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In *Manning v. Manning*,[1] the Supreme Court of Georgia held that a divorce must be granted on a motion for summary judgment after one spouse alleges an irretrievable breakdown of the marriage and then swears in an affidavit that he is unwilling to cohabit with his spouse, that there are no prospects for reconciliation and that the marriage is irretrievably broken. There is, at that point, no issue of fact for the trial court to resolve, the supreme court said.

The husband in *Manning* filed a complaint for divorce alleging that the marriage was irretrievably broken. The wife in her answer denied the irretrievable breakdown of the marriage and affirmatively alleged that the marriage was not irretrievably broken and that there were reasonable prospects for reconciliation. The husband moved for summary judgment on the sole issue of the irretrievable breakdown of the marriage. In support of the motion he filed an affidavit in which he swore that the separation between the parties was complete and permanent, that he was unwilling to live with his wife at the present time or at anytime in the future, and that there was no possibility of reconciliation. The wife filed an opposing affidavit in which she testified that the marriage was not irretrievably broken because a reconciliation might be possible and she desired to reconcile. The trial judge granted the divorce on the motion for summary judgment. The wife appealed. She contended that irretrievability was an issue of fact that could not be resolved on summary judgment.

Georgia's established policy of hindering the procuring of divorce[2] was abruptly reversed by the enactment of Code §30-103(13), authorizing a divorce when the marriage is irretrievably broken, and by subsequent decisions interpreting that section.[3] When the General Assembly added the provision for irretrievable breakdown, it added no statement indicating a change in public policy and no definition of the phrase "irretrievably broken." The courts were left to make their own decisions.

The phrase was first defined by the Georgia Supreme Court in *Harwell v. Harwell*.[4] The court stated that "an irretrievably broken marriage is one

1. Manning v. Manning, No. 31440 (Ga., Oct. 5, 1976).

2. *See* generally Note, *Divorce—Judgment on the Pleadings—Bold New Procedure in Divorce Action*, 27 MER L. REV. 331 (1975); 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).

3. *See* Whitmire v. Whitmire, 236 Ga. 153, 223 S.E.2d 135 (1976); Marshall v. Marshall, 234 Ga. 393, 216 S.E.2d 117 (1975); Friedman v. Friedman, 233 Ga. 254, 210 S.E.2d 754 (1974); Harwell v. Harwell, 233 Ga. 89, 209 S.E.2d 625 (1974).

4. 233 Ga. 89, 209 S.E.2d 625 (1974).

where either or both parties are unable or refuse to cohabit and there are no prospects for reconciliation."[5] The Court explained that proof of fault by either of the parties had no effect on the finding of an irretrievable breakdown; the parties should state merely that their marital differences are insolvable and request a change of status. The only question remaining when irretrievable breakdown of the marriage is alleged is whether there are prospects for reconciliation, the court said.

In *Friedman v. Friedman*,[6] the court held that a divorce could be granted on the pleadings alone[7] if both parties alleged and admitted that the marriage was irretrievably broken. *Reynolds v. Reynolds*[8] had created a procedural rule requiring personal appearance and presentation of oral testimony by the plaintiff in divorce pleadings regardless of whether the defendent contested, consented or defaulted. That rule was abandoned by the court in *Friedman*. The court said the public policy of this state was changed by the adoption of the "irretrievable breakdown" provision. The court added in *McCoy v. McCoy*[9] that "where one of the parties to a marriage refuses to cohabit with the other and *testifies* that the marriage is irretrievably broken, the fact that the other party maintains hope for a reconciliation will not support a finding under *Harwell* that there are prospects for a reconciliation."[10]

McCoy was different from prior cases; the divorce was contested. The husband alleged that the marriage was irretrievably broken, but the wife, opposing the divorce, denied that it was irretrievably broken. At the nonjury trial, the husband testified that there was no conceivable chance that he and his wife could get back together. The wife testified that she desired the husband's return but that he had not given her any indication he would return. The trial judge, convinced that a marriage is not broken simply because one party says it is, denied the divorce. The husband appealed on the ground that there was no evidence to support the denial. The supreme court determined that the evidence required the granting of a divorce. The court held that a divorce should be granted if one of the parties to a marriage has refused to cohahit with the other and *testifies* that the marriage is irretrievably broken, that there are no prospects for reconciliation and that the marriage is irretrievably broken.[11]

The impact of the *McCoy* opinion, according to Justice Ingram's vigorous dissent, was that when one party, by sworn pleading, alleges irretrievable breakdown of the marriage, the divorce is required as a matter of law

5. *Id.* at 91, 209 S.E.2d at 627.

6. 233 Ga. 254, 210 S.E.2d 754 (1974).

7. GA. CODE ANN. §81A-112(c) (1972) provides in part that "[a]fter the pleadings are closed . . . any party may move for judgment on the pleadings . . . ."

8. 217 Ga. 234, 123 S.E.2d 115 (1961).

9. 236 Ga. 633, 225 S.E.2d 682 (1976).

