Motion for Rehearing Granted; Petition for Writ of Mandamus Denied in part and Conditionally Granted in part; Memorandum Opinion of September 12, 2017 Withdrawn; Substitute Memorandum Opinion filed October 10, 2017; and Supplemental Motion for Rehearing Denied.

In The

Fourteenth Court of Appeals

NO. 14-17-00614-CV

IN RE WILMA REYNOLDS AND CARL GORDON, Relators

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
300th District Court
Brazoria County, Texas
Trial Court Cause No. 48170

SUBSTITUTE MEMORANDUM OPINION

On July 27, 2017, relator Wilma Reynolds filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (West 2004); *see also* Tex. R. App. P. 52. She asked this court to compel the Honorable C.G. Dibrell,

visiting judge of the 300th District Court of Brazoria County, to vacate his order denying Wilma's motion for judgment nunc pro tunc and a separate order imposing sanctions. Both orders were signed on July 19, 2017.

On September 12, 2017, we issued a memorandum opinion denying in part and granting in part the petition for writ of mandamus.

On September 15, 2017, Wilma and her attorney, Carl Gordon, filed a motion requesting this court to treat Gordon as a party in this original proceeding and to direct the trial court to set aside the sanctions order it issued against Gordon.[1] We treat this motion as a motion for rehearing.

We grant the September 15 motion for rehearing, withdraw our memorandum opinion of September 12, 2017, and issue this substitute memorandum opinion.

Relators have not shown that the trial court clearly abused its discretion by denying the nunc pro tunc motion. However, the record shows that the trial court imposed sanctions for prosecuting a bill of review proceeding after the court's plenary jurisdiction had expired. The sanctions order is therefore void. Accordingly, we deny the petition for writ of mandamus as to the order denying the motion for judgment nunc pro tunc, but we conditionally grant the petition as to the sanctions order.

[1] *See Braden v. Downey*, 811 S.W.2d 922, 928 n. 6 (Tex. 1991) ("The petition, however, clearly asserts a claim for relief on behalf of the attorney, and the attorney would have no jurisdictional bar to adding himself as the relator. We will therefore, under these circumstances, treat the attorney, like the real-party-in-interest, as a party to this mandamus proceeding.").

FACTUAL AND PROCEDURAL BACKGROUND

Wilma and David Reynolds filed for divorce in July 2008. The property division was contested. At the conclusion of the April 22, 2009 bench trial, the trial court made a written division of the property and orally stated its division of the property in accord with the written division.

On May 18, 2009, the trial court signed the final decree of divorce, which included a division of the property. Wilma appealed, but our court affirmed the divorce decree because Wilma waived her right to appeal by accepting benefits of that judgment. *See Reynolds v. Reynolds*, No. 14-09-00720-CV, 2010 WL 3418209 (Tex. App.—Houston [14th Dist.] Aug. 31, 2010, pet. denied) (mem. op.).

Since then, Wilma and her attorney, Gordon, have repeatedly attempted to challenge the divorce decree's property division though numerous trial court proceedings and have filed more than a dozen appellate proceedings in this court docketed as Case Nos. 14-10-00535- CV; 14-10-00564-CV; 14-10-00951-CV; 14-11-00002-CV; 14-11-00174-CV; 14-11-00626-CV; 14-11-01097-CV; 14-12-00379-CV; 14-12-00379-CV; 14-12-00440-CV; 14-13-00323-CV; 14- 13-00589-CV; 14-13-00871-CV; 14-13-00924-CV; 14-13-01029-CV; 14-14-00080-CV; 14-14- 00329-CV; 14-14-00624-CV; and 14-14-00875-CV.

More than eight years after the divorce decree was signed, Wilma made another attempt to re-litigate the property division. Wilma filed a motion for judgment nunc pro tunc on July 10, 2017. She asked the trial court to modify certain provisions of the

divorce decree based on asserted clerical errors that, according to relators, do not conform to the trial court's oral announcement at trial.

On July 17, 2017, David filed a response to Wilma's motion for judgment nunc pro tunc. The response asked the trial court to deny the motion and to impose sanctions against both Wilma and her attorney Carl Gordon for prosecuting an allegedly frivolous case.

At the conclusion of a hearing on July 19, 2017, the trial court signed an order denying Wilma's motion for judgment nunc pro tunc. He also signed a sanctions order that, among other things, directed Gordon to pay a penalty and attorney's fees totaling $40,000.

MANDAMUS STANDARD

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). The appellate court reviews the trial court's application of the law de novo. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). The relator must establish that the trial court could reasonably have reached only one conclusion. *Id*.

