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Trial Court Jurisdiction and Control over Judgments.

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TRIAL COURT JURISDICTION AND CONTROL OVER JUDGMENTS

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I. INTRODUCTION

The ultimate goal of the legal system is to resolve controversies by

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producing results that are correct and at the same time final. One task of the law of judgments is to balance the inherent tension between the goals of correctness and finality. Trial courts must be given leeway to ensure that their judgments are just and fair, correct and free from error. But at some point, lawsuits must come to an end, because unending litigation is itself an injustice. Litigants and third parties can hardly rely on judgments that can be modified or set aside by the trial court. A judgment that is subject to change does not settle anything. Consequently, the law must establish some point at which the trial court loses the power to change its rulings.

This article surveys the Texas rules that set the boundaries of the trial court's authority to modify its judgments.[1] Part II of the article examines the trial court's plenary power to modify its judgments, and Part III discusses the court's authority to make corrections nunc pro tunc[2] after its jurisdiction has expired. The article will focus on modifications by the trial judge who heard the case and will not explore such procedures as direct appeal, bill of review, or collateral attack, in which a judgment is attacked in a different forum.[3]

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1. The article deals with general principles that apply to all civil judgments, not with rules that are unique to certain kinds of cases. For example, in injunction cases and family law cases, there are special rules that authorize trial courts to modify final judgments. Trial courts have exclusive jurisdiction "to modify or vacate their judgments granting permanent injunctions because of changed conditions." City of Tyler v. St. Louis Southwestern Ry. Co., 405 S.W.2d 330, 333 (Tex. 1966). *But see* State v. Walker, 679 S.W.2d 484, 485 (Tex. 1984) (trial court cannot modify temporary injunction that has been affirmed on appeal, except after hearing on permanent injunction).

In family law cases, sections 3.70-3.77 of the Family Code grant trial courts power to enforce and clarify their judgments after they have become final. In addition, upon proper proof, section 14.08 of the Family Code allows modification of divorce decree provisions regarding conservatorship, child support, possession, and access. Prior to the addition of sections 3.70-3.77 to the Family Code in 1983, the courts had held that trial courts may "make orders necessary to carry [a] judgment into execution consistently [sic] with its terms." Schwartz v. Jefferson, 520 S.W.2d 881, 888 (Tex. 1975); *cf.* Reynolds v. Harrison, 635 S.W.2d 845, 846-47 (Tex. App.—Tyler 1982, writ ref'd n.r.e.) (after judgment had become final, trial court was permitted to extend deadline for specific performance). Courts, however, may not modify a judgment under the guise of clarifying it. *See* McGehee v. Epley, 661 S.W.2d 924, 925-26 (Tex. 1983).

2. The Latin phrase "nunc pro tunc" is literally translated "now for then." *See* BLACK'S LAW DICTIONARY 964 (5th ed. 1979).

3. The article will not consider appeals, the equitable bill of review, or collateral attacks, which permit only a limited challenge to the judgment and impose a heavy burden on the party attacking it.

An appeal is a limited review of specific errors that were presented to the trial court. *See* PGP Gas Prod., Inc. v. Fariss, 620 S.W.2d 559, 560 (Tex. 1981) (complaint on appeal must have been made initially in trial court); Westinghouse Credit Corp. v. Kownslar, 496 S.W.2d

II. PLENARY CONTROL OVER JUDGMENTS

A. *Plenary Jurisdiction*

Rule 329b provides that the trial court has plenary power over its judgments for 30 days after each judgment is signed.[4] If a motion for

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531, 533 (Tex. 1973) (relief may not be granted on appeal unless it was requested in trial court). In addition, only the errors that are designated as such and presented to the appellate court can be the basis for a reversal. *See* Gulf Consol. Int'l, Inc. v. Murphy, 658 S.W.2d 565, 566 (Tex. 1983) (when defendant failed to appeal partial summary judgment taken against him, court of appeals erred in reversing and remanding that aspect of case); Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 452-53 (Tex. 1978) (grounds of error not asserted by point of error or argument in the appellate court are waived).

Appellate review of default judgments by writ of error is permitted only where (1) the petition is filed within six months of the date of judgment, (2) by a party, (3) who did not participate in the trial, and (4) the error appears on the face of the record. *See* Stubbs v. Stubbs, 685 S.W.2d 643, 644 (Tex. 1985).

