Reversed and Rendered and Memorandum Opinion filed December 7, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00551-CV
NO. 14-16-00557-CV

IN THE MATTER OF THE MARRIAGE OF LANCE BOWE AND SAMANTHA PERRY

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause Nos. 2005-12087 & 2005-12087A

M E M O R A N D U M O P I N I O N

Father appeals six orders that altered a prior March 3, 2014 order dismissing all claims filed in a suit affecting the parent-child relationship.

The March 2014 order granted relief in response to a pleading Mother styled as a motion to dismiss or, in the alternative, plea to the jurisdiction. In six orders signed in 2016, the trial court altered the March 2014 order by (1) removing all factual findings discussing the grounds for dismissal; and (2) changing the March 2014 order to state that only Mother's "Motion to Dismiss is granted."

Father timely appealed the trial court's six 2016 orders. Father asserts that the changes effected by the trial court's 2016 orders go beyond the authorized reach of a nunc pro tunc judgment under Texas Rules of Civil Procedure 316 and 329b(f) because the 2016 orders impermissibly remedied judicial errors rather than mere clerical errors.

The six 2016 orders exceeded the bounds of a permissible nunc pro tunc judgment because they made substantive and material changes to the March 2014 order. We therefore vacate the trial court's six 2016 orders and reinstate the March 3, 2014 order dismissing all claims in the suit.

BACKGROUND

I. Suit Affecting the Parent-Child Relationship and the March 2014 Order

Mother filed suit seeking a divorce from Father in 2005. Her divorce petition requested that the parties be appointed joint managing conservators for their two children.

The appellate record does not contain a final divorce decree or otherwise show when the petition for divorce was resolved; the record similarly does not show what custody arrangements were established following the parties' divorce. The record shows only that the parties continued to litigate modifications of custody arrangements.

After the 2005 divorce filing, the next entry in the record is the parties' January 6, 2012 mediated settlement agreement. The settlement agreement indicates that it modified the trial court's April 28, 2009 court order establishing conservatorship, possession, and access guidelines for the parties and their children. The trial court's April 28, 2009 order is not included in the record. The settlement agreement provided that Father would be liable for the legal fees attributable to the

children's amicus attorney as well as Mother's attorney, Steven Engelhardt.

Mother filed in January 2012 a second amended emergency motion to modify the parent-child relationship, an application for a temporary restraining order, and a request for temporary orders and injunctions, citing events that transpired after the parties executed the settlement agreement. Mother's second amended emergency motion to modify sought to amend the trial court's July 22, 2009 custody order, which is not included in the record.

The trial court signed an agreed order to modify the parties' child custody arrangements on February 9, 2012. The agreed order incorporated by reference the parties' January 2012 settlement agreement and granted in part the agreement's requested modifications. The agreed order included a Mother Hubbard clause stating that "all relief requested in this case and not expressly granted is denied." The agreed order did not mention or otherwise purport to resolve the issues raised in Mother's second amended emergency motion to modify.

Shortly thereafter, the trial court severed Mother's second amended emergency motion to modify into a separate action, and signed an emergency temporary order to modify the parent-child relationship. The trial court's emergency temporary order granted in part the relief requested in Mother's second amended emergency motion to modify and limited Father's interaction with the children to periods of supervised access.

The parties continued to litigate custody arrangements in the severed action. Following the emergency temporary order, Father filed an amended counter-petition for modification of conservatorship and a motion for sanctions against Mother. Father filed a second amended counter-petition in December 2013.

The present dispute focuses on events that transpired after Mother filed a

notice of nonsuit in the severed action in January 2014. In conjunction with the notice of nonsuit, Mother filed a motion to dismiss and alternative plea to the jurisdiction seeking the dismissal of Father's counterclaims in the severed action. Contending that "[t]he court is without jurisdiction to entertain" Father's claims, Mother's motion asserted that "[t]here is no issue surviving the February 9, 2012 entry that can now be tried." The trial court held a hearing; it orally denied Mother's motion to dismiss and alternative plea to the jurisdiction.