A relator has no remedy by appeal for a trial court's erroneous denial of a motion for judgment nunc pro tunc, and such denial may therefore be reviewed by mandamus. *See In re Bridges*, 28 S.W.3d 191, 195–96 (Tex. App.—Fort Worth 2000, orig. proceeding) (citing *Shadowbrook Apartments v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990)); *see also Ex parte Florence*, 319 S.W.3d 695, 696 (Tex. Crim. App. 2010) (the appropriate remedy for denial of a motion for judgment nunc pro tunc is to file an application for writ of mandamus in a court of appeals).

Further, when an order is void, mandamus relief is appropriate without regard to whether relator lacks an adequate appellate remedy. *In re Vaishangi, Inc*., 442 S.W.3d 256, 261 (Tex. 2014) (orig. proceeding).

ANALYSIS

I. Nunc Pro Tunc[2]

We first address relators' arguments assailing the trial court's order denying her motion for judgment nunc pro tunc based on her contention that clerical errors exist because the written divorce decree differs from the trial court's oral pronouncements.

[2] Wilma's motion for judgment nunc pro tunc was not barred by her eight-year delay in bringing it. "[T]he trial court may correct clerical errors in the judgment *at any time* by using a judgment nunc pro tunc." *Barton v. Gillespie*, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing Tex. R. Civ. P. 316, 329b(f); *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986)) (emphasis added). "Mere lapse of time (delay) will not bar the right to urge a motion for judgment nunc pro tunc." *Commissioners' Court of Tarrant County v. Emerson*, 441 S.W.2d 889, 894 (Tex. Civ. App.—Fort Worth 1969, writ ref'd n.r.e.). "However, if in addition to delay there are circumstances which create interests in third parties who have acted in good faith the motion may be defeated by the doctrine of laches." *Id*. David, however, has not asserted laches as a defense.

"After the 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). "However, the trial court cannot correct a judicial error made in rendering a final judgment." *Id*. "The purpose of a judgment nunc pro tunc is to correct a clerical error in the judgment after the court's plenary power has expired." *In re Broussard*, 112 S.W.3d 827, 833 (Tex. App.—Houston [14th Dist.] 2003, no pet.). "The court can only correct the entry of a final written judgment that incorrectly states the judgment actually rendered." *Id*. "A judgment is 'rendered' when the trial court's decision is announced either orally in open court or by memorandum filed with the clerk." *Delaup v. Delaup*, 917 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1996, no writ). "A clerical error is an error which does not result from judicial reasoning or determination." *Id*. "A judicial error is one which occurs in the rendering, as opposed to the entering, of a judgment." *Id.*

A. Standard

For a judgment nunc pro tunc to be properly granted, the evidence must be clear and convincing that a clerical error was made. *Barton*, 178 S.W.3d at 127. An application for a judgment nunc pro tunc requires "the trial court to determine what the facts were at the time the original judgment was rendered, and a judgment nunc pro tunc should be granted only if the evidence is clear, satisfactory and convincing that a clerical error was made." *Davis v. Davis*, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ). Proof of a variance between the judgment rendered and the judgment entered is not enough to require correction by judgment nunc pro tunc; there must also be a fact finding, supported by evidence or the trial judge's personal recollection, that the variance

resulted from a clerical error. *Kostura v. Kostura*, 469 S.W.2d 196, 199 (Tex. App.–Dallas 1971, writ ref'd); *Kaufman v. Kaufman*, No. 05-96-01123-CV, 1998 WL 519442, at *2 (Tex. App.—Dallas Aug. 24, 1998, pet. denied) (mem. op.).

We will consider the trial court's findings of fact and conclusions of law in determining whether the asserted clerical errors exist. *Cf. In re J.G.Z.*, 963 S.W.2d 144, 148 n.15 (Tex. App.—Texarkana 1998, no pet.) (relying on trial court's findings of fact and conclusions of law to determine whether an order was intended to be a judgment). Findings of fact and conclusions of law explain the reasons for the judgment. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). In a bench trial, the trial court's findings of fact have the same weight as a jury's verdict. *CA Partners v. Spears,* 274 S.W.3d 51, 69 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Wilma is estopped to challenge the trial court's findings of fact and conclusions of law. *See Reynolds*, 2010 WL 3418209, at * 2–4.

Whether an error is clerical or judicial is a question of law that we review de novo. *See Tex. Dep't of Pub. Safety v. Moore,* 51 S.W.3d 355, 358 (Tex. App.—Tyler 2001, no pet.); *Escobar*, 711 S.W.2d at 232.

B. The Alleged Clerical Errors

Relators contend that the written divorce decree deviates from the oral property division announced in court in the following respects.

1. QTP and QIP awards

In the oral property division announcement, the trial court references its written division of the property. The written division identifies each property item by number and indicates whether it is awarded to the husband or the wife.

