Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00280-CV

IN THE INTEREST OF M.U.C.O., a Child

From the 73rd Judicial District Court, Bexar County, Texas
Trial Court No. 2017-CI-11725
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Luz Elena D. Chapa, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: August 24, 2022

NUNC PRO TUNC ORDER SET ASIDE; AFFIRMED

After a bench trial, the trial court entered an order (the "April 12 order") lifting a geographic restriction (allowing Mother[1] to relocate); awarded Mother exclusive right to consent to psychiatric and psychological treatment; and modified various provisions of the parties' 2018 agreed order in light of the trial court's lifting of the geographic restriction. After two additional days of hearings, the court subsequently entered a *nunc pro tunc* order. In five issues, appellant asserts the trial court abused its discretion. We set aside the trial court's *nunc pro tunc* order as void and affirm the trial court's April 12 order.

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[1] To protect the identity of the minor child, we refer to the parties by fictitious names, initials, or aliases. *See* TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2).

BACKGROUND

In June 2017, Mother filed an original suit affecting the parent-child relationship against Father to determine the rights and duties of each parent to their son, M.U.C.O. At that time, M.U.C.O. was five months old. The parties entered into a mediated settlement agreement that restricted M.U.C.O.'s residence to Bexar County and contiguous counties, and on March 22, 2018, the trial court entered an agreed order reflecting those terms.

In June 2018, both parents filed competing petitions to amend the parties' agreed order. On June 7, 2019, Father filed a motion to enforce geographic restriction alleging Mother moved to West Virginia in violation of the geographic restriction contained in the agreed order. The trial court denied Father's motion, finding Mother "has not moved to West Virginia at this point."

On June 30, 2019, the trial court found it would be in the best interest of M.U.C.O. to appoint a guardian ad litem with regard to the geographic restriction issue. On August 20, 2019, the trial court appointed Jack Bannin, MS, LPC, LMFT of Bexar County Solutions as guardian ad litem. On October 30, 2019, Bannin prepared a report concluding it would not be in M.U.C.O.'s best interest to lift the geographic restriction—primarily due to his young age and his parents' inability to co-parent.

Beginning on March 15, 2021, the trial court held a five-day bench trial. During the trial, the guardian ad litem testified contrary to his initial expert report and stated that he believed it to be in M.U.C.O.'s best interest that the geographic restriction be lifted. On March 22, 2021, the trial court granted Mother the right to determine M.U.C.O.'s residence within the continental United States and lifted the geographic restriction from Bexar County and contiguous counties. The trial court made additional modifications in light of the lifting of the geographic restriction, including: (1) designating Father's wife as the individual in charge of pick-up and drop-off and

excluding Father from airport exchanges; and (2) modifying child support obligations based on increased travel-related expenses.

On March 31, 2021, Father timely filed a request for findings of fact and conclusions of law. On April 28, 2021, Father timely filed a notice of past due findings and conclusions. The trial court did not enter findings of fact and conclusions of law.

On April 6 and 7, 2021, the trial court held hearings on motions to enter. On April 12, 2021, the trial court entered an order in the suit to modify the parent-child relationship. On July 9, 2021, Father timely filed a notice of appeal. On July 15 and 16, 2021, the trial court heard additional issues regarding the terms and conditions of access and possession. On July 16, 2021, the trial court signed a *nunc pro tunc* order over Father's objection that the change was allegedly judicial and not clerical. On August 13, 2021, Father timely filed a notice of appeal of the *nunc pro tunc* order.

FAILURE TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his first issue, Father asserts the trial court's failure to file findings of fact and conclusions of law constitutes harmful error by preventing him from properly presenting his case to this court.

