IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HENRY E. CURTIS — APPELLANT

VS

WANDA L. CURTIS — APPELLEE

NO. 2009-CA-01644

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY,

FIRST JUDICIAL DISTRICT,

MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT IS NOT REQUESTED

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VS — NO. 2009-TS-01644

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CERTIFICATE OF INTERESTED PARTIES

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. WANDA L. CURTIS, Appellee
3. Suzanne Baker Steele, counsel for Appellant
4. Kelly Michael Rayburn, counsel for Appellee
5. The Hon. Sanford Steckler, Chancellor in the lower court
6.

THIS THE 31st day of March, 2010.

SUZANNE BAKER STEELE
Attorney of record for Appellant

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STATEMENT OF ISSUES

1. The lower court erred in deciding property issues in an Irreconcilable Differences divorce without having a written consent to adjudicate, signed by the parties, listing the issues to be tried by the Court and stating that the parties agree to be bound by the Court's decision, as required by Mississippi Code 93-5-2(3).
2. The lower court erred in conducting a hearing to decide property issues in an Irreconcilable Differences divorce some 30 months after entry of the Judgment of Divorce with only M.R.C.P. Rule 5 notice by mail had on Appellant, where Appellant's attorney at the time was no longer able to practice law.
3. The lower court erred in conducting a hearing to decide property issues in an Irreconcilable Differences divorce some 30 months after entry of the Judgment of Divorce with only M.R.C.P. Rule 5 notice by mail had on Appellant, where said Appellant established that he did not receive such notice and did not appear at the hearing.
4. The lower court erred in addressing the alleged arrearage of medical expenses without service of a Rule 81 Summons.

5. The lower court erred in denying Appellant's Petition to Reconsider raising the aforementioned issues.

STATEMENT OF THE CASE

This appeal arises out of the Chancery Court of the First Judicial District of Harrison County, Mississippi, the Hon. Sanford Steckler presiding. APPELLANT, HENRY E. CURTIS, (hereinafter HENRY) and APPELLEE, WANDA L. CURTIS, (hereinafter WANDA) were married December 9, 1989 and separated on or about March 11, 2002. divorced by Judgment of said Chancery Court on April 10, 2006. WANDA filed for divorce and the matter preceded through discovery and was ultimately set for trial on April 10, 2006. As of the date of trial, HENRY was represented by Hon. Walter W. Teel.

On the date of trial, the parties agreed to a divorce on the grounds of Irreconcilable Differences and signed an agreed Order Allowing Withdrawal Of Fault Grounds. Said Order states that, "... the parties agreed to the adjudication of their divorce on the statutory grounds of Irreconcilable Differences by executing a Consent to Adjudicate Divorce on Grounds of Irreconcilable Differences." **RE 27.** No document styled "Consent to Adjudicate Divorce on Grounds of Irreconcilable Differences" appears in the court file, nor does any record of filing such document appear on the Clerk's Docket. **RE 5.** The Judgment of Divorce entered that date states in paragraph 6: "That the parties consent to allow the court to adjudicate certain property matters as set forth in the attached Property Settlement Agreement." **RE 17.**

The Property Settlement Agreement provides, in pertinent part:

"2(b) The court shall hold a recessed hearing and reserves ruling for a further hearing on dividing the respective equities on the above realty. Each party shall be allowed to show to the court and claims and/or credits they may claim as to the equities they believe they are entitled to." **RE 17.**

On October 30, 2006, WANDA filed her Motion For Citation of Contempt. No process was issued in relation to said allegation of contempt. Clerk's Docket; **RE 5.**

On January 15, 2008, the Mississippi Supreme Court suspended Appellant's counsel, Walter W. Teel. *011508 MSSC, 2007-BD-01651*

