Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00767-CV

Maria Christina **DIAZ**,
Appellant

v.

Felipe G. **DIAZ**,
Appellee

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 1992-CI-04150
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

Delivered and Filed: November 12, 2020

JUDGMENT NUNC PRO TUNC VACATED IN PART

Appellant Maria Christina Diaz appeals the trial court's order entering a judgment nunc pro tunc to correct a legal description contained in a divorce decree. We vacate the portion of the judgment nunc pro tunc that amended the subject property's legal description and reinstate the original judgment on that point. We do not disturb the portion of the judgment nunc pro tunc that corrects the subject property's street address.

BACKGROUND

Maria and her ex-husband, appellee Felipe G. Diaz, divorced in 1992. During their marriage, they jointly owned real property located at 3215 South Flores Street in San Antonio. The deed conveying the subject property to Maria and Felipe described it as "Lots 8 and 9, Block 2, New City Block 2655, in the City of San Antonio, Bexar County, Texas" but did not specify the property's address. Lots 8 and 9 are contiguous, and there are no physical structures separating the two lots.

When Maria and Felipe divorced, the final decree of divorce ("the 1992 decree") awarded Felipe "[t]he property and all improvements located thereon at Lot Eight (8), Block Two (2), New City Block Two Thousand Six Hundred Fifty Five (2655), according to the map, plat, or deed of records of Bexar County, Texas, and more commonly known as 3212 S. Flores St., San Antonio, Bexar County, Texas." After the divorce petition was filed, Maria executed a special warranty deed conveying the property to Felipe, and the legal description in the deed matched the 1992 decree. Maria's then-attorney drafted both the 1992 decree and the post-decree deed. Neither document refers to Lot 9, and both documents identify the property as being located at 3212 South Flores rather than 3215 South Flores. Felipe, who did not have an attorney during the divorce, signed the 1992 decree.

After the divorce, Felipe constructed an apartment building that sits on both Lots 8 and 9. He also paid all of the taxes on both lots until 2018, when Maria paid a portion of the taxes. The record shows that during some tax years, the Bexar County Appraisal District identified Lots 8 and 9 as one piece of property that belonged to Felipe alone, but in other tax years, it designated Lot 8 as property that belonged to Felipe and Lot 9 as property that was jointly owned by Maria and Felipe.

When Felipe tried to sell 3215 South Flores in 2018, he discovered the 1992 decree and subsequent deed did not specifically identify Lot 9 as his property. He filed a motion for judgment nunc pro tunc, arguing the 1992 decree contained two clerical errors that required correction: (1) the identification of the property's address as 3212 South Flores; and (2) the failure to include Lot 9 in the legal description of the property awarded to Felipe. In response, Maria did not challenge the correction of the address, but argued the decree "failed to dispose of the parties' marital interest in" Lot 9 and that failure could not properly be altered in a judgment nunc pro tunc.

After an evidentiary hearing, the trial court signed an order granting Felipe's motion for judgment nunc pro tunc. It also signed a Final Decree of Divorce Nunc Pro Tunc that listed the property awarded to Felipe as:

> THE PROPERTY AND ALL IMPROVEMENTS LOCATED THEREON AT LOT EIGHT (8) AND NINE (9), BLOCK TWO (2), NEW CITY BLOCK TWO THOUSAND SIX HUNDRED FIFTY FIVE (2655), ACCORDING TO THE MAP, PLAT, OR DEED OF RECORDS OF BEXAR COUNTY, TEXAS AND MORE COMMONLY KNOWN AS 3215 S. FLORES ST., SAN ANTONIO, BEXAR COUNTY, TEXAS.

Maria filed a motion to vacate, modify, correct, or reform the order for judgment nunc pro tunc and alternative motion for the new trial. The trial court denied Maria's post-judgment motion, and Maria timely filed this appeal.

ANALYSIS

In three issues, Maria argues the trial court could not properly add Lot 9 to the description of the property awarded to Felipe through either a judgment nunc pro tunc or a clarification of the 1992 decree. She does not challenge the correction of the property's address.

Judgment Nunc Pro Tunc

In her first two issues, Maria challenges the evidentiary and jurisdictional bases for the challenged portion of the trial court's nunc pro tunc order. We consider these issues together.

Standard of Review and Applicable Law

After the trial court loses plenary power over a matter, it generally lacks jurisdiction to act in that matter, and any additional orders it issues after that point are typically void. *Akinwamide v. Transp. Ins. Co.*, 499 S.W.3d 511, 520 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); *see also* TEX. R. CIV. P. 329b(d). However, even after its plenary power expires, a trial court may correct clerical errors in a judgment by issuing a judgment nunc pro tunc. TEX. R. CIV. P. 316; *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). A clerical error is an error "made in *entering* final judgment." *Escobar*, 711 S.W.2d at 231 (emphasis in original). A trial court cannot, however, "correct a judicial error made in *rendering* a final judgment" through a judgment nunc pro tunc. *Id.* (emphasis in original). A judicial error arises from a legal or factual mistake that requires judicial reasoning to correct, while a clerical error involves an incorrect transcription or entry of the judgment actually rendered. *America's Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 876–77 (Tex. App.—San Antonio 1995, writ denied).