Standard of Review

When properly requested, the trial court has a mandatory duty to file findings of fact and conclusions of law. TEX. R. CIV. P. 296, 297; *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989). If a trial court does not file findings and conclusions, it is presumed harmful unless the record affirmatively shows the appellant suffered no harm. *Ad Villarai, LLC v. Chan Il Pak*, 519 S.W.3d 132, 135 (Tex. 2017) (per curiam). When the trial court's reasons for its judgment are apparent from the record, the presumption of harm is rebutted. *See Landbase, Inc. v. Tex. Emp't Comm'n*, 885 S.W.2d 499, 501–02 (Tex. App.—San Antonio 1994, writ denied). "The question to

consider in determining harm is whether the circumstances of the particular case would force an appellant to guess the reason or reasons that the trial court ruled against it." *Nevada Gold & Silver, Inc. v. Andrews Indep. Sch. Dist.*, 225 S.W.3d 68, 77 (Tex. App.—El Paso 2005, no pet.).

Discussion

Father timely filed both a request for findings of fact and conclusions of law and notice of past-due findings of fact and conclusions of law. However, the trial court did not file findings and conclusions, and its failure to do so is presumed harmful unless the record affirmatively shows Father suffered no harm. Here, the record affirmatively demonstrates that Father was not required to guess the reason for the trial court's rulings. *See Nevada Gold & Silver*, 225 S.W.3d at 77. Father aptly presented his issues on appeal, and his appellate presentation confirms he understood the basis for the trial court's rulings. We accordingly hold that the trial court's failure to file findings of fact and conclusions of law was harmless, and we overrule Father's first issue.

GEOGRAPHIC RESTRICTION

In his second issue, Father asserts the trial court abused its discretion in lifting the geographic restriction.

Standard of Review

Once a trial court designates the parent who has the exclusive right to determine the primary residence of the child, it then has the discretion to either establish a geographic area in which the child may reside or specify that there are no geographic restrictions. *In re C.M.*, No. 04-12-00395-CV, 2014 WL 2002843, at *3 (Tex. App.—San Antonio May 14, 2014, no pet.); TEX. FAM. CODE § 153.134(b)(1) (providing the court shall "establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence").

Trial courts have wide discretion in determining the best interests of the child, and their judgments will be reversed on appeal only for an abuse of discretion. *Gillespie v. Gillespie*, 644

S.W.2d 449, 451 (Tex. 1982). "We must be cognizant that the trial court is in a better position to decide custody cases because 'it faced the parties and their witnesses, observed their demeanor, and had the opportunity to evaluate the claims made by each parent.'" *In re M.M.M.*, 307 S.W.3d 846, 849 (Tex. App.—Fort Worth 2010, no pet.).

When, as here, no findings of fact or conclusions of law are made, we must presume the trial court made all fact findings necessary to support its judgment. *In re A.M.*, 604 S.W.3d 192, 197 (Tex. App.—Amarillo 2020, pet. denied). We must uphold these implied findings if they are supported by the record and correct under any theory of law applicable to the case. *Id.* (citing *Marrs & Smith P'ship v. D.K. Boyd Oil & Gas Co.*, 223 S.W.3d 1, 21 (Tex. App.—El Paso 2005, pet. denied)). In deciding whether some record evidence supports the implied findings, "it is proper to consider only that evidence most favorable to the issue and to disregard entirely that which is opposed to it or contradictory in its nature." *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam). However, when the record includes a reporter's record, as here, the sufficiency of the evidence supporting the implied findings of fact may be challenged. *In re A.M.*, 604 S.W.3d at 197.

Legal and factual sufficiency challenges are factors we consider in assessing whether the trial court abused its discretion, rather than constituting independent grounds of error. *Zeifman v. Michels*, 212 S.W.3d 582, 587–88 (Tex. App.—Austin 2006, pet. denied). We engage in a two-pronged inquiry: (1) whether the trial court had sufficient information on which to exercise its discretion; and (2) whether the trial court erred in its application of discretion. *Id.* at 588. "The traditional sufficiency review comes into play with regard to the first question; however, the inquiry does not end there." *Id.* We then determine whether, based on the evidence, the trial court made a reasonable decision, "that is, that the court's decision was neither arbitrary nor unreasonable." *Id.* A trial court does not abuse its discretion as long as some evidence of a

probative nature exists to support the court's decision and "we generally will not find an abuse of discretion when the trial court bases its decision on conflicting evidence." *Id.*

Applicable Law

A court may modify an order providing for the terms and conditions of conservatorship if (1) the modification is in the best interest of the child, and (2) the circumstances of the child, a conservator, or other person affected by the order have materially and substantially changed since the date of the rendition of the prior order. *In re A.C.M.*, 593 S.W.3d 894, 898 (Tex. App.—El Paso 2019, no pet.); TEX. FAM. CODE § 156.101.

