions of a divorce decree.[147] Second, the supreme court noted that property rights which are subject to modification by the court may not be modified by the parties without the approval of the court.[148] Third, the supreme court noted that not all provisions in a divorce decree may be modified through the statutory procedure.[149] Finally, the supreme court tried to distinguish alimony from division of property. The court stated: "Fixed allocations of economic resources between spouses, those that are already vested or perfected, are not subject to modification by the court while terminable allocations are."[150]

> Terminable allocations are economic allocations to a spouse that must be paid or delivered in the future and either contain no time limitation or contain an express provision that it shall terminate on the death or remarriage of the receiving spouse. Such allocations generally include, *inter alia*, what is commonly termed "periodic alimony" and payments for support.[151]

Finally, the court held that, "[w]hen modification under the statutory procedure is available, court approved modification must be sought; but, once property rights have become fixed or perfected and may not be modified by the court, the parties are free to contract with each other regarding that property."[152] The court commented that either spouse could have petitioned during the two years following the decree for a modification of the terms relating to the use of the house, but that in July 1981, when the interests in the marital property became fixed or perfected and modification under the statutory procedure became unavailable, the parties were

145. *Id.* at 181, 378 S.E.2d at 124.
146. O.C.G.A. §§ 19-6-18 to -27 (1982 & Supp. 1990).
147. 259 Ga. at 181, 378 S.E.2d at 124.
148. *Id.*
149. *Id.* at 182, 378 S.E.2d at 124.
150. *Id.*
151. *Id.* at 182 n.1, 378 S.E.2d at 124 n.1.
152. *Id.* at 182, 378 S.E.2d at 124.

free to contract with each other regarding the use, possession, or sale of the property.[153] The lease agreement was held to be valid and enforceable.[154] Tangled in the distinctions between alimony and equitable division of property, the court almost suggested that what starts out as an award of alimony may over time become transmuted into a division of property.

Anderson v. Larkin[155] was an appeal from a suit on a promissory note. In contemplation of divorce, the wife executed a promissory note in which she promised to pay the husband $3,000 in exchange for a deed to real property. After executing the promissory note, the parties executed a property settlement agreement that was incorporated into the final judgment and decree of divorce. The settlement agreement stated that the parties had effected a division of property prior to the divorce action, and each party released the other from all claims as to real property that he or she might otherwise have as a result of the marriage. The deed was executed, but appellant declined to pay the $3,000. The trial court granted summary judgment to the husband.[156]

The court of appeals noted that the settlement agreement expressly referred to a division of real property that was completed prior to the filing of the divorce and was completely satisfactory to each party.[157] The court stated:

> "[T]he true rule of res judicata in divorce and alimony cases seems to be that a final decree has the effect of binding the parties and their successors as to all matters which were actually put in issue and decided, or which by necessary implication were decided between the parties."[158]

However, the " 'meaning and effect [of a settlement agreement] should be determined according to the usual rules for the construction of contracts, the cardinal rule being to ascertain the intention of the parties.' "[159] Considering the final judgment and decree, the settlement agreement, the promissory note, and the factual admissions of the parties, the court decided that the settlement agreement was only a partial integration of the parties' contractual intent regarding the real property.[160] The court of appeals held that the terms of the promissory note were intended to be controlling, and the decision of the trial court was affirmed.[161]

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153. *Id.*
154. *Id.*, 378 S.E.2d at 125.
155. 190 Ga. App. 283, 378 S.E.2d 707 (1989).
156. *Id.* at 283, 378 S.E.2d at 707.
157. *Id.* at 284, 378 S.E.2d at 708.
158. *Id.* (quoting Brookins v. Brookins, 257 Ga. 205, 207, 357 S.E.2d 77, 79 (1987)).
159. *Id.* (quoting Cousins v. Cousins, 253 Ga. 30, 31, 315 S.E.2d 420, 422 (1984)).
160. *Id.*
161. *Id.* at 285, 378 S.E.2d at 708.