A bill of review — an independent suit in equity to set aside a judgment that can no longer be appealed — requires proof of these elements: (1) a meritorious defense to the cause of action that supports the judgment, (2) which the movant was prevented from making by the fraud, accident, or wrongful act of the opposite party, or by the mistake of a public official, or because he was not served with process, (3) unmixed with any fault or negligence of his own. *E.g.*, Baker v. Goldsmith, 582 S.W.2d 404, 406-09 (Tex. 1979). *See generally* Siskin, *Bill of Review--The Last Chance,* 20 S. TEX. L.J. 237 (1980); Chamberlain, *The Equitable Bill of Review,* 45 TEX. B.J. 484 (1982); Meyer, *The Equitable Bill of Review in Texas,* 41 TEX. B.J. 699 (1978).

It is often stated that there are four bases for collateral attack:

> The judgment of a court of general jurisdiction is not subject to collateral attack except on the ground that it had (1) no jurisdiction of the person of a party or his property, (2) no jurisdiction of the subject matter, (3) no jurisdiction to enter the particular judgment, or (4) no capacity to act as a court.

Austin Indep. School Dist. v. Sierra Club, 495 S.W.2d 878, 881 (Tex. 1973). *See generally* Hodges, *Collateral Attacks on Judgments,* 41 TEXAS L. REV. 163 (1962). In recent years the supreme court, relying on Rule 329b, has consistently held that when the trial court had subject matter jurisdiction and the time for appeal has passed, the only way to set aside a final judgment is a bill of review. *See, e.g.,* Thursby v. Stovall, 647 S.W.2d 953, 954 (Tex. 1983) (after plenary jurisdiction expires, trial court cannot set aside judgment for lack of service of citation); El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc., 617 S.W.2d 189, 190 (Tex. 1981) (Rule 329b provides "exclusive remedy to attack a judgment which has become final"); Akers v. Simpson, 445 S.W.2d 957, 959 (Tex. 1969) ("defendant who is not served and who does not appear may not . . . attack the verity of a judgment in a collateral proceeding"). *See generally* Dorsaneo, *Res Judicata and Collateral Attacks,* ST. MARY'S FOURTH ANNUAL PROCEDURAL INSTITUTE A-1, A-15 (1982) (in four situations described above, judgment is "void" rather than "voidable").

4. TEX. R. CIV. P. 329b provides in part:

> (d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.
>
> (e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate,

new trial is filed within the 30-day period, the court's plenary jurisdiction lasts until 30 days after the motion for new trial is overruled in writing or by operation of law.[5]

Within the period of plenary jurisdiction established by the rules, the trial court's authority to modify its judgment is "virtually absolute."[6] Of course, all changes must be supported by the law and the evidence, and the court may not usurp the function of the jury.[7] But during this time period, the court has jurisdiction to grant a new trial[8] or make any changes it wants to make, and it can even vacillate

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modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

TEX. R. CIV. P. 329b(d), (e).

5. *See id.* 329b(e). A motion to modify, correct, or reform a judgment also extends jurisdiction even though the movant does not seek another trial. *See id.* 329b(g). *See generally* Guittard, *Other Significant Changes in the Appellate Rules,* 12 ST. MARY'S L.J. 667, 669 (1981) (plenary jurisdiction extended where party seeks change in judgment but not new trial).

6. *See* Garza v. Serrato, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984, no writ).

7. *See* First Nat'l Bank v. Walker, 544 S.W.2d 778, 781-82 (Tex. Civ. App.—Dallas 1976, no writ) (court cannot substitute its fact findings for those of jury). *See generally* Guittard, *Other Significant Changes in the Appellate Rules,* 12 ST. MARY'S L.J. 667, 671 (1981) (plenary power does not entitle court to render judgment contrary to jury's findings of fact, unless proper motion for judgment n.o.v. made).

8. *See* TEX. R. CIV. P. 329b(d), (e); *see also* Pope & McConnico, *Practicing Law with the 1981 Texas Rules,* 32 BAYLOR L. REV. 457, 497 (1980) (express recognition of court's power to grant new trial within 30 days of overruling original motion).

