2014 No. 1221 **DEMERARA**

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA
DIVORCE AND MATRIMONIAL JURISDICTION
DIVORCE

BETWEEN:

RAMPAUL (DAVINDRA POORAN)
Petitioner

and

RAMPAUL (SHENELLE SHEHEIDA)
NEE ROWE

October 19, 2020, November 26, 2020, May 28, 2021.
Ms. Pauline Chase for the applicant.

RULING

Hon. Madam Justice Roxane George, Chief Justice (acting)

Introduction

On October 19, 2020, the applicant petitioner, Davindra Pooran Rampaul, applied for a *nunc pro tunc* Order, so that the Order Absolute of Divorce which he had previously been granted on June 12, 2015 would take effect from May 8, 2015. The prayer for relief in the summons reads as follows:

> "That the order made herein on the 12th day of June, 2015 before the Honourable Justice Nareshwar Harnanan and entered on the 18th day of June, 2015 be and is hereby amended to have effect from the 8th day of May, 2015 so that the entire order of court states:
>
> > Referring to the Decree Nisi made in this cause on the 13th day of March 2015, whereby it was decreed that the marriage had and solemnized on the 5th day of January, 2004, at the Magistrates Court District A in the Parish of Saint Michael, Barbados, between Davindra Pooran Rampaul, the Petitioner, and

Shenelle Sheheida Rampaul, then Shenelle Sheheida Rowe, the Respondent, be dissolved by reason tht since the celebration thereof the said respondent had been guilty of malicious desertion unless sufficient cause be shown to the Court why the said decree should not be made absolute within six (6) weeks from the making thereon and no such cause having been shown, the Court on application of the said petitioner by final decree pronounced and declared the said marriage to be dissolved and it is ordered that the order herein takes effect from the 8th day of May, 2015."

Facts

On November 21, 2014, the applicant as petitioner, applied for an order *nisi* to have his marriage of January 5, 2004 to the Respondent, Shenelle Sheheida Rampaul, dissolved. The Order *nisi* was granted on March 13, 2015, and was eligible to become absolute six weeks thereafter, providing that no sufficient cause was shown to the Court why the Order should not be made absolute.

The applicant deposed that he believed that the order *nisi* would have automatically become absolute on the expiration of the six week period, that is, on April 24, 2015. He said that he did not know that an application for an order absolute had to be filed by his attorney-at-law. Relying on this belief, on June 8, 2015, he applied for permanent immigration status to the United States of America on the grounds that he was the unmarried child of his mother, Shamwattie Persaud.

It was further deposed that "although the requisite period of six weeks from the grant of the *nisi* had long elapsed on the filing of the aforesaid immigration application, the final decree order ... was not made until the 12th June, 2015, that is, four (4) days after the filing of the immigration application." He stated that it was only just before filing this application for an order *nunc pro tunc* that he became aware that his divorce became final and took effect from the grant of the decree absolute on June 12, 2015.

It was stated that due to his honest mistake and or misunderstanding, the four day difference between the grant of the order absolute and his immigration application could prejudice the latter application of June 8, 2015. He therefore seeks a *nunc pro tunc* order, to give earlier effect to the absolute order as of May 8, 2015. He avers that there would be no prejudice as the six week period had already crystallized as at April 24, 2015. The applicant further

contends that there would be no prejudice to his former wife if the application is granted, moreso as she was served, acknowledged service and has not filed any objection. An affidavit of service was filed as proof of service of the application by prepaid registered post on the respondent who is stated to reside in Barbados. It was also deposed that she was served by email and a response acknowledging receipt of the emailed application was exhibited. It is noted that there is no evidence of permission or leave to serve the application on the respondent out of the jurisdiction, but I do not consider that this is of any consequence in the context of this case.

Ms. Chase was requested to and provided submissions on this application. I thank her for her industry.

Whether the Court has jurisdiction to make a *nunc pro tunc* order

I have found no local authority on this issue. Hence, I will review the authorities cited, and those found during my research.

