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DOMESTIC RELATIONS Uncontested Divorces: Provide for Waiver of Evidentiary Hearings

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DOMESTIC RELATIONS

Uncontested Divorces: Provide for Waiver of Evidentiary Hearings

CODE SECTIONS:	O.C.G.A. §§ 19-5-8 (amended), 19-5-10 (amended)
BILL NUMBER:	HB 234
ACT NUMBER:	601
SUMMARY:	The Act amends the current statutory provisions mandating evidentiary hearings in divorce actions. While evidentiary hearings are still authorized, now uncontested divorces can also be granted by the court based either on the verified pleadings, affidavits or "such other basis or procedure as the court may deem proper in its discretion." The waiver of a required evidentiary hearing applies also to issues of alimony, child support, and child custody when those issues are uncontested. The new statutory provisions apply to all proceedings either pending on or commenced after July 1, 1987.
EFFECTIVE DATE:	July 1, 1987

History

Statutory provisions relating to divorce in the 1895 and 1910 Civil Codes stated that there could be no verdict or judgment by default in a suit for divorce; the allegations in the divorce petition must be established "by evidence before the juries"[1] or before "both juries."[2] In 1958, the General Assembly amended the statutory provision to require that the allegations of the divorce petition be established by evidence before a judge *or* jury,[3] thus alleviating the requirement that divorce actions be tried before a jury.

In 1967, the statutory provision again was amended and this time any

1. GA. CIV. CODE § 2440 (1895), GA. CIV. CODE § 2959 (1910).
2. GA. CIV. CODE § 5074 (1895), GA. CIV. CODE § 5658 (1910).
3. 1958 Ga. Laws 316. In a 1958 opinion, the Georgia Attorney General stated that the change from "both juries" to "judge or jury, as the case may be" merely reflected the abolition of the two verdict requirement in Georgia. 1958 Op. Att'y Gen. No. 85.

reference to judge or jury was eliminated.[4] However, the amended statute retained the requirement that the allegations of the pleadings be established by evidence.[5]

Similar statutory provisions imposed upon a judge a duty in "ex parte"[6] or "undefended"[7] divorce cases to either see that "the asserted grounds for divorce are legal and sustained by proof" or to "appoint the district attorney or some other attorney of the court to discharge that duty for him."[8]

Prior to the legislature's recognition in 1973 of "no-fault" divorce,[9] Georgia courts usually strictly enforced the requirement that evidentiary hearings be held in divorce actions. In *Harmon v. Harmon*,[10] the Georgia Supreme Court stressed, "The essential allegations in a petition for divorce . . . *must* be established by evidence."[11] Since the adoption of no-fault divorce, however, the courts have not as consistently required that evidentiary hearings be held.

In the 1974 case of *Friedman v. Friedman*,[12] the Georgia Supreme Court affirmed the trial court's holding that since "the parties admitted in their pleadings that the marriage was irretrievably broken there was no genuine issue of fact to be decided by a jury" and held that the trial court did not err in granting the husband's motion for a judgment on the pleadings.[13] The court declared that there was no merit to the wife's contention that the trial court had erred in granting a divorce without hearing oral evidence, emphasizing that "the public policy of this state has been changed with the adoption of the statute providing for divorce on the grounds that the marriage is irretrievably broken."[14]

In two 1977 cases, the Georgia Supreme Court again suspended the requirement for evidentiary hearings in divorce actions. In *Sims v. Sims*,[15] the court affirmed the trial court decision granting the husband's motion for summary judgment. The husband had filed an affidavit stating that the marriage was irretrievably broken and the wife did not file a counter-

4. 1967 Ga. Laws 247.

5. The 1967 amendment was codified as § 30-113 of the 1933 Code and became O.C.G.A. § 19-5-8 when the Georgia Code was recodified in 1982.

6. GA. CIV. CODE § 1735 (1873), GA. CIV. CODE § 2455 (1895), GA. CIV. CODE § 2974 (1910).

7. GA. CODE ANN. § 30-129 (Harrison 1933).

8. O.C.G.A. § 19-5-10 (Supp. 1987).

9. 1973 Ga. Laws 557 added an additional ground "sufficient to authorize the granting of a total divorce" by providing that a divorce may be granted if "[t]he marriage is irretrievably broken." This ground, commonly referred to as "no-fault" divorce, is codified at O.C.G.A. § 19-5-3(13) (1982).

