

**Affirmed as Modified; Petition for Writ of Mandamus Denied and Opinion filed
October 7, 2010.**



In The

Fourteenth Court of Appeals

NO. 14-09-00429-CV

MONICA DARLENE RAWLINS, Appellant

V.

ROBERT E. RAWLINS, JR., Appellee

**On Appeal from the 300th Judicial District Court
Brazoria County, Texas
Trial Court Cause No. 39934**

NO. 14-09-00602-CV

IN RE MONICA DARLENE RAWLINS, Relator

**ORIGINAL PROCEEDING
WRIT OF MANDAMUS**

OPINION

This consolidated appellate proceeding, consisting of an appeal and a petition for writ of mandamus, arises out of the trial court's granting of a motion for judgment nunc pro tunc in which the trial court changed dates in the Agreed Final Decree of Divorce. We modify the trial court's "Order on Motion for Judgment Nunc Pro Tunc" by deleting certain portions of the order and, as modified, we affirm. We deny the petition for writ of mandamus as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 9, 2007, the trial court signed an Agreed Final Decree of Divorce, dissolving the marriage of appellant/relator Monica Darlene Rawlins (hereinafter "Mother") and appellee Robert Rawlins, Jr. (hereinafter "Father"). The Agreed Final Decree of Divorce provided for Father to pay child support for the couple's child.

Over two years later, on March 12, 2009, Father filed a motion for judgment nunc pro tunc, alleging that the Agreed Final Decree of Divorce contained a clerical error in the date child support was to begin. Specifically, Father alleged that the date of January 5, 2006 stated in the Agreed Final Decree of Divorce should have been January 5, 2007. Mother responded that the error was not a clerical error but a judicial error, and the trial court could not correct by judgment nunc pro tunc a judicial error after it lost plenary power over the judgment.

On April 9, 2009, a hearing was held on the motion for judgment nunc pro tunc.¹ At the hearing, Father confirmed that he and his attorney came to court on January 9, 2007 relative to the Agreed Final Decree of Divorce. Father testified that Mother filed for divorce in September 2006, and the parties agreed to temporary orders for child support to begin in October 2006.

¹ The findings of fact and conclusions of law state the hearing was held on March 31, 2009; however, the transcript lists the date as April 9, 2009.

Father stated that he was to pay Mother directly until payments were deducted from his paycheck. It was Father's understanding that child support was to be deducted from his first paycheck of January 2007. Therefore, according to Father, the statement in the Agreed Final Decree of Divorce that child support was to begin on January 5, 2006 was incorrect and should have read January 5, 2007. Father testified that Mother knew there was a mistake in the Agreed Final Decree of Divorce regarding child support and indicated as much to him. Mother testified that she filed for divorce in September 2006, she was not in court on the day the Agreed Final Decree of Divorce was proved up, and she agreed to the terms of the Agreed Final Decree of Divorce.

The trial court took judicial notice of the file and noted at the hearing that (1) the petition for divorce was filed on September 25, 2006 and, according to the petition, the parties did not cease to live together until September 8, 2006; and (2) there were temporary orders entered on October 10, 2006 that indicated child support was to begin October 21, 2006. Based on this information, the trial court concluded the dates on pages one and seventeen of the Agreed Final Decree of Divorce were clerical errors. That day, the trial court signed an order granting the motion for judgment nunc pro tunc, finding the following two clerical errors in the Agreed Final Decree of Divorce: (1) the date on the first line of the judgment which read, "On January 9, 2006, the Court heard this case" should have read "On January 9, 2007, the Court heard this case" and (2) the date on which child support was to begin should have read "January 5, 2007" and not "January 5, 2006."

On April 28, 2009, Mother filed a request for findings of fact and conclusions of law. On May 28, 2009, the trial court issued findings of fact and conclusions of law. The trial court concluded that the errors in the Agreed Final Decree of Divorce were clerical

errors. Mother filed an appeal on April 9, 2009 and a petition for writ of mandamus on July 7, 2009. Father did not file an appellee's brief.²

II. ANALYSIS

In what we construe as one issue, Mother contends the trial court erred by granting Father's motion for judgment nunc pro tunc to change the date on which child support was to begin because the evidence is insufficient to support the trial court's conclusion that the Agreed Final Decree of Divorce contained clerical error. Mother argues the error is a judicial error, rather than a clerical error, and could not be changed after the trial court's plenary power had expired. Mother made the same arguments in her petition for writ of mandamus.

The trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform its judgment within 30 days after the judgment is signed. Tex. R. Civ. P. 329b(d). Once the trial court's plenary power expires, it cannot set its judgment aside except by a bill of review for sufficient cause. Tex. R. Civ. P. 329b(f). However, the trial court may at any time correct a clerical error in the judgment by entering a judgment nunc pro tunc. Tex. R. Civ. P. 316, 329b(f); *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).

