

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

APPEAL FROM THE CHANCERY COURT
PEARL RIVER COUNTY, MISSISSIPPI

BRIEF FOR THE APPELLANT

ORAL AGRUMENT NOT REQUESTED

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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 of the Appellant

Nancy Steen, Attorney for the Appellee

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

Submitted this the 14th day of May, 2009.

RONALD WAYNE HENDERSON

By: 

BLEWETT WILLIAM THOMAS
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES

DID THE CHANCELLOR ERR IN GRANTING AN
IRRECONCILABLE DIFFERENCES DIVORCE IN
DISREGARD OF THE APPELLANT'S FILING OF A
SECOND COMPLAINT FOR DIVORCE

STATEMENT OF THE CASE

The Appellant Ronald Henderson ("Ron") and Em Pok Henderson ("Em", the Appellee in this Cause) were married on October 12, 1985, in Poplarville, Mississippi. Ron was a native of Pearl River County, and the couple lived together as husband and wife in Pearl River County for sixteen (16) years until their final separation on October 26, 2001. There were no children born of this marriage nor were substantial marital assets accumulated during the marriage.

Prior to the marriage, Ron had operated a business known as UCP Financial. UCP Financial is a specialized service provider to local banks in South Mississippi. Ron operated the business personally and with hired assistants. The business operations allowed Em ready access to the business' income, and for this reason she did not maintain regular individual employment during the course of the marriage. Unfortunately, Ron's inability to control Em's spending habits resulted in the accumulation of substantial tax liability and business debts by 2001. In order to satisfy these liabilities, the marital home was mortgaged for in excess of One Hundred Fifty Thousand Dollars (\$150,000) during the summer of 2001. The tax liabilities and pressing business debts were immediately satisfied, and the balance of the mortgage proceeds was retained by Ron and Em. By the time the couple separated during October 2001, the remaining funds had been squandered through Em's spending habits.

This marriage was not strong, and over the course of the years the couple grew apart. In sum, Em provided no meaningful contributions to the marriage and

she remained in it solely for her personal benefit. On October 26, 2001, Ron's adult son from a prior marriage suddenly died. Later that day, Em told Ron that she did not love him and that she was leaving him. She immediately moved from the marital home.

A joint complaint for divorce was filed on December 4, 2001, in Pearl River County Chancery Court Cause No. 01-0547GN-TH on the stated grounds of irreconcilable differences. Em was represented by Kathleen Smiley of Gulfport, Mississippi. Ron was not represented by counsel. A property settlement agreement was filed concurrently with the joint complaint for divorce. After executing the agreement, the parties immediately undertook to perform their respective obligations without waiting for the entry of a final divorce decree.

Unknown to either party, the proceedings in Cause No. 01-0547GN-TH were dismissed for lack of prosecution on April 12, 2004. Neither party was directly advised of this fact.

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. As a result of the effects of Hurricane Katrina, Ron's business suffered serious financial losses. Due to the fact that he could no longer pay \$2000 in monthly alimony to Em, he reviewed the chancery clerk's file in Cause No. 01-0547GN-TH and discovered that the case had been dismissed. Thereafter he retained counsel and filed for divorce against Em in

Pearl River County Chancery Court Cause No. 05-0527GN-D on November 3, 2005.

After Em was served with the complaint in the second divorce proceedings, it was discovered that Helen Swartzfager of Laurel, Mississippi, who had never entered an appearance for either party in the initial divorce proceedings, had presented a Final Decree of Divorce to the chancery court in Cause No. 01-0547GN-TH on April 23, 2002, and the chancellor signed the Final Decree on that date. Apparently Em received a copy of this decree, but it was never filed of record with the chancery clerk.