Nunc pro tunc is translated to mean now for then so that a court order or judgment is antedated and deemed retroactive. The order can be applied for *ex parte*, as has been done in this case. The term was explained thus in the Canadian case of **Weiche v. Berghof Estate, 2013 ONSC 7742:**

> *"The Encyclopedia of Words and Phrases Legal Maxims, Canada, 6th Cumulative Supplement, 1990* states merely:
>
> > *nunc pro tunc*: 'Now, as of the previous date.'
>
> *The Canadian Law Dictionary*, by John A. Yogis, Q.C., provides:
>
> > *Nunc pro tunc*: Lat.: now for then. A judgment *nunc pro tunc* is entered when the court directs a proceeding to be dated as of an earlier date than that on which it was actually taken. A judgment that was delayed by act of the court can be antedated, or if the plaintiff has died between the hearing and date when the judgment was given, a judgment *nunc pro tunc* may be entered.
> >
> > 'Leave of the court must be obtained to do things *nunc pro tunc*; and this is granted to answer the purposes of justice, but never to do an injustice. A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court.' *Carey v. Beardsley* (1973),

6 NSR (2d) 46 at 48 (Co. Ct.), quoting from 11 *Bouvier's Law Dictionary* 247 (1875). ..."

Turner v London and South-Western Railway Co. (1874) LR 17 Eq 561 was a case where *nunc pro tunc* was applied to antedate the order of court to the date the arguments were completed in circumstances where the plaintiff had died in the ensuing period between the completion of the hearing of the case and the delivery of judgment. Sir Charles Hall, VC in concluding that "the object is to put the party on the one side or the other, plaintiff or defendant, exactly in the same position as if judgment had not been delayed by the Court" explained at p 566 that:

> "In Chitty's Archbold's Practice of the Queen's Bench (1858) the rule of law is stated thus: 'The Court will in general permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court.' ... **Then it goes on to explain that the Court will not do it where the act arises from the neglect of the party himself in completing the judgment.**" (Emphasis mine.)

In **Krueger v Raccah (1981) 128 DLR 3d 177 (Saskatchewan)** the Court of Queen's Bench of Saskatchewan defined *nunc pro tunc* as follows:

> "*Nunc pro tunc*, the Latin phrase, 'now for then' is used to refer to the common law power of the Court to permit that to be done now which ought to have been done before. **The power is used sparingly and traditionally its exercise has been confined to a narrower range of acts and circumstances ....**
>
> **Most often one encounters the power being used to overcome an administrative failure of the Court, in the nature of a slip or omission where there is no prejudice to the parties, rather than in the cure of a failing on one of the litigants.**" (Emphasis and double emphasis mine.)

In **Hogarth v Hogarth [1945] 3 DLR 78 (affd [1945] 3 DLR 750)**, the plaintiff issued a writ to sell the defendant's lands after the latter failed to pay a judgment. The sheriff sold the lands. The plaintiff then sought a court order to seize and sell the lands. She had not applied for an order directing the sale of the lands prior to the sale. The plaintiff applied for an order of seizure and sale *nunc pro tunc*. In refusing the application, Kelly J stated as follows (p 79):

> "There is inherent jurisdiction in the Court to make orders *nunc pro tunc* to validate proceedings which have been carried out and have been found ineffective by reason

of some slip or oversight having been made in the conduct of such proceedings, and to ensure against some injustice resulting therefrom. The procedure has been invoked to direct the entry of an order or judgment made on an earlier date but which, by some oversight, has not been entered, although proceedings have been taken in pursuance of such judgment or order. The procedure has also been invoked to make an order as of a date when argument has been terminated before the Court and decision thereon reserved, so as to protect the litigant against some injustice resulting from the delay in rendering the judgment, which delay was caused for the convenience of the Court. **But where a litigant has been delayed by his own laches, or where the delay has been extraordinary, some delay being unavoidable, the Court will refuse to direct a judgment or order to be entered *nunc pro tunc*.** In my opinion the Court should not make an order *nunc pro tunc* when the litigant adopts one procedure and carries it through to completion, and then decides he might have been in a more advantageous position if he had adopted some other procedure. Further, the sale having been completed, the basis for such an order is gone, and the Court will not make an order unless it is effective in relation to the relief sought." (Emphasis mine.)