On July 1, 2008, almost 27 months after entry of the Judgment of Divorce, the Harrison County Court Administrator issued a Notice of Court Setting and mailed said Notice to HENRY at his last known address of 11375 O'Neal Road, Gulfport, Mississippi 39503. Said Notice provided that the matter of Wanda L. Curtis v. Henry E. Curtis had been set for review on October 1, 2008 at 9:30 A.M. before Chancellor Sanford R. Steckler. The Notice further provided, "IF YOU DO NOT AGREE TO THE ABOVE SETTING, PLEASE NOTIFY THIS OFFICE WITHIN FIVE DAYS AFTER RECEIPT OF THIS NOTICE. IF WE DO NOT HEAR FROM YOU WITHIN THAT TIME, THE COURT WILL CONSIDER THIS A FIRM SETTING." **RE 29.**

On October 1, 2008, almost 30 months after entry of the Judgment of Divorce, a hearing was held on the issues of division of the marital property

and any credits the parties wished the Court to consider, as well as WANDA's claim for reimbursement for her rent incurred prior to the divorce. In addition, the Chancellor considered the issue of an alleged arrearage of medical support, which was not mentioned in the Property Settlement agreement, nor raised by any subsequent pleading, and for which HENRY had been served with no Rule 81 process, and awarded WANDA the sum of $1,426.24 for such alleged arrearages. (Transcript of October 1, 2008 hearing, pages 12-13; **RE 30.**)

On November 5, 2008, the Final Judgment incorporating the Chancellor's ruling from October 30, 2008 was filed. (Clerk's Docket; **RE 5**.)

On November 13, 2008, HENRY filed his Petition To Reconsider or In Alternative, For A New Trial, or In The Alternative Relief From Judgment. The Chancellor directed that counsel for the parties submit memorandum briefs detailing the parties' respective positions and any authorities to be considered. Based on the memorandum briefs, on June 24, 2009 the Chancellor sent a letter to both attorneys finding that the notice to HENRY was sufficient under the circumstances. He further recognized that HENRY had requested a full hearing and directed the attorneys to contact his court administrator to set the matter for hearing. The Petition was heard on September 1, 2009 before the Hon. Sanford R. Steckler. At the hearing, HENRY testified that he did not receive the court administrator's notice for the October 1, 2008 hearing, and that he had previously had problems with

his mail, specifically he had received other people's mail at his address (Exhibit 3, September 1, 2009 hearing; **RE 32.**) and that several times he had returned home to find his mail scattered over the landscape or the mailbox left open, causing the mail to become wet and illegible. (Transcript of September 1, 2009 hearing, page 31; **RE 34.**) Henry further testified that he was employed as a truck driver and that he was frequently out of town for his employment. (Transcript of September 1, 2009 hearing, page 24; **RE 35**) He testified that he had encountered difficulty in obtaining his file from his attorney after learning that the attorney could no longer practice law, and that he had not spoken with his attorney since the date of the divorce hearing on April 10, 2006. (Transcript of September 1, 2009 hearing, page 26; **RE 34.**)

After hearing the testimony, the Chancellor made his ruling from the bench, reiterating his earlier finding that the notice to HENRY was sufficient and denying HENRY's Petition to Reconsider. The Order incorporating the Chancellor's ruling was entered on September 18, 2009 and HENRY filed his Notice of Appeal on October 6, 2009.

SUMMARY OF THE ARGUMENT

1. The Chancellor erred in entering a Judgment of Divorce without the parties having executed a written Consent to Adjudicate as required by Mississippi Code 93-5-2(3). Without such written Consent, the court has no jurisdiction to award a divorce on the grounds of Irreconcilable Differences. Even if the Property Settlement Agreement were to be regarded as the Consent to Adjudicate, the Chancellor disregarded the agreement of the parties, at the request of the Appellee, and awarded relief beyond that contemplated by the parties at the time of execution of the Property Settlement Agreement. Rather than decide the relative interests of the parties incident to a sale, as provided in the Property Settlement Agreement, the Chancellor gave HENRY a mobile home (and ordered him to remove it from the property) and granted title to all real property of the parties to WANDA.