D. Enforcement of Temporary Orders

Thompson v. Thompson[162] involved the post-decree enforcement of a temporary order. At the trial for divorce, the wife asked for reimbursement of amounts which the husband had failed to pay pursuant to the temporary order. The trial court included in its final judgment some of the amounts obligated under the temporary order and made no mention of others. Following the judgment for divorce, the wife filed an action for contempt seeking to recover amounts that had been awarded to her pursuant to the temporary order and the final judgment and which remained unpaid. The trial court declined to find the husband in contempt concerning the claims from the temporary order which had been presented to the jury during the trial for divorce and had not been awarded to her.[163] The supreme court vacated and remanded.[164] The supreme court stated that "[t]he jury's verdict in deciding the final divorce issues cannot affect the provisions of the temporary order, which was still in effect."[165] "[T]he verdict and judgment on the jury trial for the final divorce [were] not res judicata of the issues presented in the temporary alimony order involved in this contempt."[166]

E. Procedure

Horton v. Kitchens[167] was a case of first impression in which the supreme court reviewed the issue of when an application is required under O.C.G.A. § 5-6-35(a)(2)[168] to appeal a domestic relations case. Appellant was a third-party defendant in a divorce action between her son and his wife. The wife alleged that her husband had fraudulently conveyed certain property to appellant in order to defeat the wife's claim for alimony. Following the trial court's decision to cancel the deed between the husband and his mother, the mother appealed. The wife filed a motion to dismiss for failure to file a discretionary application.[169] The supreme court held that any party who seeks to appeal a judgment or order entered in a domestic relations case must follow the procedure set out in O.C.G.A. § 5-6-35(a)(2) and file an application.[170]

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162. 259 Ga. 817, 388 S.E.2d 514 (1990).
163. *Id.* at 817, 388 S.E.2d at 515.
164. *Id.* at 818, 388 S.E.2d at 515.
165. *Id.* at 817, 388 S.E.2d at 515 (citing Baxter v. Baxter, 248 Ga. 144, 281 S.E.2d 572 (1981)).
166. *Id.* at 818, 388 S.E.2d at 515.
167. 259 Ga. 446, 383 S.E.2d 871 (1989).
168. O.C.G.A. § 5-6-35(a)(2) (1982 & Supp. 1990).
169. 259 Ga. at 446, 383 S.E.2d at 871.
170. *Id.*, 383 S.E.2d at 872.

In *Scott v. Mohr*,[171] the wife brought an action for breach of a contract entered into by the parties on the same date as the divorce settlement and judgment. This contract expressly provided that it would not be made a part of any court order and would be enforceable as a separate, subsequent contractual commitment between the parties. The trial court granted summary judgment to the husband, and the wife appealed.[172] The husband contended that the wife's direct appeal of the trial court's judgment violated O.C.G.A. § 5-6-35(a)(2). Finding that the agreement was clearly intended by both parties to be a separate contract which could be and was sued upon independently of the court's judgment and decree, the court of appeals held that the wife's direct appeal did not violate O.C.G.A. § 5-6-35(a)(2).[173]

III. Marriage and Family

A. *Common Law Marriage*

In *Ridley v. Grandison*,[174] appellee, Mae Grandison, filed a complaint for divorce approximately nine years after she and appellant, Jerome Ridley, began living together with appellee's son. Appellant filed taxes as head of household and claimed appellee's son as a dependent. On a credit application with a local furniture company, the parties checked the box marked "married," and appellee signed the application as Mae Ridley. In her complaint for divorce, appellee alleged that she and appellant had a common-law marriage. One of her grounds for divorce was adultery. The jury found that a common-law marriage existed, awarded the parties a divorce, and awarded appellee alimony for three years. Appellant's motions for a judgment notwithstanding the verdict and a new trial were denied, and the supreme court affirmed.[175]

Four of the supreme court justices agreed that the jury's verdict must be upheld because there was some evidence to support it; three of the justices concluded that the evidence demanded a verdict for Ridley and entitled him to a judgment notwithstanding the verdict.[176] In his lengthy dissent, Justice Weltner stated: "[T]he law of common law marriage is chaos that cries out for order."[177] Justice Weltner's dissent also included an appendix that documented eight years of appellate level turmoil with

171. 191 Ga. App. 825, 383 S.E.2d 190 (1989).
172. *Id.* at 826, 383 S.E.2d at 191.
173. *Id.*
174. 260 Ga. 6, 389 S.E.2d 746 (1990).
175. *Id.* at 6, 389 S.E.2d at 746.
176. *Id.* at 16, 389 S.E.2d at 748.
177. *Id.* at 8, 389 S.E.2d at 749 (Weltner, J., dissenting).

regard to the law of common-law marriage.[178] Quoting from *Johnson v. Green*,[179] Justice Weltner stated:

