

IN THE SUPREME COURT OF MISSISSIPPI

PEIRCE McINTOSH

APPELLANT

VS.

CASE NO. 2006-TS-2136

GAY REED McINTOSH

APPELLEE

Consolidated with:

GAY REED McINTOSH

APPELLANT

VS.

CASE NO. 2006-TS-01762

PEIRCE McINTOSH

APPELLEE

APPEAL FROM THE CHANCERY COURT
OF WASHINGTON COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, PEIRCE McINTOSH

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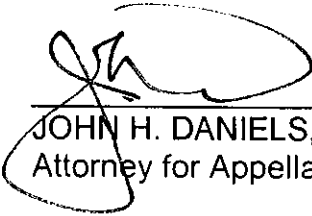
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Peirce McIntosh, Appellant;
2. John H. Daniels, III, Attorney for Appellant;
3. Gay Reed McIntosh, Appellee;
4. Edward D. Lamar, Attorney for Appellee;
5. Honorable Marie Wilson, Chancellor

This the 12 day of April, 2007.



JOHN H. DANIELS, III
Attorney for Appellant

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STATEMENT OF THE ISSUES

I.

Did the lower court erroneously grant a stay of its October 2, 2006 Judgment of Divorce.

II.

If a stay of the lower court's Judgment of October 2, 2006 was to be granted, it could only be granted with supersedeas pursuant to Rule 8, Mississippi Rules Appellate Procedure or Miss. Code Ann. §11-51-31 (1972); and

III.

Was the lower court without authority/jurisdiction to reinstate its Order of Temporary Relief entered January 18, 2006.

STATEMENT OF THE CASE

These causes have been consolidated for appeal purposes.

The Appellee, Gay Reed McIntosh (hereinafter "Appellee") filed a Complaint for Separate Maintenance on September 22, 2005.

The Appellant, Peirce McIntosh (hereinafter "Appellant") filed his response to the Appellee's Complaint for Separate Maintenance, along with a Counterclaim for divorce on October 25, 2005.

A hearing was held by the Washington County Chancery Court (hereinafter "lower court") in December of 2005 on the issue of temporary support and following an Order was entered granting the requested support on January 18, 2006.

Following the Temporary Order discovery proceeded and thereafter a trial with the entry of a well reasoned Judgment of Divorce on October 2, 2006.

The trial was followed by a number of post-trial proceedings which ultimately led to two (2) separate appeals to this Court on several different issues.

The issues-at-bar concern the Appellant's claim for relief as set forth in the Statement of Issues.

STATEMENT OF THE FACTS

Not unlike many couples in our state -- the McIntoshs married, raised a family and sought out the American dream.

Not unlike the plight of many couples in our state -- the McIntoshs' relationship deteriorated over the years to where in 2005 they sought relief from the Chancery Court of Washington County, Mississippi in the form of separate maintenance and/or

divorce.

The pleadings in this cause reveal a typical march to the courthouse – a claim for separate maintenance (CP 8-12, RE 7-11) by the Appellee and a responsive pleading thereto with a Counterclaim for Divorce by the Appellant (CP 17-20, RE 12-15).

On January 18, 2006, the lower court entered an Order of Temporary Support (CP 25-30, RE 16-21). That Order of Temporary Support required the Appellant to pay certain funds for the support of the Appellee and the parties' child – and "...remain[ed] in effect until further order of this court." (CP 27, RE 18). (Insert in bracket ours).

Following the lower court's Order of January 18, 2006 (CP 25-30, RE 16-21), discovery proceeded as usual and with a trial on all issues which culminated in a Judgment of Divorce in favor of the Appellant on October 2, 2006. (CP31-56, RE 22-47). The lower court's Judgment of Divorce denied the Appellee's request for separate maintenance and effected an orderly division of property by way of equitable distribution and the payment of child support by the Appellant to the Appellee for the care of their minor son; including other relief set forth or spelled out therein.

The Appellee being aggrieved of the lower court's decision granting a divorce immediately perfected an appeal but did not claim the benefit of an additional post-trial review pursuant to Rule 59, MRCP. (Emphasis ours) (See Appellant's Motion Objecting to Modification, Reconsideration or Altering of Judgment and for Other Relief for a historical sequence of the post-trial proceedings following the Appellee's appeal of the lower court's Judgment of October 2, 2006.) (CP69-72, RE 58-61).