10. *Id.* at 634, 225 S.E.2d at 683 (emphasis added).

11. *Id.* at 634, 225 S.E.2d at 683.

on the pleadings alone.[12] *Manning* has proven Justice Ingram's assessment of the impact essentially correct. However, careful study of the language of *McCoy* and another recent case[13] shows that the holding in *Manning* was not required by *McCoy* and in fact broadened the holding in *McCoy*. The court in *McCoy* began with the proposition that if there was any evidence to uphold the decision of the trial court in denying a divorce, the denial would be sustained, but if there was no evidence to uphold the denial, it would be reversed. The court proceeded to examine the facts of the case. It reviewed not only the pleadings of the husband but also the facts surrounding his separation from his wife and the testimony of both the husband and the wife. Only after examination of all the facts did the court rule that the undisputed evidence showed there were no prospects for reconciliation, so the marriage was irretrievably broken.

Whitmire v. Whitmire[14] provided further evidence that divorce was not necessarily required by law when only one of the parties pleads irretrievable breakdown. The court held that a divorce should be granted on the pleadings alone if both parties allege irretrievable breakdown, but "in a contested 'irretrievably broken' divorce case evidence of efforts to save the marriage, or absence thereof, is to be considered with all other evidence in determining whether there is a possibility of reconciliation."[15]

McCoy stopped short of requiring that a divorce be granted as a matter of law at any time before trial in a contested irretrievable-breakdown divorce case, since the trial judge still had the opportunity to find a possibility of reconciliation. Admittedly the practical effect of *McCoy* was that any time one party pleaded irretrievable breakdown and then *testified* that the marriage was irretrievably broken and that there was no hope for reconciliation, the trial court was required to grant the divorce as a matter of law. It takes two consenting parties to make a reconciliation; the desire of one party to reconcile is not sufficient.[16] Consequently, when one of the parties testified that there were no prospects for reconciliation, there was logically no evidence that could possibly support a trial judge's finding that there were such reconciliation prospects. Without such prospects, a finding of irretrievable breakdown was required under *McCoy*, and the divorce would have to be granted.

What a strict reading of *McCoy* would have required, and what may be argued as being an important check in preserving the state's interest in the institution of marriage and assuring that only irreconcilable marriages are dissolved, is the personal appearance of the complaining party in the contested irretrievable-breakdown case. This statement immediately raises

12. *Id.* at 636, 225 S.E.2d at 684.

13. Whitmire v. Whitmire, 236 Ga. 153, 223 S.E.2d 135 (1976), held it was error to deny a divorce where both parties allege irretrievable breakdown.

14. 236 Ga. 153, 223 S.E.2d 135 (1976).

15. *Id.* at 154, 223 S.E.2d at 136.

16. 236 Ga. at 634, 225 S.E.2d at 683.

the question why a personal appearance to give testimony should be required when a sworn affidavit in support of a motion for summary judgment would suffice. It could be argued that personal appearance would impress upon the complaining party the solemnity of the occasion and the interest of this state in preserving the institution of marriage. It would take a great deal more conviction for a party to swear in open court that he was not willing to reconcile with his spouse than it would take to sign what is likely to become a "form" affidavit in an attorney's office.

This should not be construed as an argument in favor of a return to the hypocrisy of "fault" divorces in which each party attacked the other's conduct. The aim of the divorce laws certainly should be to allow a marriage that is irreconcilable to dissolve as peacefully as possible. There is probably little argument with Justice Ingram's view in *Manning* that pretrial disposition of a divorce case is acceptable if both parties agree that the marriage is finished or if one spouse asserts that the marriage is over and the other tacitly admits it by failing to contest. However, it may be that so long as one of the parties wishes to reconcile, it is in the best interest of the state and the parties that the possibility of reconciliation remain an issue until the moving party gives affirmative proof that no possibility remains. There need be no question about reasons for the parties' differences. Personal, unwavering testimony before the court that the marriage is irreconcilable should suffice.

The confusion that reigned as a result of the Georgia legislature's retention of all the fault grounds and its failure to provide guidelines for the incorporation of the new "no-fault" ground is at an end. It is settled that when it is admitted by both parties that a marriage is irretrievably broken[17] or when a fault ground is alleged by one party and irretrievable breakdown is alleged by the other,[18] a motion for judgment on the pleadings must be granted. *Manning* has determined that in the contested irretrievable-breakdown divorce case, the trial judge must grant the divorce on a motion for summary judgment if that motion is supported by a sworn affidavit stating that the moving party is unwilling to reconcile.

Leniency in allowing divorces cannot go much further unless, as Justice Ingram says, we permit one of the parties to write "Cancelled" on the marriage license and mail it in to the judge of the probate court—that is, if we have not already effectively reached that stage. The only question that remains is whether the supreme court has accurately gauged the public policy of this state. Only the legislature can answer that question.

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17. Whitmire v. Whitmire, 236 Ga. 153, 223 S.E.2d 135 (1976).
18. Loftis v. Loftis, 236 Ga. 637, 225 S.E.2d 685 (1976).