"[W]hat judgment the trial court actually *rendered* initially is a question of fact for the trial court, and it is only after the trial court makes a factual determination of what it actually *rendered* that the judicial or clerical question becomes a question of law on appeal." *Killam Ranch Props., Ltd. v. Webb County*, 376 S.W.3d 146, 159 (Tex. App.—San Antonio 2012, pet. denied) (emphasis in original, quotation marks omitted). We review the trial court's determination of what judgment was actually rendered for legal and factual sufficiency. *In re R.P.T.*, No. 04-03-00475-CV, 2005 WL 418220, at *2 (Tex. App.—San Antonio Feb. 23, 2005, pet. denied) (mem. op.). However, whether an error is clerical or judicial is a legal issue we review de novo. *In re Marriage of Russell*, 556 S.W.3d 451, 457 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding). In reviewing this question, we must look to the judgment the trial court actually rendered, not what it could have or should have rendered. *Escobar*, 711 S.W.2d at 231.

It is well-established "that judgment is *rendered* when a trial court's decision is officially announced." *Davis v. Davis*, 647 S.W.2d 781, 782 (Tex. App.—Austin 1983, no writ) (emphasis in original). "In order to issue a judgment nunc pro tunc, there *must* be some evidence that the judgment the trial judge actually rendered is not correctly represented in the judgment she signed and entered of record." *Galvan*, 897 S.W.2d at 877 (emphasis in original). "There should be no entry of a judgment nunc pro tunc unless evidence is adduced to show that the court did, in fact, announce or render the judgment which the nunc pro tunc judgment purports to evidence." *In re R.P.T.*, 2005 WL 418220, at *3. A nunc pro tunc judgment that corrects a judicial error after plenary power has expired is void for lack of jurisdiction. *In re Marriage of Russell*, 556 S.W.3d at 457.

Application

Address of the Property

We hold the trial court had jurisdiction to correct the street address of the property through a judgment nunc pro tunc. There is no evidence that 3212 South Flores ever belonged to Maria and Felipe during their marriage.[1] In contrast, both Maria and Felipe testified they owned 3215 South Flores during their marriage and that the 1992 decree disposed of that property, at least in part. *In re M & O Homebuilders, Inc.*, 516 S.W.3d 101, 110 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding), *mand. denied sub nom. In re Elizondo*, 544 S.W.3d 824 (Tex. 2018) ("Evidence of the judgment actually rendered may come from witness testimony[.]"). As a result, we hold the evidence supports the trial court's implied finding that the 1992 decree actually rendered judgment disposing of 3215 South Flores, not 3212 South Flores. *See Thompson v. Tex. Dep't of Human*

---

[1] During the nunc pro tunc hearing, Maria testified that she owned both 3212 South Flores and 3215 South Flores. However, she did not testify that she and Felipe jointly owned both properties, and Felipe unequivocally testified that he never owned 3212 South Flores.

Res., 859 S.W.2d 482, 484 (Tex. App.—San Antonio 1993, no writ) (determination of what judgment trial court actually rendered in original order is question of fact for trial court). We further hold that the recitation of 3212 South Flores in the 1992 decree was a clerical error that did not require judicial reasoning or determination and could therefore be corrected through a judgment nunc pro tunc. *See Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 167 (Tex. 2013).

Legal Description of the Property

Our holding that the trial court had subject matter jurisdiction to correct the property's street address does not necessarily mean it had authority to correct the legal description of the property. While Felipe contends the property at 3215 South Flores has always consisted of both Lots 8 and 9, the 1992 decree only explicitly disposes of Lot 8. In order to grant Felipe's motion for judgment nunc pro tunc as to the legal description of the property, the trial court was required to find that the 1992 trial court actually rendered judgment disposing of both lots. *See In re R.P.T.*, 2005 WL 418220, at *3. If that finding is supported by the evidence, then we must consider whether the written judgment's omission of Lot 9 was a mere clerical error that "clearly did not reflect the trial court's rendition." *Barton v. Gillespie*, 178 S.W.3d 121, 127 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *see also Mora v. Mora*, No. 04-17-00428-CV, 2018 WL 4903079, at *2–3 (Tex. App.—San Antonio Oct. 10, 2018, pet. denied) (mem. op.).