Item no. 33 in the written division is Quantlab Incentive Partners I, LLC (QIP), which was assigned a value of $5,274.50. Item no. 34 is Quantlab Trading Partners US, LP (QTP), which was assigned a value of $600,000. The written division awards both of these interests to the husband.

With respect to the QIP and QTP award, the trial judge stated orally as follows:

> And then with regard to 33 and 34, I have, based upon the testimony, assigned the value on each of those as it is reflected there and find that there is no other value in that there is no vesting. I have read both of the [QIP] agreements represented by Petitioner's Exhibit 4 and Petitioner's Exhibit 5 and find that there is no vesting at this point; therefore, no interest beyond the capital contributions that have been made. Since those are the only testimony before me or evidence before me, those are the amounts—that is the amount that was assigned as the value to each No. 33 and 34, being Quantlab Incentive Partners I, LLC, as No. 33; and Quantlab Trading Partners, US LLP being No. 34. And based upon the division, the overall values, I will find that this represents a 50-50 division, which is fair and equitable based on the testimony presented in this case.

The divorce decree awards David 100% of the QIP and QTP interests.

Relators contend that the divorce decree deviates from the oral property division announced in open court because it awards David not only the unvested interests in QTP and QIP, but also the bonuses and funds that allegedly remained in accounts controlled

by the entities. We reject this contention because there is no conflict between the oral property division and the written divorce decree. The written division, which the trial court adopted as part of its oral judgment, and the divorce decree both award David all of the QIP and QTP interests.

Additionally, the divorce decree's award of the QIP and QTP interests is stated verbatim in the trial court's findings of fact and conclusions of law. The findings of fact and conclusions of law demonstrate that the trial court intended this award to be part of the judgment it rendered. Accordingly, the trial court did not abuse its discretion by concluding that its inclusion of this award in the divorce decree was not a clerical error.

2. Bonuses and other employment benefits

The divorce decree awards to David:

> All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of the husband's past, present, or future employment, including but not limited to the E401k Plan from Fidelity Quantlab Financial 401(k) Plan.

Relators argue that this award should be stricken except for the language awarding David "the E401k Plan from Fidelity Quantlab Financial 401(k) Plan"[3] because it is not stated in the oral property division. However, this award in the written divorce decree is stated

[3] The Fidelity Quantlab Financial 401(k) Plan is identified as item no. 40 in the written division, which is awarded to the husband.

verbatim in the trial court's findings of fact and conclusions of law; they demonstrate that the trial court intended this award to be part of the judgment it rendered. Accordingly, the trial court did not abuse its discretion by concluding that its inclusion of this award in the divorce decree was not a clerical error.

Further, relators have not produced evidence that David had any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, or disability plan other than the Fidelity Quantlab Financial 401(k) Plan. Therefore relators have not shown that the modification to the divorce decree Wilma seeks is material.

3. Stocks, bonds, and securities

The divorce decree awards David: "All stocks, bonds, and securities, together with all dividends, splits, and other rights and privileges in Husband's name." Realtors argue that this award should be stricken from the divorce decree because it is not stated in the oral property division. However, this award of the divorce decree is stated verbatim in the trial court's findings of fact and conclusions of law; they demonstrate that the trial court intended this award to be part of the judgment it rendered. Accordingly, the trial court did not abuse its discretion by concluding that its inclusion of this award in the divorce decree was not a clerical error.

4. Insurance policies

The divorce decree awards to David: "All policies of life insurance (including cash values) insuring the husband's life, including but not limited to the Ameriprise Financial Services, Inc., RiverSource Variable Universal Life IV Insurance, account

number ending in 004." Relators argue that this award should be stricken, except for the language awarding David "the Ameriprise Financial Services, Inc., RiverSource Variable Universal Life IV Insurance," because the oral property division does not reference any other life insurance policies. However, this award of the divorce decree is stated verbatim in the trial court's findings of fact and conclusions of law; they demonstrate that the trial court intended this award to be part of the judgment it rendered. Accordingly, the trial court did not abuse its discretion by concluding that its inclusion of this award in the divorce decree was not a clerical error.

Further, relators have not produced evidence that David had any life insurance policies other than the Ameriprise Financial Services, Inc. policy, so relators have not shown that the modification to the divorce decree she seeks is material.

In sum, the trial court's conclusion that the divorce decree does not contain the alleged clerical errors is well supported by its written division and its findings of fact and conclusions of law, with which the divorce decree is entirely consistent. Relators have not produced clear and convincing evidence of any clerical errors. Accordingly, relators have not established that the trial court clearly abused its discretion by denying Wilma's motion for judgment nunc pro tunc.

