IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

HENRY E. CURTIS	**APPELLANT-DEFENDANT**
V	**NO.: 2009-TS-01644**
WANDA L. CURTIS	**APPELLEE-PLAINTIFF**

BRIEF OF THE APPELLEE

Presented to the Court by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1) Henry E. Curtis, Appellant

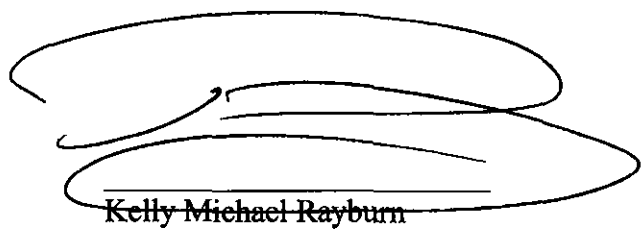
2) Suzanne Baker Steele
Counsel of Record for Appellant

3) Wanda L. Curtis, Appellee

4) Kelly Michael Rayburn
Counsel of Record for Appellee

5) Hon. Sanford R. Steckler
Chancellor

This the 21st day of June 2010.



Kelly Michael Rayburn

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STATEMENT OF THE ISSUES

Appellee is content with the statement of the issues as raised in Appellant's brief without restating them herein.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS*

*(combined together for clarity)

The Appellant states in his Statement of the Case that no document styled "Consent to Adjudicate Divorce on Grounds of Irreconcilable Differences appears in the Court file. . ." Of course, this is because the parties on the day of the scheduled divorce trial, agreed to resolve the case without the necessity of a trial, and with both parties each separately represented by counsel, agreed to enter into a written Property Settlement Agreement, which is attached to the final judgment of divorce. Because the parties had reached an agreement to resolve the issues without necessity of trial, they agreed to withdraw fault grounds so that their divorce would be adjudicated on the grounds of irreconcilable differences. (RE – 17-24).

In the Child Custody, Visitation, Support and Property Settlement Agreement incorporated into the Final Judgment of Divorce entered on April 10, 2006, by agreement of the parties, each of whom was separately represented by counsel, the Court was to reserve ruling on the issue of applicable credits claimed by the respective parties to be applied towards the disposition of two parcels of real property. (RE-20). This was done because an appraisal was needed for both properties with the parties later submitting to the Court at the review their respective credits against the parties' equity in the two parcels. Mr. Curtis signed the agreement along with Ms. Curtis, and is, of course, presumed to know what he in fact agreed to. (RE-24).

Mr. Curtis was uncooperative in securing the appraisals and a contempt action was filed. This motion was served upon his attorney. However, this was not the issue to be

reviewed by the Court on October 1, 2008. Mr. Curtis was aware that before the review could be set, an appraisal of each property had to be made. Subsequently, Mr. Curtis cooperated in securing the appraisals as previously agreed upon in the Settlement Agreement and the contempt action against him was not heard, as it was rendered moot by his cooperation. This left only the review hearing on the issue of credits.

At the time that present counsel contacted the Court Administrator, Mr. Teel had been disbarred. Mr. Curtis had not retained an attorney to make an appearance in this action. So present counsel requested that Mr. Curtis be notified by the administrator of the review hearing to his last known mailing address, an address to which he was living at the time of the divorce, and where he still currently resides. At no time did Mr. Curtis make any effort or attempt to bring this matter back before the Court. As he was living in the marital residence, free of charge, he had no incentive to do so.

The Court Administrator transmitted notice to Mr. Curtis three months prior to the hearing, July 1, 2008, giving him ample time to retain new counsel if he desired. At no time prior to the hearing on October 1, 2008, and following the April 10, 2006 entry of the Judgment of Divorce, did Mr. Curtis ever file any document with the Court asking for reconsideration of the parties' agreement, nor did he appeal the final judgment of divorce.

The October 1, 2008 hearing was an evidentiary hearing. Mr. Curtis did not appear in open court to submit any evidence. Following the hearing, counsel prepared a judgment for the Court and that judgment was signed by the Chancellor and entered on November 5, 2008. Any reference to a hearing "on that date" was a mistake as the record clearly reflects the date on which the evidentiary hearing was held, as does the notice received by

Mr. Curtis. Following the entry of the judgment, a copy was mailed to Mr. Curtis at the same address, which he acknowledged that he received. (RE-35-36).