An order granting a new trial within the period of plenary jurisdiction is interlocutory and not reviewable on *appeal. See* Cummins v. Paisan Constr. Co., 682 S.W.2d 235, 236 (Tex. 1984). In addition, an order granting a new trial can be controlled by *mandamus* only when (1) it is wholly void, as when the trial court had lost jurisdiction, or (2) it is based on an irreconcilable conflict in special issues. *See, e.g.,* Johnson v. Court of Civil Appeals, 162 Tex. 613, 615, 350 S.W.2d 330, 331 (1961) (improper because trial court did not specify grounds on which motion for new trial was granted); Anheuser-Busch, Inc. v. Smith, 539 S.W.2d 234, 236 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (trial court ordered to set aside mistrial granted because of partial jury verdict); Neunhoffer v. State, 440 S.W.2d 395, 397 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.) (district court clearly exceeded authority in issuing mandamus against county court whose grant of new trial was outside scope of *Johnson).*

When a motion for new trial has been filed, and as of the 75th day a new trial has been *granted,* the court loses jurisdiction to set aside the order granting the new trial. *See, e.g.,* Fulton v. Finch, 162 Tex. 351, 355, 346 S.W.2d 823, 826-27 (1961) (interpreting earlier version of Rule 329b); Essex Int'l Ltd. v. Wood, 646 S.W.2d 322, 324-25 (Tex. App.—Dallas 1983, no writ) (when court has granted new trial and 75-day period has expired, it "loses its power to reconsider the motion, and the case stands on the docket for trial as if no judgment had been rendered"); Smith v. Caney Creek Estates Club, Inc., 631 S.W.2d 233, 234-35 (Tex. App.—Corpus Christi 1982, no writ) (because new trial granted, not overruled, as of 75th day, court did not have 30 more days of jurisdiction).

and change its mind back and forth.[9] The court can, for example, revise its earlier division of property in a divorce case,[10] reassess its award of attorney's fees[11] or personalty[12] to a party, and change its decision about terminating parental rights.[13]

B. *The Timetable for Plenary Jurisdiction*

The trial court's period of plenary power does not begin to expire until a written judgment is *signed.*[14] It makes no difference when the case was tried, when the ruling was pronounced from the bench, or when any post-trial hearings took place, even if weeks or months have passed. Until a written judgment is signed, the judge has plenary jurisdiction to vacate or modify every ruling that has been made.[15] This

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9. *See* Essex Int'l Ltd. v. Wood, 646 S.W.2d 322, 324-25 (Tex. App.—Dallas 1983, no writ) (within period of plenary jurisdiction, trial court can grant new trial and vacate that action, reinstating its original judgment); *see also* Canavati v. Shipman, 610 S.W.2d 200, 201-03 (Tex. Civ. App.—San Antonio 1980, no writ) (no error found when trial court granted new trial but later reinstated original judgment).

Although the court is not required to give notice of any changes, that is the preferred practice. *See* Go Leasing, Inc. v. Groos Nat'l Bank, 628 S.W.2d 143, 144 n.2 (Tex. App.—San Antonio 1982, no writ). The court may modify or set aside the judgment on its own motion. *See, e.g.,* Louwien v. Dowell, 534 S.W.2d 421, 422 (Tex. Civ. App.—Dallas 1976, no writ) (trial court may unilaterally modify or correct its initial judgment); Dickson & Assoc. v. Brady, 530 S.W.2d 886, 887 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (court may on its own motion modify, correct, reform, or vacate original judgment as justice requires); Law v. Law, 517 S.W.2d 379, 381 (Tex. Civ. App.—Austin 1974, no writ) (court may modify or amend without necessity of motion by any party).

10. *See* Allen v. Allen, 646 S.W.2d 495, 496 (Tex. App.—Houston [1st Dist.] 1982, no writ) (trial court action in setting aside previous oral judgment not an abuse of discretion).

11. *See* Bray v. Bray, 618 S.W.2d 93, 96 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd) (no error in signing judgment different from that originally rendered orally if within plenary jurisdiction).

12. *See* Mathes v. Kelton, 569 S.W.2d 876, 878 (Tex. 1978) (changing party entitled to possession of property permissible within period of plenary power).

