

SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

NO. 2008-CA-02107

RONALD WAYNE HENDERSON

APPELLANT

versus

EM POK HENDERSON

APPELLEE

The undersigned counsel of record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Ronald Wayne Henderson, Appellant

Em Pok Henderson, Appellee

Blewett William Thomas, Attorney for the Appellant

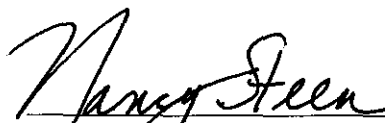
Nancy Steen, Attorney for the Appellee

Honorable James H. C. Thomas, Jr., Chancellor

Submitted this the 16<sup>th</sup> day of July, 2009.

EM POK HENDERSON

By:

A handwritten signature in cursive script, appearing to read "Nancy Steen", written over a horizontal line.

NANCY STEEN, ATTORNEY  
FOR APPELLEE

## TABLE OF AUTHORITIES

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**STATEMENT OF THE ISSUE**

WHETHER THE CHANCELLOR CORRECTLY ORDERED THAT THE JUDGMENT OF DIVORCE SIGNED ON APRIL 23, 2002, BE FILED AND ENTERED *NUNC PRO TUNC* BACK TO APRIL 23, 2002.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is an appeal from a Judgment of Divorce entered *nunc pro tunc* on or about November 20, 2008. (R. E. 38-46)

### **B. Course of Proceedings**

Ronald Wayne Henderson and Em Pok Henderson filed a Joint Complaint for Divorce on December 4, 2001 (R.E. 2-4). On that same date, the parties filed a Property Settlement Agreement (R.E. 5-9). It is now clear that a final decree of divorce, duly incorporating the Property Settlement Agreement signed and filed by the parties was presented to the chancellor and signed by the chancellor on April 23, 2002. That decree was never filed in the Henderson court file. (See Motion for Entry of Judgment, R.E. 14-22, and “Entry of Judgment of Divorce *Nunc Pro Tunc*”, R.E. 38-41.) Through counsel, Em Pok Henderson filed a motion requesting entry of the Judgment of Divorce *nunc pro tunc*, which motion was granted by the chancellor in his Entry of Judgment of Divorce *Nunc Pro Tunc* on November 20, 2008. (R.E. 38-46). Ronald has appealed the entry of the Judgment, claiming that he has now withdrawn his consent to divorce on the grounds of irreconcilable differences.

### **C. Statement of Facts**

There were no evidentiary hearings conducted in this matter, and the only relevant facts to this Court’s decision are found in the pleadings and other documents contained in the court file. It should be noted that the “Statement of the Case” provided in the Appellant’s brief (Brief of Appellant, pp 2-4), contains

a number of statements which are prejudicial to Em and are not supported by any record or testimony. Em disputes these statements and it would be unfair and prejudicial for this Court to consider the factual background type statements contained in Ron's Statement of the Case. The Court is respectfully requested to disregard Ron's description or complaints about his marriage.

The facts which are relevant to this Court's decision at this time are simple:

These parties filed a Joint Complaint for Divorce in 2001, and entered into a Property Settlement Agreement. The Judgment of Divorce was presented to the chancery court and was signed by the chancellor on April 23, 2002. The parties conducted themselves as though the Final Decree of Divorce was in full force and effect, and specifically, Ron paid the alimony on a monthly basis to Em until September of 2005, at which time Ron stopped paying the alimony. (R.E. 14).

At no time throughout these proceedings has Ron alleged, either in pleadings or testimony, that he withdrew his consent to the divorce on April 23, 2002, the date the Judgment of Divorce was presented to the chancellor and signed. Indeed, he states in his Brief of Appellant:

During the years after the separation in 2001, Ron proceeded under the assumption that the divorce had been finalized and he continued to pay Em alimony through the summer of 2005...

(Brief of Appellant, p. 3) At no time has Ron alleged that he did not intend for the divorce to be finalized back in 2002, and he has never alleged that he believed himself still to be married, until he checked the court file in 2005, seeking relief from the alimony payment.

## **SUMMARY OF THE ARGUMENT**

*Nunc pro tunc* is a Latin term that literally means now for then, and refers to the changing back to an earlier date of an order, judgment or filing of a document. The Court has the discretion to enter judgments or orders on a *nunc pro tunc* basis, and the chancellor in this case correctly exercised his discretion in the filing of the Judgment of Divorce.