Then in **Re Parker v Atkinson et al (1993) 104 DLR 4th 279 (Ontario)** the applicant, who had been appointed a committee for her mentally incompetent father, entered into an agreement with his wife, the respondent, as regards their property. This was done without the prior approval of the court as statutorily required. The applicant's father subsequently died and the respondent became mentally incompetent. The Public Trustee, representing the respondent submitted that the agreement was invalid as it had not been approved by the court as required. The applicant sought an order approving the contract *nunc pro tunc*. While noting that the respondent may have been prejudiced by the making of the order, the application was refused on the ground that to do so would be to act contrary to the specified statutory provision. Beckett J (U.F. Ct. J.), applied Kelly J's judgment in **Hogarth** thus (p 282):

"In **Hogarth**, Kelly, J suggests that orders *nunc pro tunc* should be made only to validate proceedings which have been carried out, but which were subsequently found to be ineffective due to a procedural error such as where there has been a delay in entering a judgment.

...

This was not a case where some procedural error was made, such as forgetting to enter the order or requesting validation of proceedings which had previously occurred."

Justice Beckett went on to summarise the learning on *nunc pro tunc* orders as follows (p 286):

> "In summary, it appears to me that the courts have established through jurisprudence several circumstances where *nunc pro tunc* orders should or should not issue:
>
> (1) Errors in procedure or practice or errors in following the Rules of Civil Procedure are irregularities and can be validated *nunc pro tunc: Hogarth v. Hogarth, supra; Giles v. Arnold Palmer Motors, supra; Coldwell v. Forster.*
>
> (2) The court should not correct a default which is due to the noncompliance of a statutory directive: *Krueger v. Raccah, supra; BP Exploration v. Hagerman, supra.*
>
> (3) The court cannot grant an order *nunc pro tunc* **if** in doing so it would contradict the express language of the statute: *Coldwell v. Forster; R. v. Fenrich, supra.*
>
> (4) **The court ought not to use *nunc pro tunc* orders to cure a failing in one of the litigants or to grant relief where the solicitor is at fault:** *Krueger v. Raccah; Carey v. Beardsley, supra.*
>
> (5) Approving a statutory requirement *nunc pro tunc* should only be done sparingly and in very particular circumstances after much consideration: *Krueger v. Raccah; Faraguna v. Faraguna, supra.*" (Emphasis mine.)

These cases are quite unlike that of **Carey v Beardsley (1973) 6 NSC (2d) 46 (Co. Ct.)** which was also cited in **Parkinson** (supra). In this case the clerk of court had omitted to seal a writ of summons. The lack of the seal was overlooked by both parties to the action who proceeded as though the writ had been validly issued. The defendant/applicant applied to have the writ set aside while the plaintiff/respondent applied to have the court affix the seal *nunc pro tunc*. In granting the plaintiff's application, McClellan J said at pp 47 and 48:

> "Neither party is at fault — in so stating I am overlooking the fact that the solicitor for the claimant in the previous action did not notice that the writ had not been sealed when it was returned to him by the sheriff after service. He had a right to assume that the clerk would act in accordance with the Rules of the Supreme Court when the writ was presented for issuing. The courts have been slow to grant any relief where the solicitor has been at fault ...
>
> ...
>
> Here there has been default by an officer of the court and in my view this is emminently a case where an order for sealing the writ *nunc pro tunc* ought to issue. *Bouvier's Law*

Dictionary (1875) Vol. 11, at 247 sets forth the principle involved when invoking this procedure:

> 'Leave of the court must be obtained to do things *nunc pro tunc*; and this is granted to answer the purposes of justice, but never to do an injustice. **A judgment *nunc pro tunc* can be entered only when the delay has arisen from the act of the court.'"** (Emphasis mine.)

