# THE DIVORCE PROCEDURE IN THE REGULATION OF THE NEW CIVIL CODE AND THE CIVIL PROCEDURE CODE

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*Abstract:Divorce is a legal means of breaking marriage that will have effects in the future[1]. By divorce it is understood that marriage is rendered in spouses during the life of the spouses by court order for grave reasons attributable to both spouses or only the spouse who make it impossible to continue the marriage for the husband requesting her dissolution[2]*
*According to the provisions of civil civil law, marriage is terminated by the death of one of the spouses or by the judicial declaration of the death of one of the spouses.*
*The court may divorce marriage if, for good reasons, the relations between the spouses are seriously injured and the continuation of marriage is no longer possible.*
*By judicial excellence, divorce, whether pronounced on the initiative of one of the spouses or on the consent of both spouses, extinguishes, on the date of the irrevocable stay of the court ruling, the main effects of the legal act of marriage in spouses' relations, personal[3]*
*Divorce is different from:[4]*
*- the termination of marriage (the death or judicial declaration of the husband's death);*
*-finance of marriage (invalidity of marriage);*
*- the actual separation (the actual separation of the spouses), when they remain married but have suspended the obligation of cohabitation;*
*- body separation (an institution governed only by those systems of law that do not accept divorce or accept it under restrictive conditions such as Spain, Great Britain, France, Italy, called divorce anticameral or divorce of Catholics), consisting of the suspension by the court, at the request of one or both spouses, the obligation of cohabitation, the sharing of common goods, and the entrustment of minors to raising and education, the marriage remaining valid.*
*Therefore, for divorce marriage dissolution it is necessary to cumulate the following conditions:*
*- the existence of sound reasons that the court is competent to carefully analyze;*
*- the impossibility of continuing marriage;*
*- the serious deterioration of marriage relationships as a consequence of sound reasons.*

*Keywords: marriage, divorce, participants, spouses,families.*

The divorce procedure is governed by Chapter VII, entitled The Disbandment of Marriage Art.373-404 of the Civil Code and 915-935 C. proc. civil, and the divorce action belongs only to spouses, being strictly personal, can only be introduced by them. In art. 918 of C. proc.civ alin 2 provides for a waiver from the spouses' active legal process in the sense that a spouse under a court injunction may request divorce by a legal or personal representative if it proves that it has the ability to discern unaffected. In accordance with Art. 39 of the Law on the Application of the Civil Code,

1 . Harbadă, Family Law and Civil Status, "Alexandru Ioan Cuza" University, Iaşi, 2003, p. 75;
2 D. Lupascu, Family Law, ed. the 4th fined and updated, Ed. Universul Juridic, Bucharest, 2009, p. 146;
3 E. Florian, Family Law, ed. 3rd Ed. C. H. Beck, Bucharest, 2010, p. 182;
4 I. Apetrei, R. O. Andone, Family Law. Course support, Venus House, Iasi, 2005, p. 46;



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the provisions of the new Civil Code on divorce apply without distinction between marriages concluded before or after its entry into force.

The prosecutor can not enter divorce proceedings because of her personal character. However, he can intervene in the process at any stage, especially if marriage resulted in children[5] to defend their interests.

Neither husband's heirs can divorce proceedings or continue divorce proceedings because the marriage has ended with the death of one of the spouses.

**1 Court jurisdiction in divorce cases**

According to the provisions of C. proc. the divorce application is the jurisdiction of the court in whose jurisdiction the same spouses' domicile is located. If the spouses have no common domicile or if one of the spouses no longer resides in the district of the court in which the latter is domiciled, the competent court shall be that in whose district the defendant is domiciled and where the defendant is not domiciled in the country , the court in whose jurisdiction the claimant is domiciled is competent.

The rules determining territorial jurisdiction in matters of divorce are imperative. Due to the imperative character of the rules in C. proc. civic law, the exception of territorial jurisdiction over divorce can be raised throughout the trial, both in substance and on appeal, and even before the Board of Appeal if it does not require verification of facts outside the file.[6]

It is a derogatory rule from the common law as regards the territorial jurisdiction of the court to settle a claim for alimony, stating that the application will be made to the court in the divorce court, even if changes have occurred in the meantime parties. This provision is natural if the pension claim was formulated as an accessory application for divorce.