10. 209 Ga. 474, 74 S.E.2d 75 (1953).

11. *Id.*, 74 S.E.2d at 77 (emphasis added).

12. 233 Ga. 254, 210 S.E.2d 754 (1974).

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

14. *Id.* at 256, 210 S.E.2d at 755.

15. 239 Ga. 451, 238 S.E.2d 32 (1977).

affidavit disputing his allegation.[16] In *Carr v. Carr*,[17] the court held that the trial court did not err in entering a judgment on the pleadings on the issue of divorce even when the wife denied the husband's claim that the marriage was irretrievably broken: "No fault divorce judgments on the pleadings have been granted where one party sought a divorce on the ground that the marriage was irretrievably broken and the other party counterclaims for divorce on the same or any other ground."[18] The court explained that "[t]he basis for these decisions is that the pleadings show that there is no dispute over the fact that the marriage has ended in fact."[19]

HB 234

HB 234 amends the Code to allow courts to dispense with evidentiary hearings in some circumstances. In uncontested or undefended divorce cases, especially in light of the adoption of no-fault divorce in Georgia, evidentiary hearings have become, in many cases, nothing more than a formality.[20] Consequently, some superior court judges had dispensed with the requirement that the parties appear in court, be sworn in and swear to something orally that they already had sworn to in the pleadings.[21] With the amendment of O.C.G.A. §§ 19-5-8 and 19-5-10, these judges now are statutorily authorized to dispense with evidentiary hearings in cases in which the hearings would be nothing more than a formality. Evidentiary hearings to determine the grounds for divorce and issues of alimony, child custody, and child support are still authorized under the Act but are no longer mandatory when the issues are not in dispute.

When HB 234 was presented in the Senate some opposition was verbalized, primarily contending that some judges would want to retain the right to ask questions of the parties and to hear oral evidence if they believe it is appropriate.[22] The Act allows a judge to require the parties to appear in court for that purpose or to require a full evidentiary hearing if the judge finds it necessary. Judges now will have greater authority to exercise their discretion in each case.

By removing the requirement that an evidentiary hearing be held, the courts might be able to alleviate some of the serious backlog in domestic cases. Since the parties in the divorce action will not be absolutely required to appear in court, unless the judge so orders, many divorce cases

16. *Id.*, 238 S.E.2d at 33.
17. 240 Ga. 161, 240 S.E.2d 50 (1977).
18. *Id.* at 161, 240 S.E.2d at 50.
19. *Id.*
20. Telephone interview with Representative Claude A. Bray, Jr., House District No. 91 (April 27, 1987).
21. *Id.*
22. *Id.*

can be handled in the judge's chambers.[23] This should be expeditious for the courts, the parties and the attorneys involved.[24]

The Act also provides that "[a]ny motion to set aside or other proceedings to attack a judgment" on any judgment entered prior to the effective date of this Act, and "which is based on an alleged failure to properly establish evidence" must be commenced before July 1, 1988. Failure to do so will act as a total bar.[25]

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23. *Id.*

24. In Friedman v. Friedman, *supra* note 7, Justice Undercofler, dissenting, asserted that easing the requirements for divorce would hinder the state's interest in preserving marriage: "It is the duty of the court in all divorce cases to stand as a representative of the State and protect its interests. But, how can this be done when the complaining party does not appear and orally testify." 233 Ga. at 258, 210 S.E.2d at 756 (Undercofler, J., dissenting) (citation omitted), Justice Ingram, also dissenting, said "a married person can now get a divorce after 30 days by a judgment on the pleadings without ever coming to court to face the judge and persuade him by sworn testimony that a divorce ought to be granted." 233 Ga. at 259-60, 210 S.E.2d at 757-58 (Ingram, J., dissenting). Justice Ingram expressed his belief that it will encourage more divorces "by impetuous couples who have a spat, file for a divorce and then let false pride carry them through to a quick final divorce simply because their lawyers have filed the papers in court." He feared that "divorce cases will become more routine and impersonal . . . . The lawyers will simply file the papers in court and the marriage will proceed to final severance in an automatic fashion." *Id.* In light of no-fault divorce, however, it is not clear that merely requiring an evidentiary hearing would result in a reduction of the number of divorces.

25. O.C.G.A. § 19-5-10(c) (Supp. 1987).