A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered by the court, and does not arise from judicial reasoning or determination. See *Escobar*, 711 S.W.2d at 231-32; *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986) (per curiam). A judicial error, on the other hand, occurs in the *rendering*, as opposed to the *entering*, of a judgment. *Escobar*, 711 S.W.2d at 231

² Because there is no appellee's brief, we must treat the facts as undisputed. See Tex. R. App. P. 38.1(g) ("The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.").

(emphasis in original). “Judges render judgment; clerks enter them on the minutes.” *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978). A judgment is rendered when the decision is officially announced either orally in open court or by memorandum filed with the clerk. *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970) (orig. proceeding). Errors in judgments are not ipso facto clerical errors merely because they are the result of an inadvertent error. See *Finlay v. Jones*, 435 S.W.2d 136, 138 (Tex. 1968). The trial court “can only correct the entry of a final written judgment that incorrectly states the judgment actually rendered.” *Escobar*, 711 S.W.2d at 231-32.

When deciding whether an error is clerical or judicial, this court must look to the judgment actually rendered and not to the judgment that should or might have been rendered. *Id.* at 231. Even if the trial court renders judgment incorrectly, the trial court has no nunc pro tunc power to correct or modify the entered judgment which precisely reflects the incorrect rendition after its plenary jurisdiction expires. *Id.* at 231-32; *LaGoye v. Victoria Wood Condo. Ass’n*, 112 S.W.3d 777, 783 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Whether an error is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 232. “The judicial or clerical question becomes a question of law only after the trial court factually determines whether it previously rendered judgment and the judgment’s contents.” *Id.* A judgment rendered to correct a judicial error after plenary power has expired is void. *Dikeman v. Snell*, 490 S.W.2d 183, 186 (Tex. 1973) (orig. proceeding).

A judgment nunc pro tunc should be granted if the evidence is clear and convincing that a clerical error was made. *In re Broussard*, 112 S.W.3d 827, 833 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Evidence may be in the form of oral testimony of witnesses, written documents, the court’s docket, and the judge’s personal recollection. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ). If the same trial judge who renders the

judgment grants the nunc pro tunc motion, a presumption arises that the judge's personal recollection supports the finding of clerical error. *Id.*

Here, the trial court signed the Agreed Final Decree of Divorce on January 9, 2007, which included the following statements: (1) "On January 9, 2006, the Court heard this case," and (2) "IT IS ORDERED that [Father] is obligated to pay and shall pay to [Mother] child support of \$802.00 per month, with the first payment being due and payable on January 5, 2006" The trial court had plenary power for 30 days after the judgment was signed. Tex. R. Civ. P. 329b(d). On March 12, 2009, over two years later, Father filed his motion for judgment nunc pro tunc. On April 9, 2009, the trial court signed the order on the motion for judgment nunc pro tunc, granting the motion and ordering that both dates be changed from "2006" to "2007."

Neither party presented evidence at the hearing on the motion for judgment nunc pro tunc that the trial court rendered a different judgment in writing or orally prior to signing the Agreed Final Decree of Divorce. *See America's Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 878 (Tex. App.—San Antonio 1995, writ denied). There is no record from the day on which the trial court heard the Agreed Final Decree of Divorce because the parties waived the presence of a court reporter.

On May 27, 2010, we abated this case and ordered the trial court to clarify both when it rendered judgment and the contents of that judgment. The trial court responded that it orally rendered judgment after the written Agreed Final Decree of Divorce was prepared.³ The trial court did not state that the oral rendition differed from the written Agreed Final Decree of Divorce. *See In re Cherry*, 258 S.W.3d 328, 333 (Tex. App.—

³ The precise meaning of this statement is unclear. Texas Family Code section 101.026 states that to "render" in a suit affecting the parent-child relationship means "the pronouncement by a judge of the court's ruling on a matter. The pronouncement may be made orally *in the presence of the court reporter* or in writing, including on the court's docket sheet or by a separate written instrument." Tex. Fam. Code Ann. § 101.026 (Vernon 2008) (emphasis added).

Austin 2008, orig. proceeding) (finding judicial, not clerical, error when trial court ordered period of supervision to start on October 18, 2004, although court may have meant for period to start on October 18, 2005). The trial court’s docket sheet, which contains the trial judge’s initials and signature, states: “Respondent, Robert Rawlins, Jr. and attorney present. Testimony by Respondent presenting Agreed Final Decree of Divorce as evidence by signature of Petitioner and her attorney. Enter Agreed Final Decree of Divorce.” See *Escobar*, 711 S.W.2d at 232 (docket entry some evidence of rendered judgment and its contents). Thus, the only evidence in the record regarding the contents of the judgment the trial court actually rendered is the signed Agreed Final Decree of Divorce. See *Hernandez v. Lopez*, 288 S.W.3d 180, 188 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (op. on reh’g).

A proper nunc pro tunc is one in which the judgment as *entered* actually differs from the judgment as *rendered*; in that scenario, “a nunc pro tunc judgment will only serve to ensure that the judgment as rendered is actually entered of record.” *Galvan*, 897 S.W.2d at 879 (citing *Escobar*, 711 S.W.2d at 231). This is true even if, as Father asserted, the child-support start date in the Agreed Final Decree of Divorce clearly is not the date contemplated by the parties. See *Hernandez*, 288 S.W.3d at 187. This is also true even if the record indicates the mistake most likely arose from a drafting error that the parties overlooked. See *In re Daredia*, 317 S.W.3d 247, 249 (Tex. 2010) (orig. proceeding) (per curiam); *LaGoye*, 112 S.W.3d at 784 (drafting errors became part of rendered judgment and were properly characterized as judicial errors). Because nothing in the record shows that there is a discrepancy between the judgment as rendered and the judgment as entered, we are compelled by current law to hold that the error in the child-support start date was a judicial error. Therefore, Mother’s issue is sustained.⁴

⁴ In her prayer for relief, Mother prays for “attorney’s fees, expenses and cost because this suit is frivolous and brought with the intent to harass” Mother has not cited any grounds or authority for this Court to grant this relief in this case. Therefore, we deny Mother’s request. See Tex. R. App. P. 38.1(i).

This outcome, while compelled by current Texas law, is admittedly a repugnant result. Because of an apparent typographical or drafting error, Mother will receive a windfall of undeserved child-support payments encompassing a period of time when the family was still intact and living together. The fact that Mother is a Texas attorney, knows that the judgment contained a mistake, and is exploiting that error to her own financial advantage, makes the result even more intolerable. We would hope that an attorney, who is charged with safeguarding the integrity of the legal process,⁵ would not insist upon erroneous back child-support payments—even to the point of appealing from the trial court’s rather transparent efforts to correct the mistake. Regrettably, some lawyers subscribe to a different code of personal and professional ethics. As former United States Supreme Court Justice Potter Stewart observed, “[T]here is a big difference between what you have a right to do and what is right to do.”⁶

Nevertheless, this Court is required to follow the law. Therefore, we hold that the trial court erred in entering the portion of the “Order on Motion for Judgment Nunc Pro Tunc” changing the date from January 5, 2006 to January 5, 2007 on page 17 of the Agreed Final Decree of Divorce. We modify the trial court’s “Order on Motion for Judgment Nunc Pro Tunc” to delete (1) the trial court’s finding that there was a clerical error on page 17 of the Agreed Final Decree of Divorce in the paragraph titled “Child Support” on the third line down which begins “payable on January 5, 2006”; (2) the trial court’s finding that on page 17 of the Agreed Final Decree of Divorce on the third line down on the paragraph titled “Child Support” the date should read “January 5, 2007” and not “January 5, 2006”; and (3) the trial court’s order that the date on page 17 on the third

⁵ See generally *Tex. Lawyer’s Creed—A Mandate for Professionalism I, III* (adopted by the Supreme Court of Texas and the Court of Criminal Appeals Nov. 7, 1989), *reprinted in* *Texas Rules of Court* 803, 804–05 (West 2010); *Tex. Disciplinary R. Prof’l Conduct* preamble ¶¶ 1, 4, *reprinted in* *Tex. Gov’t Code Ann.*, tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

⁶ See *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 222 (Tex. Crim. App. 2003) (orig. proceeding) (Kearler, J., dissenting).

line down from the paragraph titled “Child Support” be changed for all purposes to “January 5, 2007.”

On appeal, Mother does not challenge the change made by the trial court on page one of the Agreed Final Decree of Divorce to reflect the date on which Father and his attorney appeared in court to prove up the Agreed Final Decree of Divorce.⁷ Therefore, we affirm the unchallenged portion of the trial court’s “Order on Motion for Judgment Nunc Pro Tunc” that finds there was a clerical error in the Agreed Final Decree of Divorce on page one and orders that the date on the first line of page one be changed to January 9, 2007.

III. CONCLUSION

Accordingly, we affirm the “Order on Motion for Judgment Nunc Pro Tunc” as modified. We deny the petition for writ of mandamus as moot.

/s/ Kent C. Sullivan
 Justice

Panel consists of Justices Brown, Sullivan, and Christopher.

⁷ The date that a judgment was actually rendered or signed or when a hearing was held may be corrected by a nunc pro tunc judgment. *Nolan v. Bettis*, 562 S.W.2d 520, 523 (Tex. Civ. App.—Austin 1978, no writ); *City of San Antonio v. Terrill*, 501 S.W.2d 394, 397 (Tex. Civ. App.—San Antonio 1973, writ ref’d n.r.e.); *Capital Life Ins. Co. v. Rutherford*, 468 S.W.2d 535, 536 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).