Factors to be considered in determining whether to grant an order nunc pro tunc

Ms. Chase relied in particular on the Canadian Supreme Court case of **Canadian Imperial Bank of Commerce v Green, 2015 SCC 60, [2015] 3 S.C.R. 801 (CIBC v Green)**. It was submitted that the list of factors as identified in this case is non-exhaustive so that the exercise of this jurisdiction is not limited to a particular set of circumstances.

Given the detailed explanation of the principle of *nunc pro tunc* in **CIBC v Green**, I quote from the judgment of Côté J:

> "Doctrine of Nunc Pro Tunc
>
> [85] The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: "An order is effective from the date on which it is made, unless it provides otherwise."
>
> [86] The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.
>
> [87] One of the oldest and most often cited cases, *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561, dealt with this very circumstance: the plaintiff had died after the hearing but before the court rendered its judgment. The court ordered that its judgment be entered *nunc pro tunc*, as of the day when the argument terminated, noting that this would not cause an injustice to the other party and that such a result was appropriate in a case in which the delay had resulted from an act of the court. A long line of Canadian cases has followed *Turner*, as courts have granted *nunc pro*

tunc orders where parties have died after hearings: *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467 (C.A.); *Hubert v. DeCamillis* (1963), 1963 CanLII 459 (BC SC), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109; *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369.

[88] LeBel and Rothstein JJ. drew upon this line of cases in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, affirming "the correctness of this approach" and concluding that the estate of any class member in a class proceeding who was alive on the date that argument concluded was entitled to the benefit of the judgment: para. 77.

[89] In *CIBC*, Strathy J. suggested that a court has inherent jurisdiction to issue an order *nunc pro tunc*, but only in the case of a slip or oversight. In my opinion, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction, but is instead one example of a situation in which it may do so. To hold otherwise would run counter to the historical basis for the development of the doctrine.

[90] In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice. ... None of these factors is determinative.

[91] Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 1987 CanLII 4512 (SK QB), 65 Sask. R. 257 (Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see, e.g., *CIBC Mortgage Corp. v. Manson* (1984), 1984 CanLII 2587 (SK CA), 32 Sask. R. 303 (C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.

[92] In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is

sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.

[93] Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

[94] This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.

...

[99] With all due respect, what I find particularly problematic is that the plaintiffs' request for a *nunc pro tunc* order shows that they were aware of the requirement of obtaining leave, yet they made the choice to bring a motion for leave at the same time as their certification motion rather than expediting the leave motion. Their failure to obtain leave within the limitation period is therefore a result of their own decision. The fact that the plaintiffs were surprised by the decision in *Timminco* is of no help to them, since, as Strathy J. noted, not only were they mistaken in their interpretation of the law, but they also proceeded on the assumption "that the court had jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*": para. 511.

...

[105] ... As a result, in my opinion, the plaintiffs' delay in filing their action far outweighed any delays caused by acts of the court in respect of which a *nunc pro tunc* order might be justified. In this sense, the irregularity in their case is also tied to their own deliberate and informed acts." (Emphasis mine.)

In **Messari et al. v. Alberelli et al. 2017 ONSC 5304,** Gomery J applied **CIBC v Green.** Justice Gomery explained that the court generally grants orders *nunc pro tunc* to "protect litigants from court delays or other events that they 'could not anticipate...' [and not to] "shield litigants from the consequences of their own failure to act in a reasonably diligent way."