13. *See Ex parte* Johnny G, 512 S.W.2d 821, 823 (Tex. Civ. App.—San Antonio 1974, no writ) (initial oral ruling was properly changed by subsequent written judgment).

14. *See* TEX. R. CIV. P. 4. Rule 4 provides that in computing time periods, the date of signing is not counted, and the first day *after* signing is day one of the 30-day period. *See id.* 4. "[W]hen time is to be computed *from* or *after* a designated day, the designated day will be excluded while the last day of the period is to be included." McGaughy v. City of Richardson, 599 S.W.2d 113, 115 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (emphasis in original).

When *any party* files a timely motion for new trial, the trial court's jurisdiction over the entire case is lengthened under Rule 329b(e), and the appellate timetable is extended for all parties. *See* TEX. R. CIV. P. 329b(e); *see also id.* 356(a) & 386.

15. *See, e.g.,* Bray v. Bray, 618 S.W.2d 93, 96 (Tex. App.—Corpus Christi 1981, writ dism'd) (trial court can sign written judgment that differs from one orally rendered); Verret v. Verret, 570 S.W.2d 138, 140 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (trial court

basic principle, however, is not universally recognized. One appellate court recently ordered a trial judge to sign a particular judgment, even though his plenary jurisdiction had not yet begun to expire and he would have absolute, unreviewable authority to set aside the very judgment he was commanded to sign.[16]

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retains control over case, irrespective of prior oral granting of divorce, until 30 days after written judgment is signed); Louwien v. Dowell, 534 S.W.2d 421, 422 (Tex. Civ. App.—Dallas 1976, no writ) (regardless of oral pronouncement, court "may grant a new trial or otherwise change its judgment at any time if no written judgment has been signed"). *See generally* Fullenweider & Feldman, *Domestic Relations Judgments in Texas: Draftsmanship and Enforceability,* 18 S. TEX. L.J. 1, 19 (1977) (trial judge may change judgment or grant new trial at any time so long as no written judgment has been signed).

16. *See* Flores v. Onion, 693 S.W.2d 756, 757 (Tex. App.—San Antonio 1985, no writ). In *Flores,* the parties had agreed to settle their divorce case, and their handwritten agreement had been approved and rendered by the court. Thirty-two days later, when a formal typewritten decree was presented for the court's signature, the husband had withdrawn his consent. The trial judge "refused to sign the proposed decree and denied the motion to enter judgment." *Id.* at 757. The San Antonio Court of Appeals, without even acknowledging the trial court's plenary jurisdiction to grant a new trial, granted a conditional writ of mandamus and ordered the judge to sign a judgment, even though he had indicated he would grant a new trial. *See id.* at 757.

Faced with one litigant's withdrawal of consent, the trial judge had two options. He had the discretion to sign the judgment because when he had rendered judgment earlier, both litigants had agreed on all terms. *See* Kennedy v. Hyde, 682 S.W.2d 525, 528-29 (Tex. 1984) (court may sign written judgment based upon settlement agreement that complies with Rule 11 if parties consented to all terms at time of rendition). But the judge also had the discretion to grant a new trial, and in effect that is what he had done. In view of the trial court's plenary authority under Rule 306a and Rule 329b, one can only be puzzled by the *Flores* court's statement that the trial judge had a "ministerial duty" to sign the typed decree. *See* Flores v. Onion, 693 S.W.2d 756, 757 (Tex. App.—San Antonio 1985, no writ). On the contrary, he had plenary power to reject the typewritten decree and grant a new trial.

Under similar circumstances, a different court correctly refused to order a trial judge to sign a judgment when one litigant had attempted to withdraw from a partial agreement. *See* McNear v. Stewart, 608 S.W.2d 342 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ). *McNear* is consistent with the settled rule, overlooked in *Flores,* that even though a trial judge who refuses to proceed to trial and judgment can be compelled to do so by the appellate court, the appellate court cannot require the signing of a particular judgment. *See, e.g.,* Crofts v. Court of Civil Appeals, 362 S.W.2d 101, 105 (Tex. 1962) (appellate court may mandamus district court to proceed to trial and judgment, but "may not tell district court what judgment to enter"); Tide Prods., Inc. v. Braswell, 586 S.W.2d 146, 148 (Tex. Civ. App.—Texarkana 1979, no writ) ("mandamus is not available to direct the exercise of judicial discretion in any certain manner"); Fenner v. Brockmoller, 404 S.W.2d 369, 372 (Tex. Civ. App.—El Paso 1966, no writ) (mandamus available when trial court refuses to act at all, but can not require exercise of discretion in certain manner).