2. The Chancellor erred in conducting a hearing, purportedly as part of an Irreconcilable Differences, some 30 months after entry of the Judgment of Divorce based solely on M.R.C.P. Rule 5 notice sent to Appellant (HENRY), who was represented by an attorney at the time of the divorce, but was not represented at the time of hearing because his attorney had been suspended from the practice of law. M.R.C.P. Rule 5 requires that where a party is represented by an attorney, all pleadings and notices be sent to the attorney. In the instant case, at the time of the entry of the Judgment of

Divorce, HENRY was represented by an attorney. Subsequently, that attorney's privilege to practice law was suspended, although nothing appears of record in the court file. Nevertheless, some 30 months later the court administrator sent a notice of review to HENRY directly.

3. The Chancellor erred in conducting a hearing, purportedly as part of an Irreconcilable Differences, some 30 months after entry of the Judgment of Divorce based solely on M.R.C.P. Rule 5 notice sent to Appellant (HENRY), where said Appellant established that he did not receive the notice and he did not appear at the hearing. The Chancellor based his ruling on insurance case law which has no application to the facts at issue. The Chancellor applied the postal acceptance rule which was created to address situations where an insurance policy holder mailed premiums on or before the due date but which were received by the insurance company after the due date. In that instance the postal acceptance rule was applied to find that the premiums were paid on time. In the instant case, HENRY has testified, and provided corroborating evidence, that he has had difficulty with mail service to his address and testified that he never received the notice of court setting. Thus the postal acceptance rule does not apply.

4. The Chancellor erred in awarding allegedly past due medical support to WANDA when no Rule 81 Summons had been issued or served on HENRY. It is long-standing case law in this state that the court has no jurisdiction over a defendant in contempt matters without said defendant having first been

served with a Rule 81 Summons to a date certain. No such summons was ever issued or served on HENRY.

5. The Chancellor erred in denying HENRY's Petition To Reconsider or In The Alternative For New Trial and Relief From Judgment. HENRY presented sufficient evidence at the hearing to rebut any presumption that he actually received notice of the October 1, 2008 hearing, even if such notice was sufficient, that is that assuming the matters raised and considered, including arrearage of medical expenses, did not require additional personal process on HENRY.

ARGUMENT

I.

THE CHANCELLOR ERRED IN ENTERING A JUDGMENT OF DIVORCE ON THE GROUNDS OF IRRECONCILABLE DIFFERENCES WHERE THE PARTIES DID NOT PROVIDE FOR THE SETTLEMENT OF ALL ISSUES IN THE PROPERTY SETTLEMENT AGREEMENT AND WHERE NO WRITTEN CONSENT TO ADJUDICATE WAS FILED AS REQUIRED BY MISSISSIPPI CODE 93-5-2(3).

Without such written Consent, the court has no jurisdiction to award a divorce on the grounds of Irreconcilable Differences. Mississippi Code Section 93-5-2 (Supp. 2008) governs the award of a divorce based on irreconcilable differences. Subsection (3) of 93-5-2 provides that if a couple is unable to agree on provisions related to custody or property rights, they may consent to a divorce on the ground of Irreconcilable Differences and have the court " decide the issues upon which they cannot agree." Miss.Code Ann. §93-5-2(3). In *Johnson v. Johnson*, 21 So. 3d 694, 696 (Miss. App. 2009), the Court of Appeals stated it thusly: " In *Irby v. Estate of Irby,* 7 So. 3d 223, 238 (Miss. 2009), the Mississippi Supreme Court stated:

> [T]he consent (1) must be in writing and signed by both parties; (2) must state that the parties voluntarily consent to permit the court to decide the issues upon which the parties cannot agree; (3) must specifically set forth the issues upon which the parties are unable to agree; and (4) must state that the parties understand that the decision of the court shall be a binding and lawful judgment.