If the application for a pension is made separately, after the divorce application has been filed until it is settled, the court of the plaintiff's domicile is also competent outside the defendant's domicile, being an alternative territorial jurisdiction. From the moment the divorce action starts, the claims made by the descendants, because only they can be said in this case, can only be directed at the court in which the divorce action is taking place. An imperative rule is thus constituted, the court at the plaintiff's domicile is no longer competent to hear the case.

**1.2 Participants in the divorce process**

In the area of divorce, the principle of common law is that the parties may exercise their procedural rights personally or through a trustee.

Therefore, according to C. proc. civil parties are required to appear in person before the courts of law, except in the following situations:[7]

- one of the spouses is prevented from a serious illness;
- one of the spouses resides abroad;
- one of the spouses executes a custodial sentence;
- one of the spouses is placed under a ban.

In order to ensure the appearance of the parties outside the court, the citation procedure is necessary, the courts having the obligation to verify ex officio the fulfillment of this procedure.

As regards the first term of trial, the applicant is required to be present before the court. If this is unjustified, but the defendant appears, the claim will be rejected as unsubstantiated.

If the defendant is absent, the action shall be determined in accordance with the rules of ordinary law. If the defendant makes a counterclaim, it is necessary to present himself / herself at the trial, under the same sanction on his / her counterclaim. If both parties are missing the agreed deadline, the request will be rejected as unsupported.

[5] Les, Treaty of civil procedural law, Ed All Beck, Bucharest, 2001, p. 201;
[6] V. M. Ciobanu, Theoretical and Practical Treaty of Civil Procedure, Vol. II, National Ed., Bucharest, 1997, p. 511-512
[7] G. Aioanei, E. Poenaru, Marriage and Divorce, Hamangiu Publishing House, Bucharest, 2008, p.131-133;



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When the divorce is based on the consent of the spouses, the trial at first instance requires the presence of both spouses in order to prove their insistence on the dissolution of marriage following this procedure. After verification, the divorce application is started. If both spouses are not present in the court, the divorce application is rejected.

In the divorce proceedings, the minor child has the quality of participation, if at the age of 10, the prosecutor and the guardianship authority.[8]

The minor child is listened to by the courtroom in order to manifest his desire to be entrusted to one or the other of the parents. The court will decide, with the divorce pronouncement, to which the parents will be entrusted to the minor children. To this end, the court will listen to the parents and the guardianship authority and, taking into account the interests of the children, who will also listen to them if they are 10 years old, will decide for each of the children whether they will be entrusted to their mother father.

According to the legal provisions, if the court is listening to a minor child, the hearing is done in the council chamber. The hearing of the juvenile by the judge is obligatory for the solution of the request for access to the raising and education.

The prosecutor's presence in the divorce process is motivated by the provisions of C. proc. civil law, and the provisions are: the prosecutor can draw conclusions in any civil process, at any stage of the case, if he considers it necessary for the defense of the rule of law, citizens' rights and freedoms. The Public Prosecutor may be present in the process considering the defense of the rights and legitimate interests of minors resulting from the marriage to be disposed of.

In all cases where divorced spouses have minor children, the court is required to cite in the trial the guardianship authority in whose territorial jurisdiction the parties are domiciled so that it can make written or oral conclusions about the custody of children to growth and education.

In judicial practice, the opinion of tutelary authorities in relation to the custody of minors takes the form of a social inquiry that includes information about the living conditions of the spouses, how to care for children, the degree of attachment of children to their parents. The conclusion of the social investigation is not decisive for the court, but it is corroborated with the other means of evidence administered.