Justice Gomery J. further stated:

> "[4] *Nunc pro tunc* is a Latin phrase meaning "then for now". In seeking a *nunc pro tunc* order, a party is asking the court to authorize the backdating of some step that should have taken place earlier.
>
> ...
>
> When is a *nunc pro tunc* order available?
>
> A. Traditional use of *nunc pro tunc* discretion
>
> [7] Even in the absence of Rule 59.01, the court would be able to make a *nunc pro tunc* order as an exercise of its inherent equitable jurisdiction. Courts may issue backdated orders to prevent prejudice based on events beyond the control of the parties.
>
> [8] The earliest examples of *nunc pro tunc* orders were in cases where a plaintiff in a personal action died after their case was argued in court but before the judge released their decision. In such a case, if the decision were not backdated to the hearing date, the action would have to be dismissed because the plaintiff's personal rights died with them. In this scenario, courts held that a plaintiff (or rather their estate) should not be penalized due to the court's failure to render judgment more quickly (*Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561; *Gunn v. Harper* (1902), 3 O.L.R. 693 (Ont. C.A.); *Young v. Town of Gravenhurst* (1911), 24 O.L.R. 467 (Ont. C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495, 1963 CanLII 459 (BC SC) (B.C.S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109; *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369).
>
> [9] Backdated orders have also been issued where a party could have reasonably expected to get a hearing within a certain timeline, but was prevented from doing so because of the court's schedule. Unexpected delays in court schedules are not a new phenomenon. More than a hundred years ago, the Court of Queen's Bench held that parties should not be deprived of their remedies if "an extraordinary glut of business" before the courts prevented them from getting a court date within the usual timeline (*The Queen v. Justices of County of London and London County Council*, [1893] 2 Q.B. 476 at p. 488).

[10] More recently, *nunc pro tunc* orders have been issued where delays have been caused by something other than the court's schedule. An example relevant to this motion is *Numainville v. Nanson*, 2006 CanLII 27868, [2006] O.J. No. 3274 (Ont. Sup. Ct.). Nanson filed and served a motion for leave to issue a third party claim against Fruitman before the expiry of the two-year limitation period. The original returnable date for the motion was prior to the expiry. After being served, however, Fruitman delayed the hearing until after the limitation period had passed. The court gave Nanson leave to issue the third party claim against Fruitman backdated to the date that the motion was originally supposed to be heard. It held that a *nunc pro tunc* order was in the interests of justice because the delay was not the defendant's fault.

B. What are the current rules?

[11] The Supreme Court of Canada's decision in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 dealt with three class actions where the plaintiffs had to obtain leave to pursue statutory remedies under the *Ontario Securities Act*. In each case, the plaintiffs failed to obtain leave prior to the expiry of the three-year deadline under the Act. In her decision for the majority, Justice Côté reviewed the basis for *nunc pro tunc* jurisdiction and established a two-step analysis for deciding whether a court ought to issue a backdated order:

1. The party seeking the order must meet the "red-line rule".

2. If the applicant meets the red-line rule, the court must weigh factors that support or argue against the exercise of equitable discretion.

(1) The red-line rule

[12] The red-line rule means that a notice of motion for a *nunc pro tunc* order must be filed and served prior to the expiry of the relevant limitation period (*CIBC v. Green* at para. 93; *Pennyfeather v. Timminco Ltd.*, 2017 ONCA 369 at para. 42; *1186708 Ontario Inc. v. Gerstein*, 2017 ONSC 1217 (Ont. Div. Ct.) at para. 2). The party seeking a backdated order must have been ready to present argument to the court prior to the deadline to obtain it.

[13] This rule makes sense for two reasons. First, it requires the party asking for the order to act diligently. Second, once the limitation period has passed, the court is no longer dealing with a procedural irregularity that can be fixed by simply backdating an order. If a party waited until after the limitation period had passed, its rights would already have lapsed when it filed the motion.

(2) Factors relevant to exercise of equitable jurisdiction

[14] If the red-line rule is met, *CIBC v. Green* directs the court to weigh factors for or against issuing a backdated order. These could include:

- Will the opposing party be prejudiced by a *nunc pro tunc* order?
- Would the order have been granted had it been sought at the appropriate time?
- Was the irregularity intentional?
- Will the order effectively achieve the relief sought or cure the irregularity?
- Was the delay caused by an act of the court?
- Will the order facilitate access to justice?