These provisions must be strictly followed. *Perkins v. Perkins,* 787 So.2d 1256, 1264 (Miss.2001)."

The Court of Appeals further addressed a similar situation in *Engel v. Engel*, 920 So.2d 505, 509 (Miss.App. 2006), and reversed the Chancellor's refusal to set aside a Judgment of Divorce where there was a Consent to Adjudicate which did not meet the statutory requirements, stating,

> "In the case at bar, it is clear that the divorce proceedings failed to strictly adhere to the statutory mandates. Although the parties did consent to submit certain issues for adjudication by the court, the document did not express that the parties did so "voluntarily." Moreover, the consent to adjudicate did not specifically set forth the issues to be decided by the court, as it submitted to the court the task of dividing certain personal property, which was only "tentatively identified" in the "Order." Finally, the document failed to comply with statutory requirements in that it did not recite the language: "the parties understand that the decision of the court shall be a binding and lawful judgment." Thus, under a strict reading of the statute, the chancellor erred in granting a divorce based on irreconcilable differences."

The *Engel* Court then discussed cases where failure to strictly comply with the Irreconcilable Divorces statute were held to be "harmless error", but found that it could not on the record determine that the error was harmless, as the Appellee had failed to file a brief. In the case at bar, no Consent to Adjudicate appears in the court file, nor is the recording of such reflected in the Clerk's Docket. **RE 5.** The Supreme Court addressed a similar fact situation (with regard to this issue) in *Massingill v. Massingill*, 594 So. 2d 1173, 1177-78, (Miss. 1992), where the Court stated:

"We hold the statutory requirements of Sec. 93-5-2(3) were not met in this case and that the chancellor exceeded his authority in granting a divorce on the ground of irreconcilable differences. Specifically, there was no valid consent in writing signed by both parties personally. The mere fact that irreconcilable differences was asserted in the pleadings filed by both parties as an alternate ground for divorce does not, in and of itself, meet all the statutory requirements. Accordingly, the chancellor erred in concluding that this alone was sufficient to justify a divorce on the ground of irreconcilable differences.

Even if we assume the pleadings constituted the required consent in writing signed personally by both parties--a question which we do not this day decide--the writing fails, nevertheless, on several fronts. It does not state that the parties voluntarily consented to permit the court to decide the issues upon which the parties could not agree; it does not specifically set forth the issues upon which the parties were unable to agree, and it does not state that the parties understand the decision of the court shall be a binding and lawful judgment."

Even if the Property Settlement Agreement were to be regarded as the Consent to Adjudicate, the Chancellor disregarded the agreement of the parties, at the request of the Appellee, and awarded relief beyond that contemplated by the parties at the time of execution of the Property Settlement Agreement. Rather than decide the relative interests of the parties incident to a sale, as provided in the Property Settlement Agreement, the Chancellor gave HENRY a mobile home (and ordered him to remove it from the property) and granted title of all real property of the parties to WANDA. (Transcript of October 1, 2008 hearing, page 14, 19; **RE 38, 39**.) The Chancellor clearly had no jurisdiction to award this relief. Either the Property Settlement is considered the Consent to Adjudicate (although it

fails the *Massingill* test), in which case the Chancellor ignored the provisions thereof and awarded relief which he was not given the authority to grant, or the Property Settlement is not the Consent, and *Massingill* requires reversal.

Since several cases have referred to whether prejudice is shown, it should be noted that in the instant case, HENRY was dispossessed of his home and all his real property, and left with a mobile home about which even WANDA testified "It's an abandoned place, it's not livable." (Transcript of September 1, 2009 hearing at page 50; **RE 40**.) This is extreme prejudice.

II.