When determining the best interest of a child in the relocation context, "no bright-line test can be formulated," as these suits "are intensely fact driven" and require the consideration and balancing of numerous factors. *Lenz v. Lenz*, 79 S.W.3d 10, 18–19 (Tex. 2002). Factors that courts have considered in the relocation context include: (1) the reasons for and against the move; (2) the effect on extended family relationships; (3) the effect on visitation and communication with the non-custodial parent to maintain a full and continuous relationship with the child; (4) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the non-custodial parent and child; and (5) the nature of the child's existing contact with both parents, and the child's age, community ties, and health and educational needs. *Id.* at 15–16.

Discussion

After an extensive investigation spanning two months, Bannin issued a report concluding it was not in M.U.C.O.'s best interest that the geographic restriction be lifted. This report constitutes the basis for Father's argument that the evidence is legally and factually insufficient to support the lifting of the geographic restriction. However, Father ignores Bannin's changed opinion by the time of trial. Two weeks before trial, the parties deposed Bannin. By that time, Bannin had changed his conclusion and believed it was in M.U.C.O.'s best interest to lift the

geographic restriction. In his deposition and testimony at trial, Bannin testified at length as to the rationale behind his conclusion, including why it changed from his original report. Bannin's testimony—explicitly tracking the *Lenz* factors—provided legally and factually sufficient information on which the trial court could exercise its discretion. *See Zeifman*, 212 S.W.3d at 587.

At best, Father presents an issue of conflicting evidence between Bannin's original report and his subsequent testimony; however, we "generally will not find an abuse of discretion when the trial court bases its decision on conflicting evidence." *Id.* Considering the extensive evidence before the trial court touching on the *Lenz* factors, we cannot say the trial court erred in its application of discretion. *See Zeifman*, 212 S.W.3d at 588. We accordingly overrule Father's second issue on appeal.

PSYCHIATRIC AND PSYCHOLOGICAL TREATMENT

In his third issue, Father asserts the trial court abused its discretion in granting Mother the exclusive right to consent to M.U.C.O.'s psychiatric and psychological treatment.

Standard of Review

We review a trial court's decision to modify conservatorship under an abuse of discretion standard. *Gillespie*, 644 S.W.2d at 451; *Zeifman*, 212 S.W.3d at 587. The trial court's order will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *Zeifman*, 212 S.W.3d at 587. A trial judge is wisely vested with this discretion because she is best able to observe the witnesses' demeanor and personalities. *Id.* A trial court abuses its discretion if it acts arbitrarily and unreasonably or without regard to guiding rules or principles. *Id.* (citing *K–Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000)).

Legal and factual sufficiency challenges are factors we consider in assessing whether the trial court abused its discretion, rather than constituting independent grounds of error. *Id.* We engage in a two-pronged inquiry: (1) whether the trial court had sufficient information on which

to exercise its discretion; and (2) whether the trial court erred in its application of discretion. *Id.* at 588. "The traditional sufficiency review comes into play with regard to the first question; however, the inquiry does not end there." *Id.* We then determine whether, based on the evidence, the trial court made a reasonable decision, "that is, that the court's decision was neither arbitrary nor unreasonable." *Id.* A trial court does not abuse its discretion as long as some evidence of a probative nature exists to support the court's decision and "we generally will not find an abuse of discretion when the trial court bases its decision on conflicting evidence." *Id.*

Discussion

In their original agreed order, the parents agreed each had the independent right, after conferring with the other parent conservator, to consent to M.U.C.O.'s psychiatric and psychological treatment. After trial, the trial court removed Father's independent right and awarded Mother the exclusive right to psychiatric and psychological treatment.

Father asserts the only evidence presented in this case regarding psychiatric or psychological treatment was Father's desire to seek counseling for M.U.C.O. and the parties' communications on that issue. According to Father, there is legally and factually insufficient evidence to support the trial court's ruling because there was no evidence presented at trial that M.U.C.O. ever attended counseling and the parties' communications were insufficient to support the trial court's stripping of Father's independent right, after conferring with Mother, to consent to treatment.

Mother responds that trial testimony demonstrated a conflict created by the court's prior order granting independent rights to consent to treatment. According to Mother, the evidence at trial established a conflict created by the April 12 order's authorization of independent treatment authority.

The evidence at trial established Father desired to seek counseling for M.U.C.O., and Mother did not agree with that decision. Father's desire to place M.U.C.O. in counseling arose in response to an argument between the parents. In his initial communication regarding treatment, Father stated, "I just wanted to let you know that I will be placing [M.U.C.O.] in counseling. It will be best for [M.U.C.O.] and all involved. And for you to say [M.U.C.O.] says that I am 'angry and mean' is a flat out lie. You should be ashamed of yourself to even message that to me." Mother responded:

> I will gladly attend the counseling pre session as to what exactly he will be in counseling for and would also like to be there to meet the counselor in which you have chosen or have looked into. We can confer after this and to see if this is what is best for [M.U.C.O.] moving forward. I will have questions for the counselor as well for sure. Just let me know when and where. And the date and time. Not a problem. Anything that involves [M.U.C.O.] and what's best then I am gladly ready to do so. What is it exactly that you think he needs counseling for, I would like to know, so we can better understand and be on the same page.

Father responded, "It will be during my visitation time and I can provide any information you need. No need for you to be present with us during the process." After it was clear Father intended to prohibit Mother from attending a pre-counseling session, Mother replied, "Just following up with you in regards to your message informing me of [M.U.C.O.] attending counseling or the process of starting counseling etc. Just so we are clear and there is no misunderstanding; I am not agreeable to [M.U.C.O.] attending counseling, nor do I see the need for [M.U.C.O.] needing any type of counseling. Should you change your mind and want to discuss/confer further, let me know. Thank you." Father then asserted he intended to proceed under his independent right to seek treatment: "You can read over the court order or call your lawyer, but the bottom line is that I do not need your approval to move forward."

While there is little evidence explicitly touching on this issue, this issue cannot be decoupled from the abundant evidence before the trial court regarding interparental conflict between Mother and Father. From the parties' communications coupled with generous evidence of interparental discord, the trial court had sufficient evidence to ascertain that the original independent right to seek psychological and psychiatric treatment resulted in conflict and discord that was not in the child's best interest. We cannot say the trial court abused its discretion in allocating an exclusive right to Mother. We accordingly overrule Father's third issue.

MODIFICATION OF ANCILLARY PROVISIONS

In his fourth issue, Father asserts the trial court abused its discretion in modifying further provisions of the parties' 2018 agreed order in light of the trial court's ruling to lift the geographic restriction. Father's fourth issue involves four discrete complaints over abuses of discretion: (1) in not awarding Father first, third, and fifth weekends, contrary to the standard possession order presumption; (2) in prohibiting Father from entering the airport or participating in M.U.C.O.'s exchanges; (3) in "interrupting [Father's] Thanksgiving holiday possession so that M.U.C.O. could be with his younger sister on her birthday each year on November 23"; and (4) in modifying child support and in its allocation of increases expenses as a result of Mother's relocation to West Virginia.

Standard of Review

We review a trial court's decision to modify conservatorship under an abuse of discretion standard. *Gillespie*, 644 S.W.2d at 451; *Zeifman*, 212 S.W.3d at 587. The trial court's order will not be disturbed on appeal unless the complaining party can show a clear abuse of discretion. *Zeifman*, 212 S.W.3d at 587. A trial judge is wisely vested with this discretion because she is best able to observe the witnesses' demeanor and personalities. *Id.* A trial court abuses its discretion if

it acts arbitrarily and unreasonably or without regard to guiding rules or principles. *Id.* (citing *K–Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000)).

Legal and factual sufficiency challenges are factors we consider in assessing whether the trial court abused its discretion, rather than constituting independent grounds of error. *Id.* We engage in a two-pronged inquiry: (1) whether the trial court had sufficient information on which to exercise its discretion; and (2) whether the trial court erred in its application of discretion. *Id.* at 588. "The traditional sufficiency review comes into play with regard to the first question; however, the inquiry does not end there." *Id.* We then determine whether, based on the evidence, the trial court made a reasonable decision, "that is, that the court's decision was neither arbitrary nor unreasonable." *Id.* A trial court does not abuse its discretion as long as some evidence of a probative nature exists to support the court's decision and "we generally will not find an abuse of discretion when the trial court bases its decision on conflicting evidence." *Id.*

Possession

"The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM. CODE § 153.002. In a suit affecting the parent-child relationship, there is a rebuttable presumption that the standard possession order provides reasonable minimum possession of a child for a parent and is in the best interest of the child. *Id.* § 153.252. The standard possession order for parents who reside over 100 miles from the child include the right to first, third, and fifth weekends and shall be awarded unless the parent elects to have weekend possession only one time per month. *Id.* § 153.313(1). "The terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent's right to possession of or access to a child may not exceed those that are required to protect the best interest of the child." *Id.* § 153.193.

Under the statutory presumption, Father was entitled to first, third, and fifth weekend possession. *See id.* § 153.313(1); *see also In re Z.K.S.*, No. 13-19-00011-CV, 2020 WL 103864, at *5 (Tex. App.—Corpus Christi–Edinburg Jan. 9, 2020, no pet.). The trial court heard substantial testimony regarding the time and expense involved in M.U.C.O.'s travel to and from West Virginia. Because of lengthy travel times and M.U.C.O.'s age, the trial court could have concluded travel between Texas and West Virginia three times a month would be burdensome and impractical. The difficult interparental relationship and discord between the parties—including Father's poor conduct at prior exchanges—exacerbated the difficulty of M.U.C.O.'s exchanges. Given the record before us, we cannot say the trial court abused its discretion in granting Father less than is rebuttably presumed in M.U.C.O.'s best interests. We overrule Father's complaint to the contrary.

Travel Restrictions

The trial court further ordered that Father could not be part of M.U.C.O.'s exchanges and instead appointed Father's wife to conduct exchanges. Specifically, Father was precluded from entering the designated airport for pick-up or drop-off on exchange dates.

Father's testimony confirms the parties faced significant conflict during exchanges. Although the parties had originally agreed to exchanges occurring between Mother and Father's wife, Father repeatedly attended exchanges, resulting in conflict in M.U.C.O.'s presence. Father called the police more than twenty times during these acrimonious exchanges. Bannin testified that Father's presence and participation at exchanges escalated the conflict. In a couple of instances, Father's wife confirmed her disapproval of Father's behavior. Bannin testified that Father's wife was the correct person to be present at exchanges. Given the record before us, we again cannot say the trial court abused its discretion in limiting Father's participation in exchanges. We overrule Father's complaint to the contrary.

Thanksgiving

Under the standard possession order for parents who reside over 100 miles from the child, the possessory parent is entitled to the right of possession on Thanksgiving in odd-numbered years beginning at 6 p.m. the day the child is dismissed for the Thanksgiving break and ending at 6 p.m. the following Sunday. TEX. FAM. CODE § 153.314(3). The trial court awarded Father this standard Thanksgiving possession time; however, Mother was awarded the superior right to possess M.U.C.O. beginning on 6 p.m. on November 22 and ending at 6 p.m. on November 23 of each year for her daughter's birthday.

According to Father, the interruption in the standard Thanksgiving possession time violates his presumptive minimum possession rights under the Family Code and Mother offered no evidence to rebut that it would be in M.U.C.O.'s best interest to deprive Father of this possession time. Trial testimony established M.U.C.O.'s close relationship with his younger sister. The trial court concluded that it was in M.U.C.O.'s best interest to be present for his sister's birthday each year, and Father was not deprived of any time under the trial court's order:

> [W]ith regard to November 23rd, I understand dad would prefer that not be an agreement any longer. I think it's important for this boy to be with his sister on that date. And so I'm still going to allow him to do that, but we can add on the time so that takes nothing away from father at all. It just going to be added on, and dad has the election to add it on at Thanksgiving or if he wants to add it on in the summer.

Considering the trial court accounted for Father's lost time, we cannot say the trial court abused its discretion in modifying the standard Thanksgiving possession time to allow M.U.C.O. to spend his sister's birthday with her. We overrule Father's complaint to the contrary.

Child Support and Expenses

A trial court has discretion to set child support within the parameters provided by the Texas Family Code. *Iliff v. Iliff*, 339 S.W.3d 74, 78 (Tex. 2011). In a modification proceeding, the trial

court compares the financial circumstances of the child and the affected parties at the time the support order was entered with their circumstances at the time modification is sought. *Tucker v. Tucker*, 908 S.W.2d 530, 532 (Tex. App.—San Antonio 1995, writ denied). A trial court's order of child support will not be disturbed on appeal without a showing of clear abuse of discretion. *Iliff*, 339 S.W.3d at 78.

A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules of principles. *Id.* A trial court also abuses its discretion by failing to analyze or apply the law correctly. *Id.* We view the evidence in the light most favorable to the trial court's actions and indulge in every legal presumption in favor of the judgment. *Tucker*, 908 S.W.2d at 532. If there is some probative and substantive evidence to support the judgment, the trial court did not abuse its discretion. *Id*.

The amount of Father's child support payments remained the same before and after trial. Father did not seek modification of his child support obligation because the evidence he introduced at trial established payments remained within $100 of his current child support payment. *See* TEX. FAM. CODE § 156.401 (providing for modification of child support if the monthly amount of the child support award under the order differs by either 20 percent or $100 from the amount that would be awarded in accordance with child support guidelines). At trial, Father contended the child support obligation should not change, and Mother contended the child support obligation should increase. The trial court concluded that Father's child support obligation should be increased based on additional income;[2] however, the trial court offset the increased obligation with additional expenses that Father would incur on account of Mother's relocation to West Virginia—

[2] Father makes specific complaints about the trial court's calculations, but viewing conflicting evidence in the light most favorable to the trial court's actions, we cannot say the trial court's calculations were clearly erroneous.

resulting in a net zero change. We cannot find a clear abuse of discretion in the trial court's methodology.

It is rebuttably presumed that the payment of increased expenses should be borne by the party whose residence is changed—here, Mother. TEX. FAM. CODE § 156.103(b). While Father complains that Mother should exclusively bear the increased expenses associated with her move, the trial court is granted discretion to render orders allocating expenses on a fair and equitable basis in the best interest of the child. TEX. FAM. CODE § 156.103(a) ("If a change of residence results in increased expenses for a party having possession of or access to a child, the court *may* render appropriate orders to allocate those increased expenses on a fair and equitable basis, taking into account the cause of the increased expenses and the best interest of the child.") (emphasis added).

Here, the trial court ordered that, if the parties reside more than 100 miles apart and until October 31, 2021, Mother is responsible for all costs of travel incurred for the child from Mother's residence to Father's residence. After October 31, 2021, the trial ordered that the parties would split the cost of travel and each party would be responsible for the costs incurred for travel from their respective residences. Given the evidence presented at trial, we cannot say the trial court clearly abused its discretion in determining it was in M.U.C.O.'s best interest that Father's child support interest remain unchanged on account of offsetting increased travel costs against Father's increased income. We overrule Father's complaints to the contrary.

***NUNC PRO TUNC* ORDER**

In his fifth issue, Father asserts the trial court abused its discretion in entering a *nunc pro tunc* order.

Standard of Review and Applicable Law

A trial court has plenary power to vacate, modify, correct, or reform a judgment within thirty days after the judgment is signed. TEX. R. CIV. P. 329b(d). After the trial court's plenary power expires, it may render a judgment *nunc pro tunc* to correct any mistakes or misrecitals in the judgment so long as the errors corrected are clerical as opposed to judicial. *Molina v. Molina*, 531 S.W.3d 211, 216 (Tex. App.—San Antonio 2017, no pet.). Whether an error is judicial or clerical is a question of law. *Id.* When the issue turns on a pure question of law, the proper standard of review is de novo. *See W&T Offshore, Inc. v. Fredieu*, 610 S.W.3d 884, 896 (Tex. 2020).