The *Flores* court also disregarded well-settled limitations on its own mandamus jurisdiction. An order granting a new trial cannot be reviewed by mandamus except under extremely limited circumstances not present in *Flores. See* note 8 *supra.* Thus, the *Flores* court erred in three respects: it ignored the trial court's plenary power to grant a new trial, it required him to

Once a written judgment has been signed and the timetable has begun, the duration of the period of plenary power will vary from 30 to 105 days, depending upon (1) whether a motion for new trial is filed and (2) when it is overruled in writing.[17] If no one files a motion for new trial within 30 days after the judgment is signed, the trial court loses jurisdiction over the case on the 31st day, and thereafter the judgment cannot be set aside by the trial court except by bill of review.[18] Except for nunc pro tunc corrections, any attempt by the trial judge to tamper with the judgment on the 31st day or afterward will be void for lack of jurisdiction and can be set aside by mandamus in an appellate court.[19]

By contrast, if any party files a motion for new trial within the 30 days after the written judgment is signed, the trial judge's jurisdiction is lengthened for a maximum of 105 days from the date of signing.[20] The court can shorten the 105-day maximum period by promptly overruling the motion in writing, an event that starts the clock on the final 30 days of jurisdiction.[21] Often the victorious party, anxious for the trial judge to lose jurisdiction, will schedule a hearing on the motion, have the motion overruled in writing, and thereby trigger the appellate timetable. But if no written order disposing of the motion for new trial is signed within 75 days of the date the judgment is signed, the motion is overruled by operation of law.[22] Thereafter, the

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sign a particular judgment, and it exceeded its mandamus jurisdiction by reviewing an order that in effect granted a new trial.

17. *See* Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985) (since motion for new trial was filed in wrong cause, court's plenary power ended after 30 days and decision made after that time was void); Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983) (because motion for new trial was overruled by operation of law after 75 days and judgment became final 30 days later, court was without jurisdiction to grant motion for new trial after six months).

18. *See* Middleton v. Murff, 689 S.W.2d 212, 213 (Tex. 1985); Thursby v. Stovall, 647 S.W.2d 953, 954 (Tex. 1983).

19. *See* First Alief Bank v. White, 682 S.W.2d 251, 252 (Tex. 1984) (no motion for new trial having been filed, judgment became final and court lost jurisdiction 30 days after judgment was signed); Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983) (because motion for new trial was overruled by operation of law after 75 days and judgment became final 30 days later, court was without jurisdiction to grant motion for new trial after six months).

20. *See* Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985); Taack v. McFall, 661 S.W.2d 923, 924 (Tex. 1983).

21. *Cf.* TEX. R. CIV. P. 329b(c), (e).

22. *See id.* 329b(c), (e); *see also* Clark & Co. v. Giles, 639 S.W.2d 449, 452 (Tex. 1982) (if no order signed within 75-day period, motion for new trial deemed overruled by operation of law).

court has 30 more days of plenary power.[23]

The court's ruling on the motion for new trial must be in writing and signed. It is immaterial whether the motion is overruled in writing *after* the 75-day period, or whether it was overruled orally *within* the 75-day period, or whether the court never acted on the motion at all. In other words, every motion for new trial is overruled by operation of law on the 75th day, unless it is overruled or granted in writing within the 75-day period.[24] In view of these principles, one can never rely on an oral ruling on a motion for new trial. Unless the court takes action in writing, the motion is overruled by operation of law on the 75th day.[25]

Under very limited circumstances, the timetable can be stretched for 90 extra days. Recent changes in Rule 306a require the clerk to send notice of all judgments to all parties by first class mail.[26] Under the revised rule, the court's plenary power can be extended for 90 additional days if a party proves that neither he nor his attorney received this officially mailed notice or had actual knowledge of the judgment within 20 days after it was signed.[27] If a party makes this proof, most of the timetables — including plenary jurisdiction, filing of motion for new trial, and perfection of appeal — begin to run on the date such notice was received instead of on the date of signing.[28]

C. *Final or Interlocutory?*

For purposes of the time periods discussed above, the central date is the date the judgment is signed. But the time periods mentioned in

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23. *See* TEX. R. CIV. P. 329b(e); *see also* Clark & Co. v. Giles, 639 S.W.2d 449, 452 (Tex. 1982) (when motion for new trial overruled by operation of law, trial court retains jurisdiction for 30 days to vacate, modify, correct or reform judment).