On March 3, 2006, Em moved to enter the April 23, 2002 order *nunc pro tunc*. Ron opposed the entry of the April 2002 on the grounds that his filing of the second divorce proceedings was a renunciation of the original complaint for an irreconcilable differences divorce. In spite of the continuing objections by Ron to the entry of the April 2002 in the original divorce proceedings, the chancellor did entry the April 2002 order *nunc pro tunc* approximately thirty-two (32) months later, and it was filed on record with the chancery clerk on November 20, 2008.

Ron thereafter appealed the entry of the April 2002 order *nunc pro tunc*.

STATEMENT OF THE FACTS

A joint complaint for divorce was filed on December 4, 2001, in Pearl River County Chancery Court Cause No. 01-0547GN-TH. The grounds for divorce were stated as being Irreconcilable Differences as provided for in Miss. Code Ann. § 93-5-2. Ron was not represented by counsel in these proceedings.

Under the terms property settlement agreement filed with the joint complaint, Ron and Em were to retain their own personal affects and pay their individual debts. Ron gave Em possession of the couple's 1994 Ford van. Em transferred title to the marital home to Ron, but Ron was specifically required to assume liability for all debts and liabilities associated with this property, which included the mortgage placed on the residence during the summer of 2001. Em also transferred any interest in UCP Financial to Ron under the terms of the settlement agreement. Lastly, Ron agreed to pay Em the sum of \$2000 per month as permanent alimony, commencing December 2001. The parties immediately performed their respective obligations without waiting for the entry of a final judgment of divorce.

On March 1, 2004, the chancery court clerk wrote to Kathleen Smiley, as attorney of record for Em in Pearl River County Chancery Court Cause No. 01-0547GN-TH, and advised Ms. Smiley that no action had been taken in that cause for twelve (12) months, with the case to be dismissed for want of prosecution unless action was taken during the next thirty (30) days. Ms. Smiley apparently did not respond, and an order dismissing the case for lack of prosecution being

signed by the chancellor on April 5, 2004, and the order being filed of record on April 12, 2004. As previously noted, Ron was not represented by counsel, and the correspondence from the chancery court clerk does not indicate that Ron was copied with either the correspondence to Ms. Smiley or the order of dismissal.

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. The effects of Hurricane Katrina essentially destroyed Ron's business, UCP Financial. UCP Financial's primary customer (Regions Bank) suffered the destruction of numerous branches in South Mississippi and the bank elected to reorganize its operations in the wake of Hurricane Katrina. This resulted in a substantial decrease in UCP's income. Faced with the reality that he could no longer pay Em alimony in the amount of \$2000 per month, Ron inspected the court file in Cause No. 01-0547GN-TH during October 2005 in order to obtain a copy of the divorce degree and seek modification. It was at that time that Ron discovered that the original divorce proceedings had been dismissed during April 2004 and that he apparently was still married to Em.

Ron then retained Richard Dymond of Gulfport, Mississippi, to represent him and file a second divorce. Mr. Dymond thereafter filed a complaint for divorce in Pearl River County Chancery Court Cause No. 05-0527GN-D on November 3, 2005. The grounds for divorce were asserted to be Continuous Desertion for the Space of One Year, in violation of Miss. Code Ann. § 93-5-1, or alternatively

Irreconcilable Differences, as set forth in Miss. Code Ann. § 93-5-2. Em was served with the complaint in Wisconsin, and Mr. Dymond promptly obtained a trial setting.

Upon receiving service in the subsequent divorce proceedings (i.e., Cause No. 05-0527GN-D), Em retained Nancy Steen of Hattiesburg, Mississippi. After Ms. Steen appeared as Em's attorney, it was discovered that on April 23, 2002, Helen Swartzfager of Laurel, Mississippi, who had never entered an appearance for either party in the initial divorce proceedings, had presented a Final Decree of Divorce to the chancellor in Cause No. 01-0547GN-TH, who signed the Final Decree on that date. The underlying facts indicate this order was likely presented to the chancellor in Hattiesburg, rather than in Pearl River County. However, this order was never filed with the court clerk, and neither Ms. Swartzfager nor Ms. Smiley could ever explain any of the circumstances regarding either the presentation of this order to the chancellor or why it was never filed of record.