> "[I]f marriage is a state 'not to be undertaken lightly' (as observed at almost every wedding) it should not be too burdensome to require of parties who intend to commit their very lives to each other that they make plain to all the world such an intent by undergoing a ceremony of marriage."[180]

Justice Weltner suggested adopting a new evidentiary requirement as follows:

> *The evidence necessary to prove the conversion of an illicit arrangement into a common law marriage must include (in addition to existing evidentiary requirements) either (1) proof of a bona fide attempt to contract a valid ceremonial marriage; or (2) the birth to the parties (after the commencement of an illicit arrangement) of a child or children.*[181]

Weltner argued that such an enlargement of the rule of *Brown v. Brown*[182] would eliminate marriage by perjury and caprice and relieve the people and courts of Georgia from much of the agony, whimsy, and costs of disputed common law marriages.[183] In his dissent, Justice Hunt quoted colloquy during the cross-examination of Ms. Grandison in which she stated: " '*I am single.*' "[184] He argued that, "where both parties . . . deny in court the existence of a marriage contract, characteristics of marriage . . . cannot, by themselves, establish the existence of a marriage contract."[185]

B. Family Agreements

In *Mitchell v. Mitchell*,[186] Exie Mitchell, as executrix of her husband's estate, brought suit against Harriet Mitchell, the wife of Exie's son, on a promissory note executed in favor of the decedent. The evidence showed that the decedent had sold two riverfront lots to his son and his son's wife in exchange for $10,000 and a promissory note executed by both purchasers. Harriet testified that after each payment, the decedent's son executed

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178. *Id.* at 10-16, 389 S.E.2d at 750-53.
179. 251 Ga. 645, 309 S.E.2d 362 (1983).
180. 260 Ga. at 8, 389 S.E.2d at 749 (Weltner, J., dissenting) (quoting Johnson v. Green, 251 Ga. 645, 647, 309 S.E.2d 362, 364 (1983) (Weltner, J., concurring)).
181. *Id.* at 9, 389 S.E.2d at 749 (Weltner, J., dissenting) (emphasis in original).
182. 234 Ga. 300, 215 S.E.2d 671 (1975).
183. 260 Ga. at 9-10, 389 S.E.2d at 749-50 (Weltner, J., dissenting).
184. *Id.* at 15, 389 S.E.2d at 748 (Hunt, J., dissenting) (emphasis in original).
185. *Id.* at 16, 389 S.E.2d at 748 (Hunt, J., dissenting).
186. 191 Ga. App. 139, 381 S.E.2d 84 (1989).

a new promissory note reflecting the outstanding balance, and the decedent's son signed each note as sole obligor. After a jury verdict for Harriet, the trial court granted the judgment notwithstanding the verdict. The trial court found that there was no evidence that the notes executed by the decedent's son as sole obligor were supported by valid consideration. Harriet appealed contending there was sufficient evidence for the jury to find that a novation released appellant from the 1981 note.[187]

Reversing, the court of appeals found sufficient evidence to authorize the jury to conclude that one or more of the notes were supported by valid consideration in the form of settlement of a family dispute.[188] The court of appeals pointed to evidence that the sale of the property had led to considerable dissension within the Mitchell family, and in order to restore family harmony, the decedent agreed to remove appellant's name from the note.[189]

> "Our . . . courts have favored the furtherance of compromise agreements and the settlement of family disputes. 'An agreement to settle a family controversy will not be considered voluntary and without consideration, but will be enforced in equity as a fair family arrangement independent of its being a compromise of doubtful rights . . . .'" Once the existence of a family settlement is established, it will be enforced without an inquiry "into the adequacy or inadequacy of the consideration."
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> . . . We need not inquire whether this family settlement agreement fully accomplished the objective of restoring harmony within the Mitchell family because proof of execution of an agreement made to resolve a family controversy is all that is needed to establish the existence of consideration for enforcement of the obligation thereunder.[190]

IV. Conclusion

The cases of this survey period reflect an effort by the supreme court to elevate substance over form. We see in this a challenge to all family law practitioners to strive for greater skill and care with the words they use to settle their clients' problems out of court.

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187. *Id.* at 139, 381 S.E.2d at 85.
188. *Id.* at 140, 381 S.E.2d at 86.
189. *Id.* at 140-41, 381 S.E.2d at 86.
190. *Id.* (citations omitted).