Clerical errors are mistakes or omissions that prevent the judgment as entered from reflecting the judgment as rendered. *H.E.B. v. Pais*, 955 S.W.2d 384, 388 (Tex. App.—San Antonio 1997, no pet.). To be subject to correction as a clerical error, the judgment must incorrectly state the judgment actually rendered. *Id.* A clerical error does not arise from judicial reasoning or determination. *Molina*, 531 S.W.2d at 216. Judgment *nunc pro tunc* should be granted only if the evidence is clear, satisfactory, and convincing that a clerical error was made. *Id.*

A judicial error is an error that occurs in the rendering, as opposed to the entering, of a judgment. *Hernandez v. Lopez*, 288 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A judicial error arises from a mistake of law or fact and requires judicial reasoning or determination to correct. *Molina*, 531 S.W.2d at 216. Judicial errors may not be corrected by a *nunc pro tunc* proceeding after the trial court's plenary power expires. *America's Favorite Chicken v. Galvan*, 897 S.W.2d 874, 876 (Tex. App.—San Antonio 1995, no pet.) A judgment rendered to correct a judicial error after the trial court's plenary power has expired is void. *Molina*, 531 S.W.3d at 216.

When deciding whether an error is clerical or judicial, a trial court must look to the judgment actually rendered and not to the judgment that should or might have been rendered. *Id.*

"The trial court can only correct the entry of a final written judgment that incorrectly states the judgment actually rendered. Even if the trial court incorrectly rendered judgment, it cannot alter a written judgment that precisely reflects the incorrect rendition." *Id.*

Where a judgment is prepared by an attorney and signed and entered by the court, it becomes the judgment of the court. *Stock v. Stock*, 702 S.W.2d 713, 716 (Tex. App.—San Antonio 1985, no writ). "Recitations or provisions alleged to have been inserted or omitted by a mistake of the attorney are nevertheless part of the court's judgment." *Id.* (citing *Dikeman v. Snell*, 490 S.W.2d 183 (Tex. 1973)). A judgment *nunc pro tunc* cannot "re-adjudicate or rewrite and change the decretal portion of the judgment as rendered." *Id.* at 186. Thus, erroneous recitals in a judgment are judicial errors which cannot be cured by a *nunc pro tunc* proceeding after the judgment is final. *Id.* (citing *Finlay v. Jones*, 435 S.W.2d 136 (Tex. 1969)).

Discussion

The April 12 order in suit to modify the parent-child relationship resulted after a lengthy drafting process undertaken by the parents' attorneys. The April 12 order included a notice provision in the "less than 100 mile" possession and access provision; however, the April 12 order did not include a corresponding notice of provision in the "more than 100 mile" possession and access provision. Absent the notice provision, Father could choose not to provide notice of the location of pick up and drop off until the last minute, resulting in Mother not being able to be at the designated location at the time of the exchange.

Although there is significant evidence that the failure to include the notice provision in both parts of the April 12 order resulted from attorney drafting error, we agree with Father that the omission of the notice provision in the April 12 order resulted from judicial error and not clerical error. The trial court's statement at the *nunc pro tunc* hearing that it intended to include the notice provision in the April 12 order post-dated entry of the April 12 order. The parties do not cite, and

we cannot find in the record, an oral rendition by the trial court relating to notice prior to entry of the April 12 order. Thus, the parties' April 12 order—omitting the notice provision from the "more than 100 mile" possession and access provision—constitutes the court's judgment. *See Stock*, 702 S.W.2d at 716. Being a judicial error, the erroneous omission of the notice provision cannot be cured by a *nunc pro tunc* proceeding. We accordingly sustain Father's fifth issue on appeal, hold the *nunc pro tunc* order is void, and set aside the *nunc pro tunc* order.

CONCLUSION

We set aside the *nunc pro tunc* order as void, reinstate the trial court's April 12 order, and affirm the trial court's April 12 order.

Liza A. Rodriguez, Justice