THE CHANCELLOR ERRED IN CONDUCTING A HEARING, PURPORTEDLY AS PART OF AN IRRECONCILABLE DIFFERENCES DIVORCE, SOME 30 MONTHS AFTER ENTRY OF THE JUDGMENT OF DIVORCE BASED SOLELY ON M.R.C.P. RULE 5 NOTICE SENT TO APPELLANT (HENRY), WHO WAS REPRESENTED BY AN ATTORNEY AT THE TIME OF THE DIVORCE, BUT WAS NOT REPRESENTED AT THE TIME OF THE HEARING BECAUSE HIS ATTORNEY HAD BEEN SUSPENDED FROM THE PRACTICE OF LAW.

M.R.C.P. Rule 5 requires that, where a party is represented by an attorney, all pleadings and notices be sent to the attorney. In the instant case, at the time of the entry of the Judgment of Divorce, HENRY was

represented by an attorney. Subsequently, on January 15, 2008, that attorney's privilege to practice law was suspended, although nothing appears of record in the court file. (*Mississippi Bar v. Teel*, 011508 MSSC, 2007-BD-01651; no other citation can be found.) (Note: A telephonic inquiry made to the Bar as of March 30, 2010, resulted in information that the attorney is still listed as suspended.) Nevertheless, some 30 months later, the court administrator sent a notice of setting of review to HENRY directly, contrary to the express language of M.R.C.P. Rule 5(b), which states in pertinent part,

> "(b) **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 party himself is ordered by the court."

Here, there is no indication in the record that the Chancellor was officially made aware of the disqualification of HENRY's attorney of record, nor that HENRY was directed to inform the court of his new attorney, if any. Nevertheless, the court administrator's notice, the first action taken in the court file/cause for approximately 30 months, was sent directly to HENRY, by mail.

III.

THE CHANCELLOR ERRED IN CONDUCTING A HEARING, PURPORTEDLY AS PART OF AN IRRECONCILABLE DIFFERENCES DIVORCE, SOME 30 MONTHS AFTER ENTRY OF THE JUDGMENT OF

DIVORCE BASED SOLELY ON M.R.C.P. RULE 5 NOTICE SENT TO APPELLANT (HENRY), WHERE SAID APPELLANT ESTABLISHED THAT HE DID NOT RECEIVE THE NOTICE AND HE DID NOT APPEAR AT THE HEARING.

In finding that HENRY had sufficient and proper notice of the "review," the Chancellor based his ruling on insurance case law which has no application to the facts at issue. The Chancellor's application of the postal acceptance rule in relation to the notice sent to HENRY is a misapplication of the law. (Transcript of September 1, 2009 hearing at page 70-71; **RE 41, 42**.) The postal acceptance was created to address situations where an insurance policy holder mailed premiums on or before the due date but which were received by the insurance company after the due date. In that instance, the postal acceptance rule was applied to find that the premiums were paid on time. *Miss. Ins. Underwriting Assoc. v. Maenza*, 413 So. 2d 1384, 1387-88, (Miss. 1982). In the instant case, HENRY has testified, and provided corroborating evidence, that he has had difficulty with mail service to his address and further testified that he never received the notice of court setting. (Transcript of September 1, 2009 hearing at page 27-30; **RE 43-46**.) Although WANDA testified that she was not aware of any problems with the mail at that address during the marriage (Transcript of September 1, 2009 hearing at page 50; **RE 40**.) and WANDA also testified that she and HENRY had been separated and she had been living elsewhere since 2004.

(Transcript of October 1, 2008 hearing at page 8; **RE 47**.) Thus, WANDA could have no knowledge of the problems described by HENRY.

IV.

THE CHANCELLOR ERRED IN AWARDING ALLEGEDLY PAST DUE MEDICAL SUPPORT TO WANDA WHEN NO RULE 81 SUMMONS HAD BEEN ISSUED OR SERVED ON HENRY.

