

IN THE COURT OF APPEALS OF IOWA

No. 9-562 / 09-0160
Filed August 6, 2009

IN RE THE MARRIAGE OF SANDRA SHULTICE AND ROBERT W. SHULTICE

Upon the Petition of

**SANDRA SHULTICE, n/k/a
SANDRA ONG,**
Petitioner-Appellant,

And Concerning

ROBERT W. SHULTICE,
Respondent-Appellee.

Appeal from the Iowa District Court for Benton County, David M. Remley,
Judge.

Appeal from a nunc pro tunc order entered after a decree of dissolution.

AFFIRMED AND REMANDED.

Francis Hurley of Phil Watson, P.C., Des Moines, for appellant.

David Brown and Alison Smith of Hayek, Brown, Moreland & Smith,
L.L.P., Iowa City, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

This appeal challenges a nunc pro tunc order entered some ten months after a dissolution decree was filed. We affirm and remand to the district court.

SCOPE OF REVIEW. The parties both agree the matter is in equity and contend our review is de novo. See Iowa R. App. P. 6.907 (2009). We therefore so review.

BACKGROUND AND PROCEDURE. The marriage of Sandra and Robert Shultice was dissolved in December of 2007. The decree was filed following a hearing addressing financial issues. The portion of the decree relevant to these proceedings is the following paragraph:

Sandra shall pay Robert the sum of \$38,400 within 90 days of the date the Decree of Dissolution of Marriage is filed. If this amount is paid within the 90-day time period, it shall not bear interest. If this amount is not paid within 90 days of the date the Decree of Dissolution of Marriage is filed, interest shall accrue on the entire amount at the rate of 7 percent per annum from the date the Decree of Dissolution of Marriage is filed. If this cash payment has not been paid as of the date of the closing on the sale of the home and/or adjoining real estate, it shall be paid in full on closing.

Both parties filed post-trial motions. Sandra filed an Iowa Rule of Civil Procedure 1.904(2) motion that included a request that she be granted additional time to make the cash payment to Robert. Specifically, the relevant portion of her motion provided the following:

Additional time to finance payment of \$38,400 cash payment. Because of her financial situation, Sandra will have to try to refinance the mortgage on her property or obtain a second mortgage in order to pay \$38,400 to Robert. Sandra believes that it may take longer than the 90 days allotted by the Court to find a means of paying Robert what the Court has awarded him.

She prayed for the following relief:

Petitioner [Sandra] prays that the Court find that 90 days would be excessively onerous for the payment of the \$38,400 due Robert, and that the court grant her a total of 180 days within which to obtain the necessary financing for this payment.

The district court responded on January 30, 2008 to Sandra's rule 1.904(2) motion with the following ruling:

Sandra's request to extend the time for payment of \$38,400 cash to Robert from 90 days from the date of the Decree to 180 days is denied. *The Decree does not absolutely require that this be paid within 90 days.* However, if it is paid within 90 days, Sandra is not required to pay interest to Robert on this amount. I conclude that it would be inequitable to allow Sandra to be excused from paying interest on this sum for more than 90 days. The Decree provides that if the entire amount is not paid within 90 days, interest accrues at the rate of 7 percent from the date of the Decree until payment is made.

(Emphasis supplied.)

Robert's attorney received a letter on October 28, 2008, from an attorney representing Sandra advising that they disagreed with Robert's position that the \$38,400 was then due or that it was payable at any time certain and that Sandra was only required to pay Robert the sum when the parties' homestead was sold, that Sandra is not required to sell the home on any date certain, and that the timing of the sale is entirely at her discretion.

On November 24, 2008, Robert filed an application for a Nunc Pro Tunc Order and/or Clarification of Decree. His position was that he had not yet received the \$38,400 and Sandra was claiming it was not payable at any date certain in the future. Sandra resisted, arguing Robert was seeking a nunc pro tunc order under the guise of seeking a clarification, there was no clerical error, and to honor his request would make a substantive change in the decree.

Following a telephone hearing, the district court judge who heard the dissolution case, entered the decree, and ruled on Sandra's rule 1.904(2) motion, concluded that Robert's application for the Nunc Pro Tunc Order and/or for Clarification of the Decree should be sustained in part. The court noted that the decree still provided that Sandra shall pay the sum within ninety days of the date of the decree is filed. The judge considered that in denying Robert's request for alimony he found, "Robert will be receiving a substantial cash property settlement pursuant to paragraph number 10 of the Decree."¹ He reasoned that Sandra understood the money was due in ninety days when she filed her post-trial motion asking she be given 180 days to pay the sum. The court noted that it clouded the matter when it said, "The Decree does not absolutely require this be paid within 90 days." The judge also indicated that he had ordered the money to be paid at the closing of the sale of real estate because the property could have been sold and the sale closed in less than ninety days. The court then deleted the sentence from his January 30, 2008, ruling that said, "The Decree does not absolutely require that this be paid within 90 days."