[15] In the end, the court is assessing the overall fairness of granting a backdated order by considering the diligence of the party seeking it, and potential prejudice to the opposing party if the order is granted.

[16] The focus on diligence is important because of the origins and purpose of the *nunc pro tunc* order. **A party seeking a backdated order must persuade the court that their situation is due to factors beyond their control.** They likely will not be able to do so if they let most of the limitation period pass without taking any steps to advance their rights, then sought the court's help at the eleventh hour. As observed by Justice Côté, a party "cannot simply assume that he or she will be granted relief, doing nothing although knowing that the limitation period is going to expire" (*CIBC v. Green* at para. 100; see also *Pennyfeather* at para. 94 and *Stratton v. Petro Canada*, 2017 ONSC 4567 at paras. 27-30)." (Emphasis mine.)

CIBC v Green and **Messari** were applied in another Canadian case: **M.P.A.N. v J.N. [2019] ONSJ 96** where Finlayson J held that the omission of a clause providing for interest on costs in the order of court was a mistake and that it should not have been entered with this error. It was considered that the original court order should be corrected *nunc pro tunc* to include the post judgment interest clause.

Whether the Court should exercise its jurisdiction to give earlier effect to the order absolute dissolving the applicant's marriage, to avoid prejudicing applicant's immigration application

The authorities all confirm that the court does have jurisdiction to direct an order of court to take effect from a particular date – whether ante dated or post dated. At the time of granting

an order, a court may determine the effective date of the order – whether it will ante date or post date the date the order is made or granted.

The relevant rules of court that are applicable to this case are those that were extant as at 2015 when the orders *nisi* and absolute were granted. Thus, the Rules of the High Court, Chapter, 3:02 (the Rules) and the Matrimonial Causes Rules (MCR) of the Matrimonial Causes Act, Chapter 45:02 (MCA) are applicable.

Order 35 rule 2 (2) of the Rules provides that:

> "Every judgment or order when drawn up shall be dated as of the day when such judgment is pronounced or the order made, unless the Court or a judge shall otherwise direct, and shall take effect from that date.
>
> Provided that by special leave of the Court or a judge a judgment or order may be ante-dated or post-dated."

Rule 62 (1) of the MCA states that:

> "**62.** (1) Every order, if and when drawn up, shall be dated the day of the week, month and year on which the same was made, unless the Court otherwise directs."

These Rules clearly permit the High Court to adjust the date on which an order of the Court is to take effect.

Having established that the court can grant an order *nunc pro tunc*, I now turn to consider whether I should exercise my discretion on the particular facts of this case. A perusal of the judgments indicates a generally cautious approach to the exercise of the *nunc pro tunc* jurisdiction.

The learning reveals that the most common use of a *nunc pro tunc* order is to correct past clerical errors or omissions made by the Court that would affect the efficacy of the order. In this regard, the order as corrected would have legal force from the time of the initial decision so that no prejudice occurs. Thus, the purpose of *nunc pro tunc* is to correct errors or omissions to achieve the results that would have been originally intended by the Court at the earlier time. In particular, where the cause for the delay lies with the court, then the order could be dated to be effective so as to cure the effects of such delay. Importantly, the learning indicates that an order or judgment *nunc pro tunc* should only be entered when the delay has arisen from the act or omission of the court such as would prejudice a litigant.

A decree *nisi* is peculiar, when compared to other court orders, since its effect or operation is suspended until the expiration of a statutory period and the subsequent application by a petitioner or respondent for an order or decree absolute. Thus, a decree *nisi* determines the status of the parties though its final operation is suspended. As noted by Lord Thankerton in **Fender v Mildmay [1937] 3 All ER 402 at 415 - 416**:

> "... once the decree nisi has been pronounced, the petitioner ... has done all that he or she can do in order to obtain dissolution of the marriage tie, except to apply, after expiry of the statutory period, for the decree absolute. ... The waiting period is imposed in the public interest, in order to insure that there has been full disclosure before the Court."