**1.3 The request for a summons** and the counterclaim

The petition must include the following:[9]

the name, domicile or residence of the parties. The name means the surname and forenames acquired by the parties as a result of the marriage or the name changed by administrative means during the marriage with the consent of the other spouse, and by domicile means the place where the person can be found or the place where the process communications are to be made ;

the name and the quality of the person who is in the process, and if the representation is through a lawyer, his or her name and business premises. Wives can not be represented in the law court but only assisted by them. Also, representation of the party can be made if the spouse is placed under a ban, citing the guardian of the prohibition as mandatory as his legal representative;

subject of the request. The main claim will be the one concerning the dissolution of the marriage. The subject of the petition may be amended or supplemented throughout the process by filing additional requests to entrust children, the maintenance payments they owe, the retention of the name during the marriage, the assignment of the benefit of the lease, the eviction of the defendant's spouse, the maintenance allowance owed by spouses and the sharing of common assets;

The divorce court is required to rule on the custody of minor children and the maintenance due to them, since they will be made ex officio to the parties and settled by a court order:

[8] G. Lupşan, Family Law, Ed. Junimea, Iaşi, 2001 p. 65;
[9] G. Aioni, E. Poenaru, op. cit., pp. 128-130;



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the reasons for fact and of law on which the application is based. The petitioner will have to submit to the court the facts he considers relevant in setting up the reasons for divorce without legally fitting it, and this obligation rests with the judge;
indicating the evidence on which each claim is based in order to enable the court to proceed with the administration of evidence without prolonging the trial and putting the parties in a position of legal equality;
the signature, which confirms the parties' will to trigger the civil trial, but also the accuracy of the content of the petition for legal action. The application will be signed personally by the applicant spouse.

At the request for divorce, drawn up in duplicate, the applicant shall attach a certified copy of the marriage certificate and, where applicable, of the birth certificates of the minor children.[10]

The divorce application, together with the supporting documents, is personally submitted by the plaintiff to the president of the court, who gives him reconciliation advice, and if he insists on resolving the case, he will set a time limit for the trial. Because the applicant is present, he is given a period of trial in the knowledge, which means that he will not be summoned for this first term nor for the subsequent time-limits.In divorce by agreement of the parties, the application will be signed by both spouses, but the presence at the court president may be made by one of them.

For the divorce action, a fixed stamp duty is levied, which is low in the case of divorce legally based on the provisions of art. 373 of the C. civil., But also in the situation where the applicant has no income or these are lower than the minimum wage in the economy. Obligatory is due to a legal stamp whose value is based on the form of claim.

The procedural law according to the provisions of Article 917 of the Proc. civil, allows the defendant's spouse to defend himself or to seek the dissolution of the marriage through counter-claim.

The moment at which the counterclaim may be formulated, the legislator expressly provides for three such moments:
Not later than the first day of appearance in public, for the events before that date. Failure to comply with the deadline for the promotion of counterclaims leads to the sanction of the defendant 's acquittal for the reasons he has up until then. However, if, after the aforementioned date, new facts arise which may constitute grounds for divorce, the respondent may make a counter-claim;
Until the debates on the merits in the main proceedings begin, but only by invoking those facts that arose after the first day of appearance;
If the reasons for the divorce arise after the opening of the debates at the first instance, and while the judgment of the first application is in the appeal, the claim of the defendant will be made directly to the court hearing the appeal, this legal provision is an exception.

Failure to comply with the time-limits for lodging a counterclaim by the defendant entails the sanction of the forfeiture of the right to request the divorce from the plaintiff's exclusive guilt.[11]

By way of derogation from the common law, the counterclaim may not be divulged by the divorce action.

If the counterclaim is lacking, the merits of the divorce reasons invoked by the plaintiff, the marriage can not be dissolved, even if the debtor's fault results from the debates.

### 1.4 Accessory Requests

The applicant's spouse may, in the divorce proceedings, make a series of additional applications, some of which are mandatory, and which the court, in the absence of the appellant's inheritance, claims them ex officio and others of a voluntary[12] nature. 919 of C. Proc. Civic entitled Accessory

[10] G. Lupan, op. cit., p. 60;
[11] G. Aioanei, E. Poenaru, op. cit., p. 131;
[12] G. Lupșan, op. cit., p. 61;



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and incidental claims states that; Upon request, the divorce court shall also pronounce on: (a) the exercise of parental authority, the parents' contribution to the cost of raising and educating children, the child's home, and the right of the parent to have personal ties to the child; b) the names of the spouses after divorce;c) family homed) Damages claimed for material or moral damages suffered as a result of the divorce;e) the maintenance obligation or the compensatory benefit between the former spouses;

f) the termination of the matrimonial regime and, as the case may be, the liquidation of the community of goods and their division. When spouses have minor children born before or during marriage or adopted, the court will rule on the exercise of parental authority as well as on parents' contribution to raising and educating children, even if this was not requested through the divorce application . The court will also rule ex officio on the name of the spouses after the divorce, according to the provisions of the Civil Code.