Instead the Appellee, without the benefit of Rule 59, supra, sought relief from the lower court pursuant to Rule 62, MRCP, which was objected to by the Appellant – Appellee was attempting to “stay” the enforcement of the lower court’s decision of October 2, 2006, pursuant to Rule 62, supra and without the benefit of a supersedeas bond. (CP 57-61, CP 62-66, RE 48-52, RE 53-57).

On November 1, 2006, the lower court modified the October 2, 2006, Judgment (CP 67-68, RE 58-59), which was objected to by the Appellant (CP 69-72, RE 60-63), all of which following a hearing on the various Motions brought the lower court to a number of conclusions/decisions.

- a. November 30, 2006 Order (CP 115, RE 66) setting aside the lower court’s Order of November 1, 2006;
- b. November 30, 2006 Order (CP 116, RE 67) rendering the Order of the lower court of November 1, 2006 void and of no affect; and
- c. December 1, 2006 Order (CP 113-114, RE 64-65) stayed the October 2, 2006 Final Judgment and reinstated the Order of Temporary Relief of January 18, 2006.

With these Orders/decisions the Appellant perfected his appeal to this Court; as the Appellant is aggrieved of the decision of the lower court in (1) staying the lower court’s Judgment of October 2, 2006; and (2) reinstating the lower court’s Order of January 18, 2006 *nunc pro tunc* October 2, 2006; all without the benefit of either a supersedeas bond as required by Miss. Code Ann. §11-51-31 (1972) or of Rule 8, MRAP and without the benefit or existence of a marital relationship upon which an

Order of Separate Maintenance, temporary or otherwise might be entered or jurisdiction of the lower court to reinstate its Order of January 18, 2006.

The proceeding on the various Motions at bar is codified in the transcript of hearing held on November 16, 2006. (T. 24-44, RE 68-89). During that argument and hearing the lower court revoked its former Order of reconsideration of its Judgment of October 2, 2006; reinstating the Judgment for the simple reason that the Appellee failed to file a Rule 59, MRCP, Motion for Reconsideration – but ended up staying the Judgment of October 2, 2006 (without the benefit of a supersedeas bond) and reinstating the lower court's Order of January 18, 2006 – an Order of support for which the Appellant contends, among other reasons, could not be “re-entered” due to the absence of the “marital relationship” or the court having jurisdiction to reinstate the Order of January 18, 2006.

From that decision (as codified in the lower court's Order of December 1, 2006, entered December 4, 2006) (CP 113-114, RE 64-65) the Appellant perfected his appeal to this Court and which for clarity purposes has been consolidated with the main appeal in this cause.

SUMMARY OF THE ARGUMENT

The lower court was in error when it granted a stay of the October 2, 2006 Judgment of Divorce. The only way that Judgment could be stayed was with the approval of a bond of supersedeas.

In addition the lower court reinstated its Temporary Order of January 18, 2006. Clearly this was error – the court was without jurisdiction to reinstate that Order and

furthermore the Order (temporary in nature but predicated upon the Petition for Separate Maintenance) was conditioned on the existence of a marital relationship. Without such relationship or jurisdiction the court had no authority to enter an Order of Separate Maintenance, temporary or otherwise.

ARGUMENT

The lower court granted a divorce to the Appellant in its Judgment of October 2, 2006. In that Judgment the court ordered an equitable distribution of jointly held property, child support, child custody and other relief. From that Judgment an appeal was perfected by the Appellee; no post-trial reconsideration of the Judgment was requested by Appellee or her counsel. The lower court in this case was without jurisdiction to “reconsider” its Judgment of October 2, 2006 as all litigation in the case-at-bar had ceased. The lower court was without authority to alter, or to amend its findings of fact or conclusions of law – because without more the lower court’s hands were tied and the jurisdiction of the case-at-bar was vested in this Court. See generally *Banks v. Banks*, 522 So. 2d 933 (Miss. 1987); *Henson v. Henson*, 877 So. 2d 547 (Miss. 2004); as well as Rule 54, MRCP. A Final Judgment is an appealable Order from which all litigation ceases and from which the lower court would be divested of jurisdiction and therefore could not affect, alter or amend an order/judgment for which it had no jurisdiction over.

Clearly the lower court had no choice in the matter as it was without jurisdiction. The only thing that the lower court could consider was the requested stay pursuant to Rule 62, MRCP; the lower court was thus precluded procedurally from altering or

amending its Judgment of October 2, 2006, or from reinstating a previous Temporary Order.