As the Court had reserved ruling on the issue of credits, which obviously involved retaining jurisdiction on this issue, a summons was not served upon Mr. Curtis pursuant to Rule 81. Notice was sent to Mr. Curtis pursuant to Rule 5 of the Mississippi Rules of Civil Procedure at his last known (his actual) address.

One September 1, 2009, following the Chancellor's denial of Mr. Curtis' motion following submission of letter briefs by counsel for both parties, an evidentiary hearing was held. At that hearing, Mr. Curtis acknowledged that he resided at the address where the notice was mailed and the Court Administrator testified that she in fact mailed the notice to Mr. Curtis, and further that the notice was not returned unclaimed. She further testified that if the notice was returned unclaimed that she would have filed it in the Court file. The Court file does not include a returned notice or envelope. Appellant's record excerpts seem to mingle pages from the transcripts of the October 1, 2008 hearing and the September 1, 2009 hearing. To avoid confusion, Appellee directs this Court's attention to the entire transcript of the proceedings on those dates rather than the confusing assortment of excerpts as contained in Appellant's record excerpts.

Furthermore, Wanda Curtis testified at the hearing that she never had issues with receiving the mail at that address when she lived there. (RE-40). She also testified that Mr. Curtis is not a truthful person. The Chancellor's ruling is found on pages 41-42 of Appellant's record excerpts.

SUMMARY OF THE ARGUMENT

I.

The Appellant complete misconstrues the facts with regard to his first argument. The Appellant states in his Statement of the Case that no document styled "Consent to Adjudicate Divorce on Grounds of Irreconcilable Differences appears in the Court file. . ." Of course, this is because the parties on the day of the scheduled divorce trial, agreed to resolve the case without the necessity of a trial, and with both parties each separately represented by counsel, agreed to enter into a written Property Settlement Agreement, which is attached to the final judgment of divorce. Because the parties had reached an agreement to resolve the issues without necessity of trial, they agreed to withdraw fault grounds so that their divorce would be adjudicated on the grounds of irreconcilable differences. (RE – 17-24). As a result, there was no necessity for a consent to adjudicate as a written property settlement agreement was executed by the parties with full benefit of counsel.

II.

The July 1, 2008 notice of the October 1, 2008 hearing was transmitted to Mr. Curtis because his attorney was disbarred at that time. The settlement agreement anticipated that the issue of applicable credits would be reviewed at a later date following the securing of appraisals of the real property and the Court retained jurisdiction to review those issues. The notice that was required as contemplated by the rules of Civil Procedure was mailed to Mr. Curtis at his last known address (and current address at that time) pursuant to Rule 5.

III.

The Court Administrator testified that she mailed the notice to Mr. Curtis at this address, and that the notice was not returned unclaimed. Mr. Curtis testified that he in fact lived at the address where the notice was transmitted. Wanda Curtis testified that Mr. Curtis was not a truthful person and that he had a problem with telling the truth during their marriage. She testified that she never had issues with receiving the mail when she lived with him at the same address. She checked with her neighbors and they had not had issues with receiving their mail. Mr. Curtis testified that he in fact received the Court's judgment, which was also mailed to the same address. The Court determined, among other things, that Rule 5 notice was all that was required under these circumstances. Also implicit in the Court's ruling was a credibility determination, based upon the totality of the circumstances, with the Chancellor sitting as the trier of fact, that Mr. Curtis' testimony was not credible.

IV.

The Appellee concedes that the Property Settlement Agreement is unclear with regard to her right to claim past due medical expenses. Appellee contends that these expenses awarded were not incurred after the judgment of divorce was entered but were expenses that Mr. Curtis was required to pay pursuant to the Chancellor's temporary order that pre-existed the entry of the final judgment of divorce. The issue of Mr. Curtis' failure to pay these expenses was anticipated to be heard as part of the Court's review under the provision of Paragraph 2b of the Property Settlement Agreement in which "each party shall be allowed to show to the court and [sic] claims and/or credits they may claim as to the equities they believe they are entitled to."

V.

The issues as raised in Issue No. V as contained in Appellant's brief are argued in Paragraphs I, II, and III above.

ARGUMENT

I.