The lawmaker has determined that the court may take temporary measures. The court may take, throughout the trial, by way of a provisional order, provisional measures concerning the establishment of the home of juvenile children, the maintenance obligation, the collection of the state allowance for children and the use family housing

Mandatory accessory applications are those relating to spouses' names after marriage, custody of minors to growth and education, and the determination of each parent's contribution to the cost of raising and educating the minor. If one of these additional claims is not made, the judge is obliged to make a formal appeal and to settle it.

Optional requests are those relating to the sharing of common goods, the assignment of the dwelling, the representation or the approval of the legal acts of the minor resulting from the marriage, the maintenance obligation between the spouses, the administration of the minor's property. Those applications, if not formulated in the divorce proceedings, may, after the dissolution of the marriage, have been the subject of distinct principal actions.

**1.5 Samples in the divorce process**

The divorce procedure has some peculiarities in the area of judicial probation. The derogations from common law refer to two distinct situations: the presence of means of evidence admitted in common law, but prohibited in divorce proceedings, and others admitted in divorce proceedings and prohibited under the common law:[13]

means of evidence admitted in common law, but not admitted in the matter of divorce. Interrogation can not be used to prove the reasons for divorce because, in order not to indirectly reach divorce admission by mutual consent;

means of proof not provided in the ordinary law but admitted in the matter of divorce. Taking into account the fact that family matters are discussed in divorce proceedings and are generally known by close relatives, the law permits hearing of relatives and relatives up to and including third grade, besides descendants.

Parties may use both private and authentic written documents in the divorce process. Most commonly used are the documents under private signature, usually letters that are from one of the spouses and are addressed to the other spouse or third parties.

Recently, documents such as emails or transcripts of magnetic tape recordings have been used.

In the case of emails, documents may be accepted under private signature and will be proof against the person who sent them to the extent that their content is not contested by the party to whom they object. The electronic documents are regulated by Law no. 455/2001 regarding the electronic signature, and the legislator assimilated them, with regard to the conditions and the effects, with the documents under private signature.

[13] **G. Aioanei, E. Poenaru**, op. cit., p. 133-135;



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The transcription of a husband's phone records was admitted as evidence in the divorce process, being assimilated to the document under private signature. The party that will use such a sample will file the transcription of the record as well as the medium on which the recording was made and a possible challenge to changing the content of the conversation by truncating or altering the voice may be the subject of a technical expertise specialty.

In the divorce process, a sample used very often is the photo, which dates back a long time.

In the divorce process, the relatives and affiliates of the parties, except for the descendants, can be heard as witnesses.

The reason why the relatives and affiliates of the parties are admitted as witnesses in divorce proceedings results from the fact that they are usually the best acquaintances of family relationships, even though most of these witnesses may be biased. The testimony of the witnesses must be corroborated with all the evidence in question, the testimonies of the other witnesses and the documents submitted to the case, if that evidence exists.

As regards evidence, another derogation from the common law is established by C. proc. civil, according to this regulation, the legislator excluded interrogation as a means of proof in the marriage process. The interrogation may, however, be used in divorce proceedings in connection with the addendum requests made by the parties.

**1.6 Divorce Judgment and Its Effects**

The divorce decree is the final act that puts an end to the trial initiated by the applicant.

The probationary court may administer one of the following solutions:[14]

dismisses the divorce action if the defendant opposes the dissolution of the marriage, does not make the counter-claim, and the evidence shows the plaintiff's fault. This is because no one can invoke his own fault in order to obtain the protection of the law;

dismiss the divorce action as unsubstantiated if the applicant does not appear personally (except in cases of strict and limitative exceptions provided by law where no mandatory presence is required) or in the case of divorce by common law where both spouses are not present within the prescribed time;

admits the divorce action and orders the dissolution of the marriage by agreement of the parties;

(if the defendant does not oppose the dissolution of the marriage, he / she asks for the dissolution of the marriage by the applicant and the evidence of the plaintiff's fault); the defendant's exclusive guilt (if the defendant does not appear or appear and does not oppose the action, and the evidence leads to the defendant's sole fault); from the fault of both parties (when the evidence leads to the joint guilt of spouses in breaking marriage relationships);

admits divorce proceedings and untie marriage for medical reasons (when the health of one of the spouses makes it impossible to continue the marriage);

discontinues divorce proceedings if the spouses reconcile before the irrevocable stay of the divorce judgment or in the event of the death of one of the spouses prior to the irrevocable stay of the divorce judgment.

Applications for divorce are judged in public[15,] but can also be judged in the council chamber if the court considers that a better trial or administration of probelo would be assured, but the judgment is pronounced in public.

If marriage breaks out and there are minors, the divorce decree must show, even in the absence of an explicit request from the spouses, to whom minor children will be entrusted to raise

[14] G. C. Frentiu, B. D. Moloman, Family and Civil Procedure Elements, Hamangiu Publishing House, Bucharest, 2008, pp. 93-94;
[15] G. Aioanei, E. Poenaru, op. cit., p. 143-145;



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and educate, and what each parent contributes to the issues necessary for their growth and education.

In the process, some of the spouses' requests are also settled and the court is automatically elected. The divorce decree also contains optional mentions on:

- the names that spouses will bear after divorce;
- with regard to the establishment of maintenance between spouses;
- with regard to the sharing of common goods;
- with regard to the assignment of the common dwelling;
- with respect to the parent who will administer the property of the minor, represent or approve the acts; such a statement will be included in the divorce judgment when the child was entrusted to a third person or institution of care.

Marriage is considered to have been wound up as of the date on which the divorce ruling was irrevocable.

The court must give reasons for the decision it gives, but if both parties ask the court not to motivate it, it will not motivate. This also applies if the divorce is pronounced on the basis of the parties' agreement. In this case, the court will divest the marriage without pronouncing the divorce for one or both spouses.

The divorce decree, as a final act of the court, produces the same effects as any court decision, dismissing the court for the settlement of the case, constitutes, from a probationary point of view, authenticated, is an enforceable title, enjoys judgmental power. An essential difference to most court rulings is that the divorce decree is a constitutive ruling of rights rather than a declaration of rights, which means that it only produces effects for the future.

Divorce has no effect on the person's citizenship, and if it occurs before the age of 18, it does not lead to the loss of the full-fledged exercise capacity acquired at the end of the marriage.

**1.7 Appeals in divorce matters**

Under the law of judicial organization, courts are competent, under the law, to hear appeals by having two degrees of jurisdiction.

The call term is 30 days and runs from the date of the judgment.

Divorce judgments based on the parties' agreement can not be appealed only with divorce applications.

Another remedy would be the appeal for annulment, namely only for breach of public policy provisions on jurisdiction. The other pleas in the appeal

annulment can not be used, as the presence of the parties is mandatory in the trial of the case for expressing consent before the court and there is no question of vitiating the citation, and the appeal in special annulment refers to the appeals against the appeal, and we we are facing a first instance sentence.

The subjects of the appeal can only be the two spouses. An exception may arise if the divorce action has included the sharing of common goods as an accessory endorsement or there has been a counterclaim for that claim. In these cases, the promotion of one of the remedies may belong to a principal intervener or other third party involved in the proceedings, but they will not affect and be able to refer to requests that are specific to marriage.[16]

If one of the spouses dies in the course of the trial in appeals, being a strictly personal action and the heirs having no procedural legitimacy, the court will take note of this fact and will allow the appeal and will amend the court decision granting the action, in the sense of closing the file.

The same happens if the spouse dies in the period between the date of the sentence or the decision and the date of the appeal by the same spouse.

[16] **G. Aioanei, E. Poenaru**, op. cit., p. 147-149.