In this position the Appellee had few, if any, choices – appeal with supersedeas – thereby staying the Judgment of October 2, 2006 or as an alternative, appealing but without supersedeas in hopes that this Court concluded that the lower court was incorrect in its Judgment of October 2, 2006.

Notwithstanding, the lower court granted what Appellant considers (procedurally) relief not otherwise available to the Appellee.

The Appellee sought and obtained the stay of the October 2, 2006 Final Judgment of Divorce and without the benefit of a supersedeas bond. In addition, the Appellee likewise sought and obtained, to the prejudice of the Appellant, a reinstatement of the lower court's Temporary Order entered January 18, 2006 – an Order for which the Appellant contends could not be reinstated.

The lower court's Order entered January 18, 2006 (CP 25-30, RE 16-21) was, although styled "Order of Temporary Support" an Order predicated upon the Appellee's Motion for Separate Maintenance. It was more than an award of temporary child support and custody – it adjusted issues of support, possession of property and other relief. In addition and most importantly, was the language of the Order concerning its continued existence. The Order entered January 18, 2006, stated, "The provisions of this Order shall remain in effect until further order of this Court." (CP 27, RE 18). Moreover, the very nature of the Order was predicated upon the continuation of the marital relation of the parties and the Appellant's return to that relationship.

Elementary in the law of divorce and separation is Miss. Code Ann. §93-5-27 (1972); which states:

In all cases of divorce from the bonds of matrimony, the marital rights shall cease with the Judgment.

Clearly this is what happened when the lower court entered its Final Judgment of Divorce dated October 2, 2006. In addition, when the Appellee immediately appealed the October 2, 2006 Judgment and failed to employ post-trial relief by way of reconsideration pursuant to Rule 59, MRCP – the lower court lost jurisdiction of the matter and the parties were therefore divorced – jurisdiction of the case was in the hands of this Court, the Supreme Court for the State of Mississippi.

The only remedy then available to the Appellee was her appeal to this Court with or without supersedeas. See generally Miss. Code Ann. §11-51-31 (1972), Rule 8, MRAP and *Deal v. Wilson*, 922 So. 2d 24 (Miss. 2005).

As such, the lower court was without authority to amend or alter its October 2, 2006 Judgment; and, was without authority to reinstate its Order of Temporary Support entered January 18, 2006. This latter Order, the Order of Temporary Support, was predicated upon the continuation of the marital relation, was void with the entry of the October 2, 2006 Final Judgment and could not be reinstated because the lower court lacked jurisdiction to reinstate same upon Appellee's immediate appeal and failure to employ the corrective measures of Rule 59, MRCP.

CONCLUSION

This Court should grant the following relief and make the following findings, to-wit:

1. That the lower court's Judgment of October 2, 2006, was a final judgment from which an appeal was taken.
2. The lower court was without jurisdiction to reconsider its Final Judgment of October 2, 2006 for failure of the Appellee to employ post-trial relief pursuant to Rule 59, MRCP.
3. That for the Appellee to stop the mandate of the lower court's Judgment the matter had to be stayed with supersedeas pursuant to Rule 8, MRAP or Miss. Code Ann. §11-51-31 (1972).
4. That without a stay or the grant of post-trial relief, the lower court's Judgment of October 2, 2006, was a final decision binding upon the lower court and the parties but subject, of course, to the right of the Appellee to an appeal; and
5. That because the lower court was without jurisdiction, the lower court had no right to alter, amend its Judgment or to reinstate its Order of Temporary Relief entered January 18, 2006.

Respectfully submitted,

PEIRCE McINTOSH

BY: 

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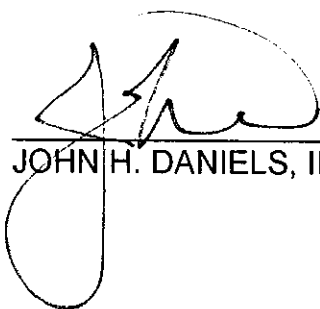
CERTIFICATE OF SERVICE

I, John H. Daniels, III, attorney for Appellant, Peirce McIntosh, certify that I have this day mailed, via regular U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

Honorable Marie Wilson
Chancellor for the Ninth District
P. O. Box 1762
Greenville, MS 38702-1762

Edward D. Lamar, Esq.
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This, the 12 day of April, 2007.



JOHN H. DANIELS, III, MSB 