After the discovery of the unfilled April 2002 order, all matters pending in Cause No. 05-547GN-D were held in abeyance. Ultimately, the parties elected to prosecute their respective divorce claims in the original divorce proceedings.

WHAT?

On March 3, 2006, Ms. Steen, as attorney for Em in Cause No. 01-0547GN-TH, filed a Motion for Entry of Judgment, seeking to enroll the April 23, 2002 order *nunc pro tunc*. Mr. Dymond, as Ron's attorney, opposed the entry of the April 2002 order on the basis that the filing of a second divorce complaint in

Cause No. 05-0527GN-D was effectively a renunciation of the joint irreconcilable differences complaint and a contest of the original divorce proceedings.

During April 2006, Ron retained his current counsel, Blewett Thomas of Gulfport, Mississippi, and an order for substitution of counsel was entered on April 27, 2006. Ron continued to oppose the entry of the April 2002 order on the grounds that the filing of the second divorce proceedings constituted a renunciation of the joint complaint for an irreconcilable difference divorce that had been filed in Cause No. 01-0547GN-TH. At no time after November 2005, and continuing through the chancellor's entry of judgment on November 10, 2008, did Ron either request the chancery court to grant him leave to withdraw the contest of the divorce proceedings nor did the chancellor enter any order showing that Ron had withdrawn his contest of the divorce proceedings.

On June 14, 2006, the chancellor did enter an order vacating the judgment of dismissal in Cause No. 01-0547GN-TH. Thereafter, Ron again objected to the entry of the April 2002 order *nunc pro tunc* on the grounds that he had renounced his consent to an irreconcilable differences divorce through the filing of a second divorce during 2005. After considering the parties' respective positions on the entry of the April 2002 order, the chancellor did sign an Entry of Judgment of Divorce Nunc Pro Tunc on November 10, 2008, with the order being filed of record with the clerk on November 20, 2008. On December 11, 2008, Ron filed his Notice of Appeal.

Subsequent to the perfection of this appeal, Em has filed a motion for citation of contempt against Ron in Cause No. 01-0547GN-TH, alleging that Ron had been in default since September 2005 on the alimony payments set forth in the settlement agreement. Ron responded to the contempt motion with allegations that Em had been cohabitating with a man and living outside of wedlock since August 2005, and therefore the chancery court should deny Em any back alimony and terminate all future obligations by Ron to pay alimony. The contempt proceedings are scheduled for trial on July 8, 2009.

SUMMARY OF THE ARGUMENT

Ron asserts that the chancellor's granting of the irreconcilable difference divorce through the entry of the *nunc pro tunc* order did not comply with the statutory requirements of Miss. Code Ann. § 93-5-2. Specifically, Ron filed a second divorce complaint in Pearl River County Chancery Court Cause No. 05-0527GN-D during December 2005 after he discovered that the original divorce proceedings in Pearl River County Chancery Court Cause No. 01-0547GN-TH had been dismissed for lack of prosecution on April 12, 2004.

Ron did not renounce his claims alleged in the second divorce, but rather he consented to reopening of the first divorce in order to finally resolve all matters at issue. Even after the first divorce had been reinstated, Ron did not renounce or withdraw his contest of the granting of an irreconcilable divorce or his request for a divorce upon fault-based grounds. In spite of the fact that Ron continued to contest the granting of an irreconcilable differences divorce, the chancellor ultimately granted the request of Em and entered the prior order of April 2002 *nunc pro tunc*. Ron asserts that his filing of a second divorce prior to the entry of the November 2008 *nunc pro tunc* order was in contradiction to the statutory requirements governing an irreconcilable differences divorce.