The Appellant complete misconstrues the facts with regard to his first argument. The Appellant states in his Statement of the Case that no document styled "Consent to Adjudicate Divorce on Grounds of Irreconcilable Differences appears in the Court file. . ." Of course, this is because the parties on the day of the scheduled divorce trial, agreed to resolve the case without the necessity of a trial, and with both parties each separately represented by counsel, agreed to enter into a written Property Settlement Agreement, which is attached to the final judgment of divorce. This is a very common occurrence. This is not a case where the parties consented to have the issues tried before the court on the date of trial, and agreed on other issues. The facts of this case are more closely aligned with those circumstances in which the parties have entered a settlement agreement but agreed to have a review based upon a future contingency.

Counsel for Mr. Curtis is under the misimpression that final judgments cannot contain provisions with regard to a future review. This is not the case. Furthermore, this agreement was not in violation of M.C.A Section 93-5-2(3) as the Court found, and the parties' agreed, that their agreement affecting custody, visitation, support, and property rights was adequate and sufficient. This was not an adjudication following a contested hearing. Section 93-5-2(3) is not specific as the myriad of circumstances concerning the possible issues that are involved in divorce cases, and what constitutes "all matters

involving . . . property rights between the parties." To the contrary, Section 93-5-2(3) only requires that (in those cases not submitted for adjudication by the Court) that the issues involving property rights be "agreed upon by the parties" and found to be adequate and sufficient by the Court.

In the present case, the parties agreed to this resolution with the review provision as described above with full knowledge of the facts and circumstances and what was to be done. Both parties had counsel at the time. It was an intelligent and rational resolution and neither party was under any threat of coercion. All it involved is exactly what was done, an appraisal of the properties, and an opportunity for either or both parties to submit evidence of any credits that he or she might claim against their respective equity interests on the two real properties. This was certainly an adequate and sufficient resolution to all property matters.

The Appellant takes an exceedingly narrow approach to this issue that would have supremely unintended consequences if taken to its logical conclusion. For example, a provision in a settlement agreement with a future contingency (such as an agreement between the parties as to what would occur in a custody matter if one party moved from the state) would be outlawed. Provisions that deal with escalations or terminations of monetary sums in a divorce settlement based upon future circumstances would be void. Provisions that state that if a refinancing of a mortgage couldn't be made, then property would be sold would be void. Counsel opposite suggests that a review under these circumstances can never be in an agreement between the parties' who occupy the same bargaining strength.

Taken to its logical conclusion, this would indeed accomplish absurd results. The law has never favored such a strict construction of parties' agreements in divorce cases. On the contrary, the law of this state is that agreements between the parties with regard to property issues in divorce cases are to be given great deference by the Court. See, *West v. West*, 891 So.2d 203, 211 (Miss. 2004)("we further note that when examining the contractual provisions of property settlement agreements, special deference is afforded such agreements.").

In *Speed v. Speed*, 757 So.2d 221, 224-225 (Miss. 2000), the Supreme Court stated:

> In property and financial matters between the divorcing spouses themselves, there is no question, that absent fraud or overreaching, the parties should be allowed broad latitude. When the parties have reached agreement and the chancery court has approved it, we ought to enforce it and take a dim view of efforts to modify it, as we ordinarily do when persons seek relief from their improvident contracts.

Because the parties had reached an agreement to resolve the issues without necessity of trial, they agreed to withdraw fault grounds so that their divorce would be adjudicated on the grounds of irreconcilable differences. (RE – 17-24). As a result, there was no necessity for a consent to adjudicate as a written property settlement agreement was executed by the parties with full benefit of counsel. The authorities cited by Appellant in his brief are inapposite and do not deal with cases in which the parties had a separate written agreement that complied with M.C.A Section 93-5-2(3).

Furthermore, the Chancellors November 5, 2008 judgment is replete with explanation of the relief granted therein. Appellant argues that the Chancellor had no authority to grant the relief therein. However, the relief that was granted, following the consideration of the credits offered by Wanda Curtis, in light of the appraised value of the properties,

was exactly the type of relief the parties anticipated would be addressed at the review hearing when they entered into their Property Settlement Agreement.

II.

The July 1, 2008 notice of the October 1, 2008 hearing was transmitted to Mr. Curtis because his attorney was disbarred at that time. As conceded in Appellant's brief, on the date of the transmission of the notice to Mr. Curtis, he did not have an attorney. Mr. Curtis was aware that his attorney had been disbarred even though he was not "officially" made aware of this fact. The settlement agreement anticipated that the issue of applicable credits would be reviewed at a later date following the securing of appraisals of the real property and the Court retained jurisdiction to review those issues. The notice that was required as contemplated by the rules of Civil Procedure was mailed to Mr. Curtis at his last known address (and current address at that time) pursuant to Rule 5.