Kelly L. Fritsch, the children's amicus attorney, filed a motion in the severed action on January 27, 2014, seeking a partial dismissal of Father's conservatorship claims. Fritsch asserted that Father failed to file an affidavit as necessary to modify a conservatorship order less than one year from the order's date. *See* Tex. Fam. Code Ann. § 156.102 (Vernon 2014).

Mother re-argued her motion to dismiss and alternative plea to the jurisdiction before the trial court on January 29, 2014. At the hearing, Mother asserted only that Father's pleadings lacked the affidavit necessary to modify a conservatorship order.

The trial court orally granted Mother's motion to dismiss and alternative plea to the jurisdiction. Counsel for Mother drafted an order signed by Judge Lombardino on March 3, 2014. The order included eight paragraphs of factual findings that based the dismissal of Father's claims in the severed action on the terms of the February 9, 2012 order:

> The parties to this action entered into an Irrevocable Settlement Agreement on January 6, 2012.
>
> [Mother] filed a Second Amended Emergency Motion to Modify Parent-Child Relationship, Application for Temporary Restraining Order, Request for Temporary Orders and Injunction on January 23, 2012.
>
> The parties signed and filed an Agreed Order in Suit to Modify Parent-Child Relationship that was signed by the Court on February 9, 2012.

> All events that occurred from the date of the Irrevocable Settlement Agreement on January 6, 2012 through the signing by the Court of the Agreed Order in Suit to Modify Parent-Child Relationship on February 9, 2012 were resolved at the time the February 9, 2012 order was signed by the Court.
>
> Therefore, the Agreed Order in Suit to Modify Parent-Child Relationship that was signed by the Court on February 9, 2012 was not based on a mediated settlement agreement or other type of agreement.
>
> The Agreed Order in Suit to Modify Parent-Child Relationship signed by the Court on February 9, 2012 fully and finally disposed of all then-pending claims, requests for relief and/or pleadings, including the Second Amended Emergency Motion to Modify Parent-Child Relationship, Application for Temporary Restraining Order, Request for Temporary Orders and Injunction filed by [Mother] on January 23, 2012, and became an appealable order.
>
> No appeal was taken pertaining to the Agreed Order in Suit to Modify Parent-Child Relationship signed by the Court on February 9, 2012 and no timely post-judgment motion was filed to extend the plenary power of the court or the appellate timetable applicable to this case. As such, the Order became final for appellate purposes thirty days after being signed by the Court on February 9, 2012.
>
> All actions taken by the Court after February 9, 2012, are void since the court lacked jurisdiction and no action was taken to extend the Court's plenary power. The Order of Severance signed March 5, 2012 was a nullity as there were no live pleadings to sever.

Judge Lombardino recused himself from the case on March 17, 2014.

II. Nunc Pro Tunc Judgment and Father's Appeal

Amicus attorney Fritsch filed in May 2016 a motion to correct record of judgment pursuant to Texas Rule of Civil Procedure 316, seeking to change Judge Lombardino's March 2014 order on Mother's motion to dismiss and alternative plea to the jurisdiction.

According to Fritsch's May 2016 motion, the March 2014 order's reference to the trial court's "purported lack of jurisdiction" provided a basis for Father to

pursue a lawsuit against Fritsch and Engelhardt to recover the attorney's fees he had paid — payments Father was required to make under the terms of the parties' January 2012 settlement agreement. Contending that "[t]here is nothing in the record indicating that the Court granted [Mother's] Plea to the Jurisdiction," Fritsch asserted that the March 2014 order's "basis for dismissal was the failure of [Father] to have the appropriate pleadings to support the relief sought pursuant to [Texas Family Code section] 156.102." Fritsch asked the trial court to sign a nunc pro tunc order "grant[ing] the dismissal, not a plea to the jurisdiction."

The trial court held a hearing in May 2016 and orally granted Fritsch's motion to correct record of judgment. The trial court then signed three orders granting Fritsch's requested relief.

- The trial court signed an order granting Fritsch's motion to correct record of judgment on June 2, 2016. The order included the parties' original case number, with the case number assigned to the severed action included in parentheses.
- The trial court signed an identical order on June 30, 2016. This order included only the case number assigned to the severed action.
- The trial court signed on June 30, 2016, a reformed order on Mother's motion to dismiss and alternative plea to the jurisdiction. The order stated only that Mother's "Motion to Dismiss is granted."

