

STATE OF MICHIGAN
COURT OF APPEALS

DONITA NUGENT, Personal Representative for
the Estate of KENNETH ST. ONGE,

UNPUBLISHED
October 25, 2011

Plaintiff-Appellee,

v

NANCY ST. ONGE,

No. 299255
Presque Isle Circuit Court
LC No. 10-083445-DO

Defendant-Appellant.

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right the *nunc pro tunc* judgment of divorce entered by the trial court. We reverse and remand for entry of dismissal of the complaint below.

The underlying facts of this matter are undisputed. Kenneth St. Onge (plaintiff) and defendant were married in 2004 and then separated in June 2009. Plaintiff instituted this divorce action in November 2009. Because defendant failed to respond in any way to the suit, a default hearing was scheduled. Plaintiff participated in the hearing telephonically and provided testimony necessary to satisfy the requirements to enter a default judgment of divorce. However, the trial court expressed some concern related to plaintiff's competency, given the fact that plaintiff was hospitalized at the time and was noticeably struggling in giving his responses. As a result, the trial court requested an affidavit verifying plaintiff's competency from plaintiff's treating physician.

Sadly, plaintiff passed away a few days later. Nevertheless, plaintiff's counsel moved forward with the divorce action by providing the requested affidavit of competency and scheduling a hearing for entry of the judgment of divorce. Defendant appeared for the first time at that hearing and challenged the entry of the judgment of divorce. After reviewing the matter, the trial court found that entry of a *nunc pro tunc* judgment of divorce was appropriate under the facts of the instant case.

We review a trial court's decision to enter a *nunc pro tunc* judgment for an abuse of discretion. *Vioglavich v Vioglavich*, 113 Mich App 376, 386; 317 NW2d 633 (1982). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

Michigan law has long held that both parties must be living in order for an entry of a judgment of divorce to be valid and “there can be no decree after death has separated the parties.” *Wilson v Wilson*, 73 Mich 620, 621; 41 NW 817 (1889). Our Supreme Court revisited this issue in *Tiedman v Tiedman*, 400 Mich 571; 255 NW2d 632 (1977). In that case, the trial court had verbally indicated that a judgment of divorce would be entered in the future, but the defendant husband died before the judgment could be signed. *Id.* at 572-573. The plaintiff, claiming status as a widow, moved for an order dismissing the complaint for divorce. *Id.* at 573. The trial court denied the motion and instead entered a judgment of divorce *nunc pro tunc* effective to the date of a prior hearing. *Id.* The *Tiedman* Court reversed the lower court’s decision, and held it was “beyond the court’s power after [the defendant’s] death to enter a judgment of divorce.” *Id.* at 577. The *Tiedman* Court did allow for the possibility that a divorce could be considered immediately effective and valid if a judge “were to read into the record all the terms of a judgment of divorce, and declare that such statement is to be given immediate effect as a judgment of divorce without further action or signing of a written judgment.” *Id.*

We find the trial court abused its discretion in entering the *nunc pro tunc* judgment of divorce in the instant case. Our review of the record demonstrates that the trial court did not read all of the terms of the judgment of divorce into the record, nor did it pronounce an intention for an immediately effective divorce. In point of fact, the trial court specifically stated that it required further action, namely receipt of a verification of plaintiff’s competency, before a judgment of divorce would be entered.

We also reject the trial court’s explanation that entering the judgment of divorce following plaintiff’s death was appropriate in this case because “it was ever the intention of [the trial court] that these parties be divorced, contingent only on the competency issue.” There can be no dispute that the trial court did not indicate on the record an intention for an immediately effective divorce. To the contrary, had plaintiff been found to have been incompetent, it is evident from the trial court’s statement that it would not have granted the divorce, at least not without further proceedings. Moreover, the *Tiedman* Court specifically noted that the determination related to whether a divorce had been granted “should not depend on . . . the judge’s later declarations or interpretations of his intended meaning.” *Tiedman*, 400 Mich at 575.

Reversed and remanded for entry of an order of dismissal. We do not retain jurisdiction. Defendant may tax costs.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly