

AFFIRM; and Opinion Filed October 3, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00589-CV

ESTATE OF ALAN MORGAN HUMPHREY, DECEASED

**On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause No. PR-13-2943-3**

MEMORANDUM OPINION

Before Chief Justice Wright and Justices Fillmore and Brown
Opinion by Justice Brown

Pro se appellant Denna Shaw appeals a final judgment against her in a breach of contract action ancillary to a probate proceeding. In her original brief and a reply brief, Shaw raises various issues generally complaining about the authority of the judge who conducted the bench trial to render the judgment. For reasons that follow, we conclude Shaw's issues are without merit. We affirm the trial court's judgment.

Alan Morgan Humphrey died in April 2013. The terms of his will permitted Shaw and her son, Alex Carlson, to live in Alan's house for a certain period of time, after which time the house was to be treated as part of his residual estate and sold. After Alan's will was admitted to probate, Shaw filed a petition for declaratory judgment seeking to be declared Alan's common-law wife. She also sought an injunction to prevent her from being evicted from the home. Alan's brother, Roger Humphrey, counterclaimed for a declaration that Shaw was not Alan's common-law spouse.

The case was set for a jury trial in July 2014. On July 22, Shaw, Roger, the executor of Alan's estate, and beneficiaries of the will appeared in court before Judge John Peyton. Judge Peyton informed the parties he was sitting as an associate judge. The parties agreed to waive their right to a de novo hearing before the elected judge of the court. *See* TEX. GOV'T CODE ANN. § 54A.213 (West 2013) (before start of hearing by associate judge, parties may waive right to de novo hearing before referring court). Shaw was represented by an attorney at that time. Her attorney announced that the parties had reached an agreement and read the terms of the agreement on the record. Under the agreement, Shaw and her son Carlson were to be deeded Alan's house and assume all debt related to it. In exchange, Shaw waived any other claims she might have against the estate and such a waiver was also contemplated for Carlson, who was not present. Two months later, Shaw filed a pro se motion asking the trial court to allow her to withdraw her agreement to the settlement.

In November 2014, Roger amended his pleadings to assert a claim against Shaw for breach of contract. He alleged the parties' agreement recited into the record was a Rule 11 Settlement Agreement which Shaw had breached. Carlson later filed a plea in intervention, alleging the agreement was conditioned on his consent, which he did not give. Roger moved to strike the intervention.

Judge Peyton presided over further proceedings in this case on January 12, 2015. Shaw appeared pro se. Judge Peyton did not, as he had in July 2014, state at the outset that he was sitting as an associate judge. He heard and granted the motion to strike the intervention.¹ He then conducted a bench trial on Roger's breach of contract claim. After hearing the testimony of Shaw, as well as the attorney who had advised her about the settlement agreement and the

¹ After this appeal was submitted, Carlson filed a pro se letter with this Court to inform us that he was a beneficiary of Alan's will and did not agree to the settlement agreement. Carlson also appears to challenge the trial court's striking of his plea in intervention. Only Shaw has filed a notice of appeal. We do not have jurisdiction to consider issues brought by a party who does not file or join in a timely notice of appeal. *Kishor v. TXU Energy Retail Co.*, No. 05-10-01496-CV, 2011 WL 5857215, at *1 (Tex. App.—Dallas Nov. 17, 2011, no pet.) (mem. op.).

executor of the estate, the judge ruled against Shaw. Judge Peyton signed the final judgment on February 10, 2015. Beneath his signature, the judgment stated, “JUDGE PRESIDING.” The judgment decreed that the agreement announced on the record on July 22, 2014, was binding on the parties and that Shaw had failed to perform under the agreement. The judgment ordered that the executor of the estate recover \$24,478.45 in damages and that the executor and Roger recover their attorney’s fees from Shaw.

Shaw filed a timely notice of appeal. After Shaw filed her appellate brief, Roger filed a motion in the probate court for judgment nunc pro tunc, asserting that the January 2015 judgment contained a clerical error, namely it omitted the stamp that indicated Judge Peyton was sitting as a visiting judge. Attached to Roger’s motion was a Minute Order issued on September 22, 2014, by Judge Guy Herman, Presiding Judge of the Statutory Probate Courts of Texas. The Minute Order assigned Judge Peyton to serve as a visiting statutory probate judge upon being called by any of the three Dallas statutory probate judges, “with all rights, powers and privileges held by a regular judge of the court.” After a hearing before the regular judge of Probate Court Number Three of Dallas County, the trial court granted the motion. Judge Peyton signed a final judgment nunc pro tunc. The only difference between the original judgment and the judgment nunc pro tunc is that in place of “JUDGE PRESIDING” below the judge’s signature line, the judgment nunc pro tunc bears the stamp, “Presiding Judge Sitting by Assignment.”

In her original appellate brief, Shaw raises four issues. She contends: (1) the associate judge of the probate court lacked authority to hear the case without a valid order of referral; (2) the associate judge lacked authority to render a final judgment; (3) the associate judge’s judgment was not final without adoption by the referring judge; and (4) she was denied due process because she was not notified of the referral of the case to the associate judge. In support of her arguments, Shaw relies on various sections of the government code, which relate to

associate judges in statutory probate courts. *See* TEX. GOV'T CODE ANN. §§ 54A.208, 54A.209, 54A.213, 54A.215 (West 2013).

Shaw's original issues are premised on the belief that Judge Peyton was sitting as an associate judge when he issued the final judgment against her for breach of contract. Instead, as reflected by the judgment nunc pro tunc, Judge Peyton was sitting as a visiting judge by assignment pursuant to the government code. A judge, former judge, or retired judge of a statutory probate court may be assigned by the presiding judge of the statutory probate courts to hold court in a statutory probate court under various circumstances. *Id.* § 25.0022(h) (West Supp. 2015). A judge assigned under section 25.0022 has the jurisdiction, powers, and duties given by various sections of the estates code to statutory probate court judges. *Id.* § 25.0022(i). Accordingly, the issues Shaw raises in her original brief lack merit. We overrule Shaw's issues one through four.

In a reply brief, Shaw raises more issues. Ordinarily, an appellant cannot raise an issue for the first time in a reply brief. *See Powell v. Knipp*, 479 S.W.3d 394, 408 (Tex. App.—Dallas 2015, pet. denied). Judge Peyton signed the judgment nunc pro tunc after Shaw filed her original appellate brief. Because Shaw did not have the opportunity to address issues related to the judgment nunc pro tunc in her first brief, we will consider the issues raised by her reply brief. Shaw numbered the issues in the reply brief one, two, and three. She actually raises four new issues. To avoid confusion, we will renumber them issues five, six, seven, and eight.

In her fifth issue, Shaw contends the record reflects that Judge Peyton presided over the trial as an associate judge, not a visiting judge. She relies on the cover page of the reporter's record from the January 2015 trial, which recites that the proceedings "came on to be heard . . . before the HONORABLE JOHN PEYTON, JR., Associate Judge presiding." In light of the judgment nunc pro tunc, we attach no legal significance to the cover of the reporter's record and

consider it merely a clerical error. Shaw also relies on the fact that Judge Peyton presided over the July 2014 hearing as an associate judge. But this fact is not inconsistent with him presiding over the January 2015 proceeding as a visiting judge. The Minute Order issued in the interim.

Shaw acknowledges that the presiding judge of the statutory probate courts may assign a visiting judge when a statutory probate judge requests the assignment. *See* TEX. GOV'T CODE ANN. § 25.0022(h)(1). But she argues that no assignment could have been made under section 25.0022(h)(1) because the record does not contain either an assignment from the presiding judge or a request for assignment of a visiting judge by the sitting judge of probate court number three. The appellate record does include the assignment order of the presiding judge of the statutory probate courts, Judge Guy Herman. That order, dated September 22, 2014, recites that the statutory probate court judges of Dallas County requested the standing appointment of Judge Peyton to preside over probate matters when requested by any of them. Judge Herman ordered that Judge Peyton is assigned to serve as a visiting statutory probate judge upon being called by any of the three Dallas statutory probate court judges, with all rights, powers, and privileges held by the regular judge of the court.