Father timely appealed the trial court's three June 2016 orders.

Fritsch and Engelhardt filed a motion to correct, modify, or reform the trial court's nunc pro tunc judgment in July 2016. At the hearing held on their motion, Fritsch referenced Father's lawsuit to collect the attorney's fees Father had paid to Fritsch and Engelhardt. Fritsch stated that the judge in that suit was "not happy" with the prior nunc pro tunc judgment and was unable to discern what the three June 2016 orders purported to change in the March 2014 order. Fritsch requested that the trial court sign a subsequent nunc pro tunc judgment explicitly removing all factual

findings from the March 2014 order.

The trial court signed three orders on September 29, 2016, granting the requested relief:

- an order granting Fritsch's and Engelhardt's motion to correct, modify, or reform the nunc pro tunc judgment;
- a "reformed order on motion to correct record of judgment (nunc pro tunc)" that explicitly removed the eight paragraphs of factual findings contained in the March 2014 order; and
- a "reformed order on motion to dismiss or, in the alternative, plea to the jurisdiction — nunc pro tunc." The order stated only that Mother's "Motion to Dismiss is granted."

Father filed a request for findings of fact and conclusions of law pertaining to the trial court's September 2016 orders. The trial court did not issue additional findings or conclusions.

Father timely appealed the trial court's September 2016 orders. On Father's motion, the appeal addressing the September 2016 orders was consolidated with the appeal addressing the June 2016 orders.

Father's appeal challenges the (1) legal validity of the trial court's six 2016 orders; (2) trial court's resolution of certain evidentiary issues at the nunc pro tunc hearing; and (3) trial court's failure to issue findings of fact and conclusions of law. Father's arguments addressing the validity of the trial court's nunc pro tunc judgment assert that:

- The trial court erred by granting a nunc pro tunc judgment that corrected judicial errors rather than mere clerical errors;
- alleged mistake or fraud does not provide a sufficient basis to grant a nunc pro tunc judgment; and
- amicus attorney Fritsch did not show by clear and convincing evidence that Judge Lombardino intended the result effectuated by the six 2016 orders.

Only Father filed an appellate brief in this court. Mother, Fritsch, and Engelhardt have not filed briefs or otherwise responded to Father's arguments on appeal.[1]

ANALYSIS

This appeal focuses on the proper characterization of the six 2016 orders under Texas Rules of Civil Procedure 316 and 329b(f).

A trial court has "plenary power to . . . vacate, modify, correct, or reform [its] judgment within thirty days after the judgment is signed." Tex. R. Civ. P. 329b(d); *In re A.M.C.*, 491 S.W.3d 62, 66 (Tex. App.—Houston [14th Dist.] 2016, no pet.). When the trial court's plenary power expires, a judgment can be set aside only through a bill of review. Tex. R. Civ. P. 329b(f). A nunc pro tunc judgment permits the trial court to "at any time correct a clerical error in the record of a judgment." *Id*. (citing Tex. R. Civ. P. 316 ("[c]lerical mistakes in the record of any judgment may be corrected by the judge in open court according to the truth or justice of the case")). A party may appeal an order granting judgment nunc pro tunc, but may raise only complaints that would not apply to the original judgment. *See* Tex. R. App. P. 4.3(b); *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 390-91 (Tex. 2008).

A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered. *In re A.M.C.*, 491 S.W.3d at 67. A clerical error does not result from judicial reasoning, evidence, or determination. *Morris v. O'Neal*, 464 S.W.3d 801, 810 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Examples of clerical errors include an incorrectly stated date or damages amount, or an order that included only a partial scan of a document it incorporates.

[1] Fritsch filed an appearance in this court as the appellee. Neither Mother nor Engelhardt filed an appearance.

See In re A.M.C., 491 S.W.3d at 67-68 (clerical error where scanner failed "to pick up entire page of the enforcement order"); *Fiske v. Fiske*, No. 01-03-00048-CV, 2004 WL 1847368, at *5 (Tex. App.—Houston [1st Dist.] Aug. 19, 2004, no pet.) (mem. op.) (nunc pro tunc order properly corrected judgment awarding "$50,00.00" in damages to read "$50,000.00"); *In re Taylor*, 113 S.W.3d 385, 393 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("a judgment nunc pro tunc may be issued to correct the date an order was signed if the original date is shown to have been incorrect").

If the same trial judge who signed the original judgment also signed an order granting the subsequent nunc pro tunc motion, we presume that the judge's recollection supports the finding of a clerical error. *In re A.M.C.*, 491 S.W.3d at 67. Here, Judge Lombardino signed the March 2014 order and recused himself from the case shortly thereafter. Because Judge Lombardino did not sign the subsequent nunc pro tunc orders, the presumption does not apply to our analysis.

A nunc pro tunc judgment may not be used to correct judicial errors. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). A judicial error occurs in the rendering, rather than the entering, of a judgment and arises from a mistake of law or fact that requires judicial reasoning to fix. *Id.*; *see also In re A.M.C.*, 491 S.W.3d at 67. Substantive changes to an order are judicial errors that cannot be remedied through a nunc pro tunc judgment. *Mathes v. Kelton*, 569 S.W.2d 876, 878 (Tex. 1978) (a nunc pro tunc judgment that changed the party entitled to possession of certain property "materially altered the substance" of the prior order and "[could] not be validly accomplished"); *Whitmire v. Lilly*, No. 14-07-00993-CV, 2008 WL 4308557, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, no pet.) (mem. op.) (nunc pro tunc judgment that "delete[d] several portions of the court's first judgment" impermissibly corrected judicial errors); *Roman Catholic Diocese of*

Dallas v. Cty. of Dallas Tax Collector, 228 S.W.3d 475, 479 (Tex. App.—Dallas 2007, no pet.) (nunc pro tunc judgment that "impos[ed] an additional two years of tax liability" impermissibly corrected a judicial error); *Riner v. Briargrove Park Prop. Owners*, 976 S.W.2d 680, 682-83 (Tex. App.—Houston [1st Dist.] 1997, no writ) (nunc pro tunc judgment improper because its modifications were substantive and material, including reinstating a lien to pay for attorney's fees).

Determining whether an error is judicial or clerical is a question of law. *In re A.M.C.*, 491 S.W.3d at 67. To resolve this issue the court looks to the judgment actually rendered, not the judgment that should have been rendered. *Id*. The trial court may correct a written judgment only if it incorrectly states the judgment actually rendered. *Id*. "When a trial court orally renders a judgment that disposes of some of the issues in a party's pleading, but is silent on others, a later signed judgment that disposes of an additional issue, while only a 'written memorandum' of the oral judgment, is a rendition of judgment on the issue addressed for the first time in the written judgment." *Wittau v. Storie*, 145 S.W.3d 732, 737 (Tex. App.—Fort Worth 2004, no pet.) (per curiam); *see also Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970) ("Judicial errors committed in the rendition of judgment must be corrected by appeal, writ of error or bill of review."). The later rendition of judgment on the additional issue, if erroneous, gives rise to a judicial error. *Wittau*, 145 S.W.3d at 737.

Applying these standards, we conclude that the trial court's six 2016 orders substantively and materially changed the March 2014 order. The six 2016 orders deleted eight paragraphs of factual findings in the March 2014 order and changed the legal basis for the trial court's dismissal of Father's claims. These substantive alterations purported to remedy judicial errors and exceeded the scope of a nunc pro tunc judgment. *See Mathes*, 569 S.W.2d at 878; *Whitmire*, 2008 WL 4308557, at

*2; *Roman Catholic Diocese of Dallas*, 228 S.W.3d at 479; *Riner*, 976 S.W.2d at 682-83.

Because we conclude that the trial court's nunc pro tunc judgment was not legally valid, we do not address Father's challenges to the trial court's resolution of certain evidentiary issues or its failure to issue findings of fact and conclusions of law.

CONCLUSION

We conclude that the trial court's six 2016 orders attempted to remedy judicial errors and exceeded the permissible scope of a nunc pro tunc judgment. We vacate the six orders and reinstate the trial court's March 3, 2014 order.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Donovan, and Jewell.