The Court Administrator testified that she mailed the notice to Mr. Curtis at this address, and that the notice was not returned unclaimed. Mr. Curtis testified that he in fact lived at the address where the notice was transmitted. Wanda Curtis testified that Mr. Curtis was not a truthful person and that he had a problem with telling the truth during their marriage. She testified that she never had issues with receiving the mail when she lived with him at the same address. She checked with her neighbors and they had not had issues with receiving their mail. Mr. Curtis testified that he in fact received the Court's November 5, 2008 judgment, which was also mailed to the same address. The Court determined, among other things, that Rule 5 notice was all that was required under these circumstances. Also implicit in the Court's ruling was a credibility

determination, based upon the totality of the circumstances, with the Chancellor sitting as the trier of fact, that Mr. Curtis' testimony was not credible.

Appellant misconstrues MRCP 5, which states, part:

> **(b) (1) Service: How Made.** Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no on one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

It is obvious that if a party does not have an attorney, Rule 5 permits the party to receive notice by mailing it to him at his last known address. Appellant quotes part of Rule 5 in his brief that discusses when a party can be served, if he still has an attorney. That was not the circumstance in the present case. As the Chancellor correctly pointed out, service by mail is complete upon mailing. There is no requirement of a proof of receipt if the notice was transmitted by mail to the party's last known address.

A court notice of setting is further one of the types of documents that Rule 5 notice covers.

> **(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte,

> **and every written notice**, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided in Rule 4 for service of summons. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(Emphasis Supplied).

This was not a contempt action that was noticed to be heard, but a review as anticipated and agreed upon by the parties. Indeed, this was not a new dispute, and was not a dispute at all, but an anticipated review of equities that both parties agreed would occur at a time subsequent to the divorce.

There is precedent even in those cases for the divorce to be valid on the grounds of irreconcilable differences even when there was no written agreement at all prior to the entry of the final judgment of divorce. *Rounsaville v. Rounsaville*, 732 So. 2d 909, 911-912 (Miss. 1999)(error in court's granting divorce on ground of irreconcilable differences before parties entered into property settlement agreement, and before court adjudicated issues between them, was procedural and harmless, where parties subsequently entered into property settlement agreement and agreement was approved by the Court). See also, *Johnston v. Johnston*, 722 So.2d 453 (Miss. 1998)(trial court's erroneous grant of divorce absolute, before adjudicating all matters involving custody and maintenance of children and property rights between the parties, was harmless).

III.

Appellee repeats and restates her argument as contained in the preceding paragraphs with regard to Issue III as raised in Appellant's brief, which are directly applicable to this issue as well.

IV.

The Appellee concedes that the Property Settlement Agreement is unclear with regard to her right to claim past due medical expenses. Appellee contends that these expenses awarded were not incurred after the judgment of divorce was entered but were expenses that Mr. Curtis was required to pay pursuant to the Chancellor's temporary order that pre-existed the entry of the final judgment of divorce. The issue of Mr. Curtis' failure to pay these expenses was anticipated to be heard as part of the Court's review under the provision of Paragraph 2b of the Property Settlement Agreement in which "each party shall be allowed to show to the court and [sic] claims and/or credits they may claim as to the equities they believe they are entitled to."

V.

Appellee repeats and restates her argument as contained in the preceding paragraphs with regard to Issue V as raised in Appellant's brief

VI.

CONCLUSION

For the reasons cited herein, the Appellee respectfully requests that the Chancellor's November 5, 2008 Judgment be affirmed in all respects and that the Appellant be awarded no relief in this matter whatsoever.

RESPECTFULLY SUBMITTED, on this 21st day of June 2010.

WANDA L. CURTIS

BY: _____
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CERTIFICATE OF SERVICE

I, Kelly Michael Rayburn, counsel of record for the Appellee herein, do certify that I have this day mailed by United States Mail true and correct copies of the above and foregoing Brief of Appellee to the following persons at their regular business mailing addresses:

1) Sanford R. Steckler, Chancellor
   Post Office Box 659
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2) Suzanne Baker-Steele
   Attorney for Appellant
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   Biloxi, MS 39533

So certified on this 21st day of June 2010.

_____
Kelly Michael Rayburn