Generally, visiting judges are assigned either for a period of time or for a particular case. *In re Richardson*, 252 S.W.3d 822, 828 (Tex. App.—Texarkana 2008, orig. proceeding). The terms of the assignment order control the extent of the visiting judge's authority. *Id.*; *In re B.F.B.*, 241 S.W.3d 643, 645 (Tex. App.—Texarkana 2007, no pet.) (noting that, in case involving assignment of visiting judge under chapter 74 of the government code, "The term of a visiting judge's assignment depends on the language used in the order of assignment."). Here, the broad language in Judge Herman's order, issued about four months before this trial, assigning Judge Peyton to serve as a statutory probate judge upon being called by any of the three statutory probate judges in Dallas authorized Judge Peyton to preside over the trial in this case. Shaw

cites no authority, and we have found none, requiring the elected probate judge's request for a visiting judge to be included in the record.² We overrule Shaw's fifth issue.

In issue six, Shaw contends that, even if Judge Peyton did sit as a visiting judge, he was not permitted to do so because he previously sat on the case as an associate judge. Shaw argues that the constitutional prohibition against dual office holding and the common-law doctrine of incompatibility forbid this situation. *See* TEX. CONST. art. XVI, § 40; *Turner v. Trinity Indep. Sch. Bd. of Trustees*, 700 S.W.2d 1, 1–2 (Tex. App.—Houston [14th Dist.] 1983, orig. proceeding). The doctrine of incompatibility prevents one person from holding two offices if the duties are inconsistent or in conflict, or if one office is subordinate to the other. Tex. Att'y Gen. Op. No. JM-819 (1987); *see also State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994). Shaw cites no law for the proposition that it constitutes dual office holding or incompatibility for an associate judge to sit both as an associate judge and a visiting judge in proceedings ancillary to a probate case. She suggests the positions were incompatible because Judge Peyton could have been called upon as a visiting judge to review his own earlier rulings as an associate judge. But there was no possibility that would happen here as the parties agreed at the outset of the hearing on the settlement agreement to forego any de novo review and bring an appeal, if any, directly to this Court. And even if it was a possibility, Judge Peyton could have simply recused himself. *See Turner*, 700 S.W.2d at 2. We overrule Shaw's sixth issue.

In her seventh issue, Shaw contends that the trial court's judgment nunc pro tunc was improper because there was no clerical error. After a trial court loses its jurisdiction over a judgment, it can correct only clerical errors in the judgment by judgment nunc pro tunc. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). A clerical error is one which does not result from

² We note that at the hearing on the motion for judgment nunc pro tunc, the elected judge of probate court number three stated on the record that Judge Peyton sat at her request in January 2015.

judicial reasoning or determination. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 167 (Tex. 2013). Whether an error in a judgment is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 232. We conclude that the error in leaving off the stamp indicating Judge Peyton was sitting by assignment did not result from judicial reasoning and was a clerical error which could be corrected by judgment nunc pro tunc. *See Naime v. Soliman*, No. 04-11-00865-CV, 2012 WL 2835161, at *3 (Tex. App.—San Antonio July 11, 2012, no pet.) (mem. op.) (examples of typical clerical errors include correction of date of judgment, correction of party name, and correction of numerical error). We overrule Shaw's seventh issue.

In her eighth issue, Shaw contends that even if Judge Peyton sat as a visiting judge, the probate court was required to give the parties notice of his assignment. We note that Shaw received notice in November 2014 that Judge Peyton would be presiding over the January 2015 trial on the breach-of-contract claim. Shaw would require specific notice that the judge was sitting by assignment rather than as an associate judge. Shaw cites no authority in support of this issue, much less any law requiring notice that a case has been assigned to a visiting judge by the presiding judge of the statutory probate courts. *Cf. TEX. GOV'T CODE ANN. § 74.053(a)(2)* (West 2013) (notice of assignment of visiting judge under chapter 74 is optional). An appellant's brief is required to contain a clear and concise argument for the contentions made, with appropriate citations to authorities. *See TEX. R. APP. P. 38.1(i)*. The failure to cite legal authority or provide substantive analysis of a legal issue results in waiver of the complaint. *Wise v. SR Dallas, LLC*, 436 S.W.3d 402, 411 (Tex. App.—Dallas 2014, no pet.). Accordingly, we overrule Shaw's eighth point of error.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ESTATE OF ALAN MORGAN
HUMPHREY, DECEASED

No. 05-15-00589-CV

On Appeal from the Probate Court No. 3,
Dallas County, Texas
Trial Court Cause No. PR-13-2943-3.
Opinion delivered by Justice Brown, Chief
Justice Wright and Justice Fillmore
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees recover their costs of this appeal from appellant.

Judgment entered this 3rd day of October, 2016.