There is no evidence that the trial court rendered judgment disposing of both lots in 1992. *See Molina v. Molina*, 531 S.W.3d 211, 216–17 (Tex. App.—San Antonio 2017, no pet.). While Felipe contends "[t]he testimony and papers the trial court had in front of it" during the nunc pro tunc hearing show that "3215 South Flores has always consisted of Lots 8 and 9," he does not contend—and the record does not show—that any of those papers or testimony were before the trial court when it rendered judgment in 1992. There is no record of the hearing that resulted in the

1992 decree, the evidence presented during that hearing, or any docket entries related to the signing of the decree. *See Mora*, 2018 WL 4903079, at *3 (affirming nunc pro tunc correction of legal description because record showed trial court verbally rendered judgment disposing of entire property); *Davis*, 647 S.W.2d at 782–84 (nunc pro tunc judgment appropriate where record showed trial court verbally rendered judgment awarding "the home" and its entire value to wife and written judgment omitted land necessary to that rendition). There is no evidence of the 1992 trial court judge's personal recollection of the judgment she rendered.[2] *See Davis*, 647 S.W.2d at 783. Finally, while Maria and Felipe offered conflicting testimony about how they subjectively intended to divide 3215 South Flores, neither presented evidence showing the trial court ever rendered judgment disposing of Lot 9 before it signed the 1992 decree that omits that land. *See Delaup v. Delaup*, 917 S.W.2d 411, 413 (Tex. App.—Houston [14th Dist.] 1996, no writ) (affirming nunc pro tunc correction where trial court orally rendered judgment approving parties' agreement and subsequent written judgment varied from agreement); *Davis*, 647 S.W.2d at 782–84.

The only evidence of the judgment the trial court rendered on the disposition of the two lots is the 1992 decree itself. *See In re R.P.T.*, 2005 WL 418220, at *2. That decree does not, as Felipe argues, explicitly award him the entirety of the land located at 3215 South Flores. Instead, it awards him "[t]he property and all improvements located thereon at Lot Eight (8), Block Two (2), New City Block Two Thousand Six Hundred Fifty Five (2655)" which it then describes as "more commonly known as 321[5] S. Flores St, San Antonio, Bexar County, Texas." This language refers to Lot 8 in the singular and does not mention Lot 9. While Felipe contends the parties intended to dispose of both lots located at 3215 South Flores, there is no evidence the trial court ever rendered judgment doing so. *See Ledbetter v. Ledbetter*, 390 S.W.2d 403, 405 (Tex. Civ

[2] We take judicial notice that the judge who signed the 1992 decree, the Honorable Carol R. Haberman, died in 2008. TEX. R. EVID. 201. Felipe filed his motion for judgment nunc pro tunc in 2018.

App.—Waco 1965, writ dism'd) (affirming nunc pro tunc correction of legal description because trial court judge testified his original order disposed of entire property). "[W]ithout such evidence in the record, it is of no consequence" whether the evidence logically supports a conclusion about what "the trial court *must* have intended." *Hernandez v. Lopez*, 288 S.W.3d 180, 187 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Because "there was simply no evidence that the trial court rendered judgment [on Lot 9] prior to signing the [1992 decree]," the trial court erred by amending the 1992 decree nunc pro tunc to include Lot 9. *Galvan*, 897 S.W.2d at 878.

It is undisputed, moreover, that Maria's divorce attorney drafted the 1992 decree, including the portion that omits Lot 9 from the legal description of the property awarded to Felipe. "It is well settled that recitations or provisions alleged to have been included in a judgment by mistake of the attorney are nevertheless part of the court's judgment as rendered, and are thus judicial errors as a matter of law." *See id.* at 879. Because the record shows Maria's attorney—not the trial court—mistakenly omitted Lot 9 from the decree's language, "there is no evidence in the record that the trial court intended to do anything other than grant the [decree] exactly as the parties requested." *Hernandez*, 288 S.W.3d at 187.

The Texas Supreme Court has explained that "even if the court renders incorrectly, it cannot alter a written judgment which precisely reflects the incorrect rendition." *Escobar*, 711 S.W.2d at 232. "An error in the rendition of judgment is *always* judicial error" that cannot be corrected by a nunc pro tunc judgment. *Galvan*, 897 S.W.2d at 878–79 (emphasis in original, internal citations omitted). Under these unique circumstances, the evidence shows that the omission of Lot 9 from the 1992 decree was a judicial error in the rendition of the trial court's judgment, not merely a clerical error in the transcription of that judgment. Because an incorrect or unintended rendition of judgment is a not a clerical error, the trial court's nunc pro tunc amendment

of the 1992 decree to include Lot 9 is void. *See In re R.P.T.*, 2005 WL 418220, at *3. We sustain Maria's first two issues.

Clarification of 1992 Decree

In her third issue, Maria argues the trial court's order cannot be affirmed as a clarification of the 1992 decree under Chapter 9 of the Texas Family Code. However, the only relief Felipe requested in the trial court was a judgment nunc pro tunc. As a result, the trial court did not rule on whether clarification would be appropriate here. Because we are not empowered to render advisory opinions based on hypothetical facts, we decline to address Maria's third issue. *See In re Lee*, 411 S.W.3d 445, 455 (Tex. 2013); *McAllen Med. Ctr., Inc. v. Cortez*, 66 S.W.3d 227, 232 (Tex. 2001).

CONCLUSION

We vacate the portion of the trial court's August 13, 2019 Final Decree of Divorce Nunc Pro Tunc that adds Lot 9 to the legal description of the subject property and reinstate the December 15, 1992 Final Decree of Divorce as to that description. We do not disturb the portion of the trial court's nunc pro tunc judgment regarding the address of the property.

Beth Watkins, Justice