NUNC PRO TUNC ORDER MADE SUBSTANTIAL CHANGES. Sandra contends the district court erred in granting the nunc pro tunc order because the order entered made substantive changes to the dissolution decree as modified by the rule 1.904(2) motion ruling and was not merely correcting an error.

Nunc pro tunc orders are limited to situations where there is an obvious error that needs correction or where it is necessary to conform the order to the

¹ This was the paragraph that ordered the payment of the \$38,400.

court's original intent. *State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008); *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224, 229 (Iowa 1987). The function of a nunc pro tunc order is "to make the record show truthfully what judgment was actually rendered—not an order now for then, but to enter now for then an order previously made." *General Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953). A court may not use a nunc pro tunc order "for the purpose of correcting judicial thinking, a judicial conclusion, or a mistake of law." *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). A nunc pro tunc order is not available to correct a judicial, as distinguished from a clerical, error. *State v. Steffens*, 282 N.W.2d 120, 122 (Iowa 1979). An error is clerical in nature if it is not the product of judicial reasoning and determination. *State v. Hess*, 533 N.W.2d 525, 527 (Iowa 1995).

The purpose of a nunc pro tunc entry is to supply or correct a record to make it conform to that which was actually done at an earlier date, and that as between the parties it operates to validate or correct the original judgment. *Murnan v. Schuldt*, 221 Iowa 242, 245, 265 N.W. 369, 371 (1936).

Sandra argues that the ruling on the rule 1.904(2) motion relieved her of her obligation to pay Robert in ninety days and the nunc pro tunc order reinstated it. We disagree. The district court, in entering the nunc pro tunc order, made it very clear that it had not been his intention in ruling on the rule 1.904(2) motion to change the date of payment. In reviewing a nunc pro tunc order, the intent of the trial judge is critical. *McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149, 151 (Iowa 1980). Furthermore, in ruling on the rule 1.904(2) motion the

court did not strike the provision in the divorce decree that ordered the money be paid in ninety days, nor did the court modify that part of the decree denying Robert alimony and noting that he would be receiving substantial cash. The district court's order nunc pro tunc corrected a clerical error. It did not constitute a change in the judge's thinking nor did it alter the court's original decision. See *Graber*, 410 N.W.2d at 230. The correction was sought to make the record entry conform to the actual pronouncement of the court, not to evidence a change in the decision itself. See *Weissenburger v. Iowa Dist. Ct.*, 740 N.W.2d 431, 435 (Iowa 2007); *State v. Harbour*, 240 Iowa 705, 710, 37 N.W.2d 290, 293 (1949). The mistake² here was a clerical error and nothing more. The nunc pro tunc order merely corrected the error. See *Beyond the Garden Gate, Inc. v. Northstar Freeze-Dry Mfg., Inc.*, 526 N.W.2d 305, 311 (Iowa 1995).

REQUEST FOR ORDER NOT TIMELY. Sandra argues that the request for the order was not timely. We disagree. The power of the court to make a nunc pro tunc order is inherent and is not lost by the mere lapse of time. *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995); see also *Locher v. Livingston*, 168 Iowa 457, 459, 150 N.W. 614, 615 (1915).

JUDGMENT ON BOND. Following notice of appeal Sandra filed a cash supersedeas bond in the amount of \$42,240 and all proceedings in district court were stayed. Robert has filed a motion pursuant to Iowa Rule of Appellate Procedure 6.603 requesting that if we affirm the judgment, we enter judgment on _____

² In fact, we question, but need not decide, whether the language of the ruling on the 1.904(2) motion made any change in payment date. Clearly the district court in the initial decree had contemplated and anticipated that Sandra might not pay the \$38,400 by the date ordered in providing for interest if she did not.

the appeal bond for the judgment rendered together with damages and costs, or remand to the district court for determination of damages and costs and entry of judgment on the bond. We enter judgment on the bond in the amount of \$38,400 together with interest at the rate of seven percent per annum from December 27, 2007, the date the decree was filed until procedendo issues. We remand to the district court to determine such damages, if any, and costs, including appellate attorney fees, that should be entered as a judgment on the bond, and direct the district court to enter further judgment on the bond in that amount.

AFFIRMED AND REMANDED.