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Another issue raised in the legal literature relates to the solution that the court of appeal can issue if an unreasonable divorce sentence is challenged and it is argued that the failure to state reasons has been requested. The divorce ruling will not be motivated if both parties ask the court to do so. In order to omit the divorce court's considerations, the court must be in the face of the will of both parties involved in the trial. Their manifestation of will must be recorded in a court settlement, during the trial, in the practice of the judgment or in a separate application, signed by both parties and filed in the file, so that the unambiguous will of the parties in this respect can be unambiguously arisen. If the contested judgment lacked the reasoning or it was inappropriate, in case the documents of the file do not result in the manifestation of the will of both parties in the sense of not justifying the decision, the appeal court will cancel the ruling and will retain the trial for re-judgment.
As for the other extraordinary ways of attack, C. proc. Civil law provides for a single derogation from the common law, namely that the divorce decree can not be subject to review.
However, the application for review is also admissible in this case, but only if it concerns the settlement of the applications for the divorce, rather than the end of the application for the dissolution of the marriage.

**2.1 Divorce remedy** The new C. proc. civil section in the section titled Divorce by the consent of the spouses in art. 929 states that; the provisions of this section do not apply to cases where spouses have opted for divorce by administrative or notary procedure under 930 of the Civil Code. If the application for divorce is based on the terms of the Civil Code under the terms of the Civil Code, it will be signed by both spouses or by a joint trustee with a genuine special proxy. If the trustee is a lawyer, he will certify the spouses' signature, according to the law. Where appropriate, in the divorce application, the spouses will also determine how they have agreed to settle divorce applications. Receiving the request made in the terms of paragraph (1), the court will verify the existence of the consent of the spouses, after which it will set a deadline for the settlement of the request in the council chamber. At the trial, the court will check whether the spouses are marrying their marriage on the basis of their agreement and, if so, divorce, without mentioning the husband's fault. By the same judgment, the court will take note of the consent of the spouses with regarding the accessory requests, according to the law. If the spouses do not agree to ancillary claims, the court will administer the evidence provided by the law for their settlement and, in the parties, will issue a ruling on divorce, according to par. (1), also addressing claims for the exercise of parental authority, parents' contribution to the cost of raising and educating children and the names of spouses after divorce. If appropriate, with regard to the other adjudicatory requests, the court will continue the judgment by issuing a decision subject to the remedies provided by law. The judgment given under para. (1) is final, and the decision rendered according to par. (2) is final only in respect of divorce, unless the law otherwise provides. When the divorce application is based on the culprit of the defendant's husband, and he acknowledges the facts that led to the dissolution of marital life, the court, if the applicant agrees, will pronounce the divorce without examining the merits of the divorce grounds and without mentioning the guilt for the dissolution marriage. The provisions of art. 931 par. (2) to (4) shall apply accordingly. If the applicant does not agree to divorce under the conditions of paragraph (1), the application shall be settled in accordance with Article 2

**2.2 Divorce for health reasons** In Section 2, entitled Art. 933 C.proc. civic conditions are stipulated when the divorce is requested because one of the spouses' health condition makes it impossible to continue the marriage, the court will administer evidence of the illness and health status of the sick husband and pronounce the divorce, according to the Civil Code, without mentioning the fault for the dissolution marriage.



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**2.3 Divorce of the husbands** in art. 934 C.proc. As a result of marital dissolution of the marriage, the court will rule the divorce on the defendant's spouse when, due to his or her serious reasons, the relations between the spouses are seriously injured and the continuation of the marriage is no longer possible. The court can rule the divorce of both spouses, even when only one of them has made a request if the evidence shows that they are both guilty of breaking marriage. If the defendant has not filed a counterclaim, and the evidence adduced shows that only the applicant is guilty of breaking the marriage, his claim will be dismissed as unfounded, unless the conditions set out in Art. 935 on the divorce of the applicant's sole fault. In art. 380 Civil Code states that if the applicant's husband dies during the trial, his heirs may continue the divorce proceedings

2.4 Divorce for long-term separation. When husbands are separated for at least two years, either of them will be able to ask for divorce, assuming responsibility for the failure of marriage. In this case, the court will verify the existence and duration of the divorce in fact and rule the divorce from the plaintiff's sole fault. (2) If the respondent husband agrees to the divorce, the provisions of Art. 931C.proc.civ.

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