24. *See* TEX. R. CIV. P. 329b(c).

25. Frequently the trial court will exercise its plenary power and modify the judgment in some way. When such a change is made, Rule 329b(h) provides that the timetable starts again. Thus another period of 30 to 105 days will begin on the date the modified judgment is signed. *E.g.*, Garza v. Serrato, 671 S.W.2d 713, 714-15 (Tex. App.—San Antonio 1984, no writ) (when trial court granted motion to modify judgment interest rate, Rule 329b timetables were extended for 30 more days).

26. *See* TEX. R. CIV. P. 306a(3).

27. *See id.* 306a(4); *see also* Aetna Casualty & Sur. Co. v. Harris, 682 S.W.2d 670, 671 (Tex. App.—Houston [1st Dist.] 1984, no writ) (if party adversely affected has not received notice within 20 days of signing, period for filing will begin on date party receives notice).

28. *See* TEX. R. CIV. P. 306a(4). The rule provides that the six-month deadline for filing a petition for writ of error is not extended, and that in no event will lack of notice postpone the beginning of the timetables later than 90 days after signing. *See id.* 306a(4).

Rule 306a and Rule 329b do not even begin to run if the signed judgment is "interlocutory" instead of "final." Consequently, even if many months have passed since a judgment was signed, the trial court still retains plenary jurisdiction if the judgment is interlocutory. The trial courts have continuing control over interlocutory orders and may set them aside at any time prior to final judgment.[29] To determine when plenary trial court jurisdiction still exists and when the appropriate timetables begin to run, one must first distinguish interlocutory decisions from final ones.

To become final, a judgment must dispose of all parties and all issues in the lawsuit.[30] Conversely, a judgment or order is interlocutory if it does not completely dispose of all issues and parties, but instead leaves the lawsuit in need of further judicial action to resolve the remaining areas of controversy.[31] A judgment, therefore, is interlocutory and not final if it leaves any part of the case "untried and unadjudicated."[32]

While simple two-party lawsuits still abound, there seem to be increasing numbers of multiparty lawsuits involving alternative causes of action, mixed with counterclaims and cross-actions. Frequently, in

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29. *See* Kone v. Security Fin. Co., 158 Tex. 445, 450, 313 S.W.2d 281, 286 (1958); Garrison v. Texas Commerce Bank, 560 S.W.2d 451, 454 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

30. *See* Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966). *See generally* Walker, *Amalgamation of Interlocutory Orders into One Final Judgment,* 3 ST. MARY'S L.J. 207, 207 (1971) (one of two major reasons for appellate dismissal due to non-final order is failure to dispose of all parties and all issues). In *Wagner v. Warnasch,* 156 Tex. 334, 295 S.W.2d 890 (1956), the supreme court gave the following definition of a final judgment: "To be final a judgment must determine the rights of the parties and dispose of all the issues involved so that no future action by the court will be necessary in order to settle and determine the entire controversy." *Id.* at 337, 295 S.W.2d at 892.

31. *See, e.g.,* Baker v. Hansen, 679 S.W.2d 480, 481 (Tex. 1984) (order dismissing plaintiff's case was interlocutory because it did not dispose of defendant's counterclaim); Webb v. Jorns, 488 S.W.2d 407, 408 (Tex. 1972) (order dismissing one of several parties was interlocutory "because it did not dispose of all parties and issues in the pending suit"); City of Arlington v. Texas Elec. Serv. Co., 540 S.W.2d 580, 582 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.) (trial court denial of plea in abatement was interlocutory); *see also* Howard Gault & Son, Inc. v. First Nat'l Bank, 523 S.W.2d 496, 498-99 (Tex. Civ. App.—Amarillo 1975, no writ) (when there are several defendants, judgment concerning one is not final until there is judgment concerning all, unless there is a severance).