ARGUMENT

1. DID THE CHANCELLOR ERR IN GRANTING AN IRRECONCILABLE DIFFERENCES DIVORCE IN DISREGARD OF THE APPELLANT'S FILING OF A SECOND COMPLAINT FOR DIVORCE

The statute governing irreconcilable divorces, Miss. Code Ann. § 93-5-2 (5), requires a party to withdraw the contest as a condition of divorce on these grounds:

(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or canceled by the party filing same by leave and order of the court.

Divorce in Mississippi is a creature of statute. *Gardner v. Gardner*, 618 So.2d 108, 111-13 (Miss. 1993) (citing *Massingill v. Massingill*, 594 So.2d 1173, 1175 (Miss. 1992)). A divorce based on irreconcilable differences has certain statutory requirements that must be met. "The starting point is that an irreconcilable differences divorce in Mississippi requires that neither spouse contest its granting." *Sanford v. Sanford*, 749 So.2d 353, 355 (Miss. Ct. App. 1999). "A cross-complaint or counterclaim may be a contest to a divorce; a second complaint, inconsistent with the first complaint that was jointly filed, may also serve as a contest." *Massingill*, 594 So.2d at 1177; *McCleave v. McCleave*, 491 So.2d 522, 523 (Miss.1986). "[T]he filing of a cross-complaint by appellee amounted to a contest or denial until withdrawn or canceled by leave and order of

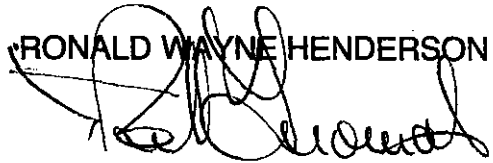
the chancery court....This Court therefore holds that the chancery court exceeded its authority in granting a divorce on the ground of irreconcilable differences in this cause..." *Alexander v. Alexander*, 493 So.2d 978, 980 (1986).

The filing of the second divorce by Ron and his continuing objection to the entry of the unfiled April 2002 order *nunc pro tunc* in the original divorce proceedings constituted his renunciation of the joint complaint for divorce filed on December 4, 2001. Until such time as Ron either withdrew his objection to the irreconcilable differences divorce or the chancellor entered an order confirming Ron's withdrawal of his objection to the divorce, the provisions of Miss. Code Ann. § 93-5-2 (5) precluded the entry of the April 2002 order *nunc pro tunc* by the chancellor. For this reason, the chancellor exceeded his authority in entering the April 2002 order *nunc pro tunc*.

CONCLUSION

In this instance, the chancellor exceeded his authority by entering the prior unfilled order *nunc pro tunc* in disregard of Ron's filing of a second divorce and his continuing objection to the entry of the unfilled April 2002 order in the original divorce proceedings. First, the entry of the unfilled order was in contradiction to the statutory mandates of Miss. Code Ann. § 93-5-2 (5), considering that a second divorce was filed by Ron prior to the entry of this order in November 2008. Further, entry of an order *nunc pro tunc* requires that all matters set forth therein have finally decided on its merits and nothing remains to be done except the entry of a decree. See generally, *Thrash v. Thrash*, 385 So.2d 961, 962, (Miss. 1980). In this instance, Ron's filing of a second divorce effectively contested of all matters at issue in the first proceedings, and accordingly there was not the requisite degree of finality in those proceedings that would have allowed the chancellor to enter the unfilled order *nunc pro tunc*. Based upon the statutory requirement that there be no contest of an irreconcilable divorce, and further considering that Ron's contest of the divorce proceedings was not withdrawn or canceled by leave and order of the chancery court, the entry of judgment by the Pearl River County Chancery Court must be set aside.

This the 14th day of May, 2009.

RONALD WAYNE HENDERSON


BLEWETT W. THOMAS
FOR THE APPELLENT

CERTIFICATE OF SERVICE

I, BLEWETT W. THOMAS, do hereby certify that I have this day mailed a true and correct copy of the foregoing Brief to:

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Honorable James H.C. Thomas, Jr.
Chancellor, Pearl River Chancery Court
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This the 14th day of May, 2009.



BLEWETT W. THOMAS