II. Sanctions

The sanctions order is predicated on conduct by both Wilma and her attorney, Gordon. Although the sanctions order is not completely clear, it appears to impose sanctions on both Wilma and Gordon.[4]

A trial court may not grant a motion for sanctions after its plenary jurisdiction has expired. *See Scott & White Memorial Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996); *see also Moore v. Novark*, No. 14-93-00794-CV, 1995 WL 571854, at *4 (Tex. App.—Houston [14th Dist.] Sept. 28, 1995, writ denied) (mem. op., not designated for publication) ("A court has no power to order sanctions after its plenary power has expired"); *In re Brown*, No. 2-07-071-CV, 2007 WL 2460361, at *3–6 (Tex. App.—Fort Worth Aug. 29, 2007, orig. proceeding) (mem. op.) (holding that a post-judgment $1,000 sanction award was void because it was issued after the plenary jurisdiction of the trial court had expired); *Wells v. Wells*, No. 03-99-00392-CV, 2000 WL 190530, at *3 (Tex. App.—Austin Feb. 17, 2000, no pet.) (mem. op., not designated for publication) (holding that order which imposed sanctions for filing of a groundless motion for judgment for nunc pro tunc is void because it was issued after the plenary power of the trial court had expired).

It is clear from the record that the trial court's order imposed sanctions based upon conduct encompassing both (1) filing the most recent motion for judgment

[4] One portion of the sanctions order awards $30,000 in attorney's fees to David but does not make clear whether payment of this fee amount is exclusively a sanction against attorney Gordon or is instead a sanction directed at both Wilma and Gordon. The order also imposes as a sanction certain limitations on Gordon's ability to make future court filings on Wilma's behalf.

nunc pro tunc, and (2) prior conduct and filings in other proceedings for which the court's plenary jurisdiction had expired. David's counsel stated at the hearing that he was seeking attorney's fees under Rule 13 for multiple proceedings. Among other things, the sanctions order states that Gordon prosecuted an unsuccessful bill of review:

> CARL GORDON prosecuted a motion for new trial in connection with the judgment, sought modification of the judgment, prosecuted an unsuccessful direct appeal of the judgment and **prosecuted an unsuccessful bill of review from the judgment**. All of these actions were taken AFTER GORDON had accepted the benefits of the judgment.

(emphasis added). The sanctions order imposed the following sanctions for this conduct:

> CARL GORDON is ORDERED to pay a penalty of ten thousand dollars in the form of a cashier's check payable to the District Clerk of Brazoria County, Texas, for deposit into the general funds of Brazoria County, Texas. . . .
>
> IT IS FURTHER ORDERED that DAVID REYNOLDS is awarded a judgment of thirty thousand dollars ($30,000) for attorneys' fees incurred in connection with this litigation, for the benefit of his attorneys, Lenette Terry and Kelly McClendon.

Notwithstanding a history of abusive litigation conduct on the part of relators, we conclude that the challenged sanctions order cannot stand.

"[W]hen a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *CHRISTUS Health Gulf*

Coast v. Carswell, 505 S.W.3d 528, 540 (Tex. 2016). The only evidence that David's counsel offered in support of the $10,000 penalty and the $30,000 award of attorney's fees in the sanctions order is the statement of his counsel at the hearing that the hourly billing rate of the two attorneys who worked on the matter is $400 and that they spent over 100 hours defending against Wilma's appeal of the trial court's denial Wilma's bill of review, which equals the $40,000 award in the sanctions order. Thus, it is clear that the trial court sanctioned relators for prosecuting the bill of review proceeding.

The trial court denied Wilma's bill of review in 2015 or earlier and our court affirmed the denial on July 23, 2015. *See Reynolds v. Reynolds*, No. 14–14–00080–CV, 2015 WL 4504626, at *4 (Tex. App.–Houston [14th Dist.] July 23, 2015, no pet.) (mem. op.). Thus, the trial court's plenary jurisdiction to impose sanctions in connection with the bill of review proceeding has long since expired. Because the trial court's order imposed sanctions for prosecuting the bill of review proceeding after the court's plenary jurisdiction had expired, it is void.

CONCLUSION

We deny the petition for writ of mandamus as to the order denying the motion for judgment nunc pro tunc because relators have not shown a clear abuse of discretion. We conditionally grant the petition as to the sanctions order and direct that it be vacated. The writ of mandamus shall issue only if the sanctions order is not vacated.

On September 27, 2017, relators filed a motion for rehearing (supplemental motion for rehearing) asking this court to direct the trial court to enter a judgment nunc pro tunc. We deny this supplemental motion for rehearing.[5]

PER CURIAM

Panel consists of Justices Boyce, Christopher, and Jamison.

[5] Not only are relators' arguments in this motion without merit, but some are new. Generally, appellate courts do not do not address new arguments presented in a rehearing. *See e.g.*, *CMA-CGM (Am.) Inc. v. Empire Truck Lines Inc*., 285 S.W.3d 9, 18 (Tex. App.—Houston [1st Dist.] 2008, no pet.).