Section 12 of the MCA provides that every decree of divorce shall be in the first instance a decree *nisi* which shall not be made absolute until the expiration of six weeks from the date of the *nisi* order. It is the party who obtained the decree who is entitled to apply for the absolute at the expiration of this six week period. However, if no such application is made, the party against whom the nisi order was made could apply for the absolute after the expiration of a further three weeks from the earliest date on which the application could have been initially made. Rule 33 of the MCR provides that an application must be filed to make absolute a decree *nisi* of divorce.

In Guyana, the application for the decree absolute is usually made by counsel on behalf of the petitioner. Counsel swears to the affidavit in support that speaks to the requisite searches having been made in the registry of the High Court, and that there has been no objection or intervention to prevent the grant of the absolute order. Subject to the provisions in MCR 33 (2) (where if there is a six day delay in the hearing of the application for the absolute, then a further affidavit in support must be filed), the prima facie entitlement to an order absolute therefore 'crystallizes' on the date of the application.

Ms. Chase submits that there will be no prejudice if the order is granted, more especially as the respondent, who has been served, has no objection. It is further submitted that the order will not change the respective rights of the parties as there is no issue of limitation and they will remain divorced. Further, the order could have been made if it had been applied for at the time of the application for the absolute. In addition, "the balance lies in the grant of the order as its refusal would have greater detrimental effect than its grant. ... the refusal of the order as prayed would adversely affect the applicant/petitioner's permanent residence application, due to an honest mistake and or misunderstanding."

While the floodgates argument regarding applications such as this one cannot be a consideration where the justice of the case so deserves, the issue is whether the court should exercise a discretion in this case in circumstances where the applicant seeks to have the court alter its order by backdating it to assist him in relation to his erroneous deposition regarding his marital status as stated in his immigration application. Indeed, there is no issue of limitation in this case. However, it does appear that the applicant's honest mistake or misunderstanding, as he puts it, is really related to his 'misstatement' on his immigration application form. It is noted that this application tends to suggest that it is the court's fault that the order absolute was granted on June 12, 2015. The applicant does not mention that, as required by the MCR, an application for the decree absolute was made by his then lawyer. This application was made on June 11, 2015 and was promptly dealt with by the court on June 12, 2015 when the order absolute was granted.

Although the court would have had jurisdiction to determine whether the order absolute should have been backdated at the time of the application for the order absolute on June 11, 2015, if an application for such had been filed, I do not consider that it would have been automatic that the court would have so ordered.

While Ms. Chase stated that "the length of time in issue is short, being only four (4) days", the fact is that there has been considerable delay in applying for this order. The applicant seeks to have the court exercise a discretion to effect a change to its order some five years plus after the order was granted and after his immigration application, with no explanation for his delay. The application to backdate the order is clearly meant to clothe the applicant's immigration statement with legality. A court must be wary of acting in such circumstances.

I do appreciate that the respondent has not objected to this application and therefore would not be prejudiced if the order is granted. But this is not the only factor to be considered. My understanding of the learning, as detailed above, is that an order or judgment *nunc pro tunc* should be entered only when the delay has arisen from the act or omission of the court. There is no evidence in this case that the delay in granting the absolute order was as a result of any act or omission on the part of the court.

The applicant did not apply or instruct his lawyer to apply for a *nunc pro tunc* order at the time of the June 11, 2015 application for the decree absolute so that the court could have considered the circumstances he now relies on over five years later for the extant application. As such, he does not explain how it is that he gave no instructions to his then lawyer

regarding what he must have known was his then proposed immigration application. And there is no explanation for why the amended date sought for the order is May 8, 2015.

In the circumstances, I decline to exercise a discretion to grant the order sought.

The application is therefore refused.

Roxane George
Chief Justice (ag)
May 28, 2021