# Does Summary Judgment Divorce Require a Hearing?

Absolute divorce trials seldom, if ever, involve any sort of courtroom drama. Most of the time, these 'trials' involve one party coming to court to testify for less than 5 minutes or the attorney of one party coming to court to hand up a summary judgment for the judge to sign. Most requests for divorce are not contested – in large part because there generally are no defenses to divorce other than the failure to live separate and apart for one year.

So it is no wonder that some districts have decided to take the process of entering summary judgment divorce out of the courtroom. To save valuable court time, some districts have decided to adopt the practice of having judges enter summary judgment divorces after reviewing the pleadings in chambers. Notices are sent to the non-moving party stating that the summary judgment will be entered by the court on a specific date or at some point during a specific week. No actual hearing is held in the courtroom on the motion for summary judgment.

Is this okay?

### Divorces Generally Require a Trial

Divorces never have been easy to obtain. For public policy reasons, state legislatures historically have imposed obstacles to ending a marriage. There was a time when individuals could divorce only through an act of legislation. Then marriages could be dissolved only upon proof that one spouse had committed some act of misconduct and the other was completely innocent. It was not until the 1970's that North Carolina allowed no-fault divorce, but even then a 2-year separation period was required.

GS 50-6 now allows divorce whenever spouses have lived separate and apart for one year. However, GS 50-10(a) still provides that "the material facts in every complaint asking for a divorce or an annulment are deemed denied by the defendant, whether the same shall be actually denied by pleading or not." So we have no absolute divorce by default. That statute further provides that, except in those situations when a clerk of superior court is authorized to enter a divorce judgment pursuant to GS 50-10(e), "no judgment shall be given in favor of the plaintiff … until such facts are found by a judge or jury."

It is these provisions in GS 50-10 that require the five minute divorce trials I mentioned above and they are the reason we cannot enter divorce judgments by consent. The party seeking a divorce must testify to the material facts required for entry of divorce and, if the court finds the testimony credible, the divorce judgment is entered. The fact that defendant raises no objection or fails to appear at the trial makes no difference; the trial court must find facts to support the judgment and there must be evidence offered to support the findings of fact.

**Summary Judgment Divorce – Is it really summary judgment?**

In S.L. 1985-140, section (d) was added to GS 50-10 to provide that:

"the provisions of GS 1A-1, Rule 56, shall be applicable to actions for absolute divorce pursuant to GS 50-6, for the purpose of determining whether any genuine issue of material fact remains for trial by jury, but in the event the court determines that no genuine issue of material fact remains for trial by jury, the court must find the facts as provided herein."

In S.L. 1991-568, the section was expanded to include the following:

"The court may enter a judgment of absolute divorce pursuant to the procedures set forth in GS 1A-1, Rule 56, finding all requisite facts from nontestimonial evidence presented by affidavit, verified motion or other verified pleading."

Surprisingly, there is no appellate case law interpreting these provisions yet.

These amendments authorized the use of Rule 56 summary judgment procedure, but it seems clear that the summary judgment allowed in a divorce case is not the same as a summary judgment granted in any other civil case. In a 'normal' summary judgment, the court enters judgment after concluding there are no issues of fact to be resolved and plaintiff is entitled to judgment as a matter of law. The judgment is entered without the court making findings of fact. *See Caldwell v. Deese*, 288 NC 375 (1975)(court is not authorized to make findings of fact or conclusions of law in a summary judgment). For summary judgment divorce, the court concludes only there are no facts to be found by a *jury*. The *court* still must find facts and conclude that entry of judgment is appropriate.

The statute does allow the court to find the necessary facts without the presentation of actual testimony; facts can be found from the presentation of "nontestimonial evidence." This means that the party seeking the divorce does not need to come to court to testify, but does this mean there is no trial? If the court must find facts based on nontestimonial evidence and make conclusions of law necessary to support the entry of divorce, isn't this a trial? At the very least, it is a hearing.

**Rule 56 Summary Judgment**

Even if summary judgment divorce is the same as any other Rule 56 procedure, it is not at all clear that a summary judgment of any kind can be entered by a court in chambers, without an actual hearing scheduled to give all parties an opportunity to be heard in open court before the motion is granted or denied. While the propriety of summary judgment generally is determined based upon the court's review of paper – the affidavits, pleadings, depositions, answers to interrogatories, and admissions of the parties, Rule 56 clearly indicates that a hearing is expected. See Rule 56(c)("the motion [for summary judgment] shall be served at least 10 days before the time fixed for hearing.").

In *Hensey v. Hennessy*, 201 NC App 56 (2009), the court held that when a statute obviously anticipates a hearing, it is not appropriate for a judge or magistrate to enter an order or judgment after simply reviewing the pleadings.

Hearings on the merits of a claim must be held in open court. GS 7A-191(trials on the merits must be held in open court); *See Stancill v. Stancill*, 773 SE2d 890(NC App 2015)('hearings' on the merits of a claim are civil trials). Summary judgment clearly is a hearing on the merits of a claim.

I understand why some districts are interested in conserving court time by not scheduling hearings in these cases, but I don't believe the present law allows such a practice.

What do others think?