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DIVORCE—JUDGMENT ON THE PLEADINGS—BOLD NEW PROCEDURE IN DIVORCE ACTIONS

In *Friedman v. Friedman*,[1] the Supreme Court of Georgia held that a divorce could be granted on the pleadings alone[2] where the parties alleged and admitted that the marriage was irretrievably broken, thereby leaving no genuine issue of fact to be decided by the trier of fact.[3]

The appellant-wife filed a complaint against the appellee-husband for temporary and permanent alimony, child support, child custody and possession of the house and its furnishings. The husband then petitioned for divorce on the ground that the marriage was irretrievably broken. The wife answered, admitting that the marriage was irretrievably broken, and cross-complained for divorce, alleging cruel treatment and that the marriage was irretrievably broken.[4] In answering the cross-complaint, the husband admitted that the marriage was irretrievably broken but denied the allegation of cruel treatment. The husband then moved for a judgment on the pleadings, which the trial court granted by awarding a judgment of divorce to both parties. It was the judgment on the pleadings which the wife sought to have reversed on appeal, asserting as error the grant of divorce without the appearance of the parties and without the hearing of oral testimony.

Georgia's policy of preserving marriages and restricting or hindering the procuring of divorces has long been evidenced in the decisions of its courts.[5] Pursuant to this policy the rules of pleading and practice applicable to civil actions in general have not always been applied to divorce actions.[6] However, in an effort to create uniformity of practice and procedure in all civil actions,[7] the Georgia General Assembly in 1967 amended Ga. Code Ann. §30-113 (Rev. 1969) by providing that the same rules of pleading and practice applicable to other civil actions shall apply to divorce proceedings.[8] Despite this apparent change in policy, the General Assembly has retained certain statutory impediments to the procurement of divorce. Ga. Code Ann. §30-113 (Rev. 1969) also provides that in actions for divorce, alimony or custody of minor children "no verdict or judgment by default

1. 233 Ga. 254, 210 S.E.2d 754 (1974).

2. *Id.* at 255, 210 S.E.2d at 755. GA. CODE ANN. §81A-112(c) (Rev. 1972) provides in part that "[a]fter the pleadings are closed . . . any party may move for judgment on the pleadings. . . ."

3. *Id.* at 256, 210 S.E.2d at 755. *See* GA. CODE ANN. §30-102(13) (Supp. 1974), which authorizes the granting of divorce when the marriage is irretrievably broken.

4. *Id.* at 255, 210 S.E.2d at 754. GA. CODE ANN. §30-102(10) (Supp. 1974) provides that divorce may be granted on the ground of cruel treatment.

5. *See* Tillotson v. Tillotson, 227 Ga. 593, 182 S.E.2d 114 (1971); Brackett v. Brackett, 217 Ga. 84, 121 S.E.2d 146 (1961); Watts v. Watts, 130 Ga. 683, 61 S.E. 593 (1908); Head v. Head, 2 Ga. 191 (1847).

6. Brackett v. Brackett, 217 Ga. 84, 121 S.E.2d 146 (1961); Cohen v. Cohen, 209 Ga. 459, 74 S.E.2d 95 (1953); Tatum v. Tatum, 203 Ga. 406, 46 S.E.2d 915 (1948).

7. 9 ENCYCLOPEDIA OF GA. LAW, *Divorce and Alimony*, §65 at 168.

8. Ga. Laws, 1967, p. 226 at 246; GA. CODE ANN. §30-113 (Rev. 1969).

shall be taken . . . but the allegations of the pleadings shall be established by evidence."[9] Sections 30-113 and 30-129 have been consistently cited for the proposition that Georgia has not entirely abandoned its interest in the domestic relations of its citizens; however, they have been applied exclusively in situations where by following the rules of civil procedure a default or undefended proceeding would have resulted.[10] Therefore, it appears that the only statutory law restricting the use of the rules of civil procedure in divorce proceedings, including judgments on the pleadings, is that embodied in sections 30-113 and 30-129 which are applicable only to cases of default and undefended actions.

In *Reynolds v. Reynolds*,[11] a 1961 contested divorce action, the Supreme Court of Georgia held that the interrogatory procedure used in the trial court was "null and void" because it had denied the defendant the right to orally cross-examine the plaintiff.[12] In that case the plaintiff had propounded interrogatories and answered them himself, without the presence of the defendant or her counsel. Although probably not necessary to justify its decision,[13] the court stated further that because of the "peculiar interest of the public in the preservation of domestic relations"[14] the plaintiff in a divorce action must personally appear and give oral testimony.[15] Thus, the court in *Reynolds* created what seemed to be a procedural rule, applicable only to divorce proceedings, requiring personal appearance and presentation of oral testimony by the plaintiff regardless of whether the defendant contested, consented or defaulted.

In 1973, the Georgia General Assembly amended Ga. Code Ann. §30-102 (Rev. 1969) and added subsection 13, which provides that divorce can be granted if the marriage is irretrievably broken.[16] One can only assume that the General Assembly's intention was to provide a no-fault ground to which the traditional defenses would be inapplicable.[17] Adding further confusion to the matter, the General Assembly retained all of the fault grounds and failed to provide guidelines for the incorporation of the new ground for divorce into the existing Georgia divorce laws.[18]

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9. In divorce proceedings which are "undefended," GA. CODE ANN. §30-129 (Rev. 1969) requires that the grounds be "legal and sustained by proof" and further provides that it is the duty of the court to see that this requirement is met.

10. *See* Todd v. Todd, 231 Ga. 647, 203 S.E.2d 480 (1974); Wallace v. Wallace, 229 Ga. 607, 193 S.E.2d 832 (1972); Harris v. Harris, 228 Ga. 562, 187 S.E.2d 139 (1972), wherein GA. CODE ANN. §81A-105 (Rev. 1972), which provides for waiver of right to notice, was held not restricted by GA. CODE ANN. §§30-113 and 30-129 (Rev. 1969). *See also* Johnston v. Still, 225 Ga. 222, 167 S.E.2d 646 (1969); Patterson v. Patterson, 219 Ga. 186, 132 S.E.2d 201 (1963).

11. 217 Ga. 234, 123 S.E.2d 115 (1961).

12. *Id.* at 250, 123 S.E.2d at 130.

13. *Id.* at 272-74, 123 S.E.2d at 143-44 (Grice, C.J., concurring).

14. *Id.* at 248, 123 S.E.2d at 128, *quoting* Watts v. Watts, 130 Ga. 683, 684, 61 S.E. 593, 594 (1908).

15. *Id.* at 249, 123 S.E.2d at 129.

16. Ga. Laws, 1973, p. 557.

17. *See* Gozansky, *No-Fault Divorce Comes to Georgia*? 10 GA. ST. B.J. 9 (1973).

18. The amendment merely provided an additional ground for divorce where "the mar-

In order for the court in *Friedman* to affirm the lower court's judgment on the pleadings, it somehow had to avoid the *Reynolds* requirement of personal appearance and presentation of oral testimony. The court did so by tersely stating that it was not following *Reynolds* because the policy toward divorce in Georgia had changed with the adoption of the statutory ground for divorce based upon irretrievable breakdown of the marriage.[19] As an additional justification for its decision, the court ruled that the appellant could not properly complain of the judgment of divorce because it was specifically what she sought in her prayer for relief.[20] In contrast to the majority opinion, the dissenters[21] believed that the *Reynolds* case was the controlling authority and that the public policy toward divorce had not been altered by the statutory amendment authorizing divorce when the marriage is irretrievably broken.[22] They felt that the majority had effectively abandoned its duty to protect society's interest in preserving the matrimonial state and to see that the alleged grounds for divorce were legal and established by evidence.[23]

The impact of the court's decision in *Friedman* upon Georgia's divorce procedure seems clear. A divorce can now be granted on a motion for judgment on the pleadings as long as the pleadings consist of an allegation and an admission or cross-complaint that the marriage is irretrievably broken. However, doubt as to the propriety of this decision arises upon the discovery that Georgia, having adopted a pure no-fault ground for divorce while retaining the traditional fault grounds,[24] appears to be the first state in which a divorce can be granted on a motion for judgment on the pleadings.[25] Confusion and uncertainty on the part of the trial courts will most certainly arise, since they must now decide divorce actions under two inconsistent legal concepts—one based upon fault and the other upon no-fault—each of which apparently, as a result of the *Friedman* decision, has a different procedural requirement pertaining to appearance of the parties and presentation of oral testimony.[26]

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riage is irretrievably broken." Ga. Laws, 1973, p. 557.

19. 233 Ga. at 256, 210 S.E.2d at 755.

20. *Id.* at 255, 210 S.E.2d at 755.

21. Three justices dissented: Nichols, Undercofler and Ingram.

22. 233 Ga. at 258, 210 S.E.2d at 756 (dissenting opinion).

23. *Id.* at 259, 210 S.E.2d at 757.

24. *See* GA. CODE ANN. §30-102 (Rev. 1974).

25. Even in those jurisdictions which have adopted a pure no-fault divorce law and have chosen to eliminate all traditional fault grounds and their defenses, the courts have not permitted judgment on the pleadings in divorce actions. Of particular relevance is Florida, whose no-fault ground, FLA. STAT. ANN. § 61.052 (Rev. 1972), contains language identical to that found in GA. CODE ANN. §30-102(13) (Rev. 1974). *See generally* McKim v. McKim, 6 Cal. 3d 673, 493 P.2d 868, 100 Cal. Rptr. 140 (1972); Stafford v. Stafford, 294 So.2d 25 (Fla. 1974); Nelms v. Nelms, 285 So.2d 50 (Fla. 1973); *In re* Morgan's Marriage, 218 N.W.2d 552 (Iowa 1974); Woodruff v. Woodruff, 320 A.2d 661 (N.H. 1974); Morrison v. Morrison, 122 N.J. Super. 277, 300 A.2d 182 (1972); *In re* Dunn, 13 Ore. App. 497, 511 P.2d 427 (1973).

26. Evidence of this inevitable confusion was shown in a recent Georgia Supreme Court decision where the trial court had granted a divorce to the parties on the ground that the

Whether the court in *Friedman* intended to drastically streamline divorce procedure in Georgia is not known. However, it has effectively done so, at least when the action involves the ground that the marriage is irretrievably broken. It now appears that the Supreme Court of Georgia, by permitting the rather innovative divorce procedure in *Friedman*, has thrust Georgia to the forefront in the trend toward liberalization and reform of divorce law.[27]

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marriage was irretrievably broken after the defendant husband moved for a judgment on the pleadings. In that case, the plaintiff alleged only cruel treatment as her ground for divorce. The court, in upholding the decree of divorce, cited *Friedman* as authority, reasoning that the plaintiff's allegations of cruel treatment amounted to an admission that the marriage was irretrievably broken. Marshall v. Marshall, 234 Ga. 393, 216 S.E.2d 117 (1975).

27. *See generally* Foster, *Divorce Reform and the Uniform Act*, 18 S. DAK. L. REV. 572 (1973); Milligan, *Dissolution of Marriage — "Fresh Air in Family Court,"* 8 AKRON L. REV. 383 (1975); Steinbock, *The Case for No Fault Divorce*, 10 TULSA L.J. 427 (1975); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Note, *Marital Fault v. Irremediable Breakdown: The New York Problem and the California Solution*, 16 N.Y.L.F. 119 (1970).