It is long-standing case law in this State that the court has no jurisdiction over a defendant in contempt matters without said defendant having first been served with a Rule 81 Summons to a date certain. *Chasez v. Chasez*, 935 So. 2d 1058 (Miss. App. 2005). No such summons was ever issued or served on HENRY. (Clerk's Docket; **RE 5**.) The Mississippi Supreme Court has held that notice by mail was insufficient where a hearing was continued but not to a specific date. *Vincent v. Griffin*, 872 So. 2d 676 (Miss. 2004). See also *Sanghi v. Sanghi*, 759 So 2d 1250 (Miss. App. 2000). The issue of non-payment of medical bills as ordered by the court is an issue of contempt, which is covered under M.R.C.P. Rule 81(d), which in pertinent part states:

> **RULE 81. APPLICABILITY OF RULES**
>
> (d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent that they may be in conflict with any other provision of these rules.

.....

(2)The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and ward's business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

.....

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which time the same shall be heard. Said time and place shall be set by special order, general order or rule of court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

The Clerk's Docket in this case shows no entry for the issuance or service of any process, Rule 81 or other, on HENRY after the date of entry of the Judgment of Divorce. Without such service, the Chancellor had no jurisdiction over HENRY to award a judgment of allegedly past due medical support. Indeed, the Judgment of Divorce and Property Settlement Agreement make no mention whatsoever of any purportedly past due or unpaid medical support and no other pleadings could be located in the court

file since the entry of the Judgment of Divorce which makes any mention of such, until the Final Judgment entered after the October 1, 2008 hearing. The award of a money judgment against HENRY in the absence of any pleading or lawful process requires reversal. (Clerk's Docket; **RE 5**.)

V.

THE CHANCELLOR ERRED IN DENYING HENRY'S PETITION TO RECONSIDER OR IN THE ALTERNATIVE FOR NEW TRIAL AND RELIEF FROM JUDGMENT.

HENRY presented sufficient evidence at the hearing to rebut any presumption that he actually received notice of the October 1, 2008 hearing, even if such notice was sufficient, that is that assuming the matters raised and considered, including arrearage of medical expenses, did not require additional personal process on HENRY. The Chancellor had ample opportunity to correct the problems with the Judgment entered as the result of the October 1, 2008 hearing. There was no testimony or evidence presented at the September, 1, 2009 hearing to indicate that WANDA had in any way altered her position in reliance on said Judgment, while on the other hand HENRY has been divested of title to every piece of real property he owned. The only prejudice suffered in this cause is by HENRY.

CONCLUSION

The combination of errors by the Chancellor in entering the Judgment of Divorce without a Consent to Adjudicate, in holding a hearing without proper notice to HENRY, and in awarding relief in the form of allegedly past due medical expenses without a Rule 81 Summons being issued, all require that the Judgment of the lower court be reversed. Any one of the errors by itself should require reversal and the cumulative effect of all certainly allows for no less a remedy. This Court should reverse the Chancellor's ruling as to HENRY's Petition to Reconsider Or In The Alternative For A New Trial or For Relief From Judgment and should further reverse the Chancellor as to the entry of the Judgment of Divorce without a written Consent to Adjudicate. It is Appellant's position that the previous cases decided by this Court and the Mississippi Supreme Court make it clear that without such Consent the Chancellor was without jurisdiction to award a Divorce. In the event that this Court finds that the Property Settlement Agreement constitutes a Consent to Adjudicate (which HENRY contends it does not under *Massingill*), then the Chancellor went beyond the provisions therein when he divested HENRY of his interest in the real property instead of ordering the sale contemplated by the Property Settlement Agreement.

Respectfully submitted,

SUZANNE BAKER STEELE
Counsel for Appellant

CERTIFICATE

I, the undersigned, Suzanne Baker-Steele, Attorney for Defendant, **HENRY E. CURTIS**, do hereby certify that to be mailed by United States Mail, first class, with postage prepaid, a true and correct copy of the foregoing Brief of Appellant, on the following persons at these addresses:

Honorable Kelly Michael Rayburn
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The Honorable Sanford R. Steckler, Chancellor
Chancery Court of Harrison County
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DATED, this the 31st day of March, 2010.

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