All of the provisions and requirement set forth in Section 93-5-2 of the Mississippi Code of 1972, as annotated and amended (Supp. 2006) were adhered to by the parties and the Court in this case. The only error was one of accidental omission or neglect in the failure to file the Judgment of Divorce. This is not a case in which procedural or technical errors require the Judgment to be vacated, and Ron is not entitled to withdraw his consent once the Judgment has been signed and he has ratified the divorce and the Property Settlement Agreement for more than two (2) years.

## **ARGUMENT AND AUTHORITIES**

A. **The Judgment of Divorce Signed by the Chancellor on April 23, 2002, was Valid and Appropriate at the Time it was Signed.**

Section 93-5-2, Miss. Code Ann. (2006) provides for the granting of a divorce on the basis of irreconcilable differences when certain conditions and requirements are met by the parties. One of these requirements is consent, which is essential to obtain a divorce based on irreconcilable differences.

In addition to the consent of the parties to the divorce on the grounds of irreconcilable differences, which clearly existed in this case, Mississippi law is very clear that for the parties' agreement to be enforceable, the Court must approve that agreement. Traub v. Johnson, 536 So.2d. 25 (Miss. 1988). In this case, the agreement of the parties was presented to the chancellor and approved by the chancellor, who then signed the Judgment of Divorce.

Mississippi statute and case law make it clear that the consent to a divorce on the basis of irreconcilable differences can be withdrawn before the chancellor has reviewed and approved the parties' agreement and signed the judgment. See 93-5-2, M.C.A. (Supp. 2006). In this case neither party withdrew consent before the chancellor reviewed and approved the agreement, and signed the Judgment.

Ron attempts to characterize his filing of a divorce complaint in 2005 in a separate case as evidence of his withdrawal of consent to an irreconcilable differences divorce. While this Court has held previously that the filing of an amended complaint on the basis of a fault ground can signify withdrawal of consent to an irreconcilable differences divorce, in each case, the amended complaint was filed **before** submission of the agreement and Judgment of Divorce



to the chancellor for approval. See Grier v. Grier, 616 So.2d 337 (Miss. 1993). Here, Ron failed to file his new complaint before the chancellor approved the agreement and granted the divorce. In fact, the new complaint he filed in 2005 has been dismissed. (R.E. 2)

B. **The Chancellor was Correct in Entering the Judgment of Divorce Nunc Pro Tunc Basis.**

*Nunc pro tunc* is a Latin term that literally means now for then. This Court has previously considered whether entry of a Judgment of Divorce *nunc pro tunc* is appropriate. In White v. Smith, 645 So.2d 875 (Miss. 1994), the Court noted, “Courts may be *nunc pro tunc* orders supply omissions in the record of what had previously been done, and by mistake or neglect not entered.” White at 880, quoting Green v. Myrick, 177 Miss. 778, 171 So. 774 (1937). In White, the parties executed a consent to divorce on the grounds of irreconcilable differences, a trial was conducted and the chancellor rendered an opinion from the bench following the trial adjudicating that the parties were divorced determining property issues. The husband died eight (8) days later, before the bench opinion had been set forth in a written judgment and presented to the chancellor. The wife objected to entry of the Judgment, contending that the complaint and counterclaim for divorce should be dismissed.

In affirming the lower court ruling to enter the Judgment on a *nunc pro tunc* basis, this Court notes:

*Nunc pro tunc* means “now for then” and when applied to the entry of a legal order or judgment, it normally does not refer to a new or fresh (de novo) decision, as when a decision is made after the death of a party, but relates to a ruling or action actually previously made or done but concerning which for some reason the record thereof is

defective or omitted. The later making does not itself have a retroactive effect but it constitutes the later evidence of a prior effectual act.

White v. Smith at 880, quoting Thrash v. Thrash, 385 So.2d 961, 963 (Miss. 1980).

In this case, where both parties clearly believed themselves to be divorced, and bound by the provisions of their agreement, and where both parties presumably benefited from their bargain, both parties should now be estopped from denying that the divorce ever occurred. The chancellor was correct in his decision to enter the Judgment *nunc pro tunc*.

**CONCLUSION**

The Court is respectfully requested to affirm the decision of the chancellor in ordering the filing the Judgment of Divorce signed on April 23, 2002, on a *nunc pro tunc* basis.

RESPECTFULLY SUBMITTED, this the 16<sup>th</sup> day of July, A.D. 2009.

EM POK HENDERSON

By:

  
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**CERTIFICATE OF SERVICE**

I, NANCY STEEN, do hereby certify that I have this day mailed a true  
and correct copy of the foregoing Brief to:

Honorable James H. C. Thomas, Jr.  
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Blewitt William Thomas  
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This the 16<sup>th</sup> day of July, A.D. 2009.

  
NANCY STEEN