32. *See* Wilcox v. St. Mary's University, 501 S.W.2d 875, 876 (Tex. 1973) (judgment was not appealable because it left part of case "untried and unadjudicated"); Hall v. City of Austin, 450 S.W.2d 836, 838 (Tex. 1970) (judgment that left part of case untried and unadjudicated was interlocutory and therefore not appealable).

these cases, the court will grant a partial summary judgment or default judgment, or act on some of the issues without disposing of the whole case. Until the entire lawsuit is concluded, however, all such rulings are interlocutory — subject to change by the trial court and not ripe for appeal.

There are four ways to convert an interlocutory ruling into a final one so the time periods for trial court jurisdiction and the perfection of appeal will begin to run. The methods include a catchall clause, nonsuit, severance, and merger.

1. Catchall Clause

Any judgment can grant complete relief and be final if it contains the right wording. If the court intends to adjudicate fully and finally all the issues between all the parties, the judgment should expressly do so. But even if the judgment specifies in careful detail what relief is granted and denied, the cautious practice is to include a catchall Mother Hubbard clause that states, "All relief not expressly granted is denied."[33] By its very terms, a judgment with this language disposes of the entire case and therefore is a final judgment. After a conventional trial on the merits, even when the judgment does not contain this clause, it will be presumed to be final.[34] It should be noted that this presumption of finality applies only after an ordinary trial and does not apply to summary judgments or default judgments.[35]

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33. The supreme court has expressly recommended that when judgments are meant to be final they should include this clause. *See* Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982); North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 898 (Tex. 1966).

34. *See* North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 897-98 (Tex. 1966). *See generally* Hodges, *Preparation for Appellate Complaint,* 12 HOUS. L. REV. 799, 809 (1975) (discusses finality of judgment after normal trial proceedings).

35. *See, e.g.,* Teer v. Duddlesten, 664 S.W.2d 702, 704 (Tex. 1984) (no presumption that summary judgment disposes of all issues and all parties); PHB, Inc. v. Goldsmith, 539 S.W.2d 60, 60 (Tex. 1976) (summary judgment does not create presumption of disposition of all parties and issues); Etter's Welding, Inc. v. Gainsville Nat'l Bank, 687 S.W.2d 521, 522 (Tex. App.—Fort Worth 1985, no writ) (because default judgment is not a case regularly set for trial on merits, presumption of finality did not apply); *see also* Dickerson v. Mack Financial Corp., 453 S.W.2d 552, 554-55 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (*Aldridge* presumption of finality did not apply to default judgment, which was not a conventional trial on the merits). But the presumption of finality does apply after brief, nonjury hearings on the merits. *See In re* Allen, 692 S.W.2d 112, 116-17 (Tex. App.—Amarillo 1985, no writ).

2. Nonsuit

When the court does not intend to adjudicate the entire case, and a catchall clause would therefore be inappropriate, other devices must be used if a judgment that grants only partial relief is to become final. For instance, if the plaintiff, having obtained relief against one defendant, nonsuits the other defendants in the case, the judgment against the first defendant will cease to be interlocutory and will become final.[36]

3. Severance

When the remaining parties or issues in the case cannot be nonsuited, a severance[37] can accomplish the same goal. Thus, if the court has ruled on certain issues between certain parties, that part of the case may be severed from the remainder of the case, creating a new but smaller lawsuit in which the court's complete and dispositive action will become final.[38] Most often this occurs when the plaintiff

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36. The supreme court has stated the general rule concerning such interlocutory orders as follows:

> [W]here an interlocutory order is entered disposing of one defendant, that order becomes final, and there is a final judgment, when a subsequent order is entered disposing of the remaining defendants.

H. B. Zachry Co. v. Thibodeaux, 364 S.W.2d 192, 193 (Tex. 1963); *see also* McEwen v. Harrison, 162 Tex. 125, 127, 345 S.W.2d 706, 707 (1961); Corso v. Carr, 634 S.W.2d 804, 809-10 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). The converse of the *Thibodeaux* rule also holds true. A judgment that disposes of the entire case, and is therefore final and appealable, becomes interlocutory if the court grants a new trial to one of several defendants. *See* Amcole Energy Corp. v. Chapman, Inc., 666 S.W.2d 540, 541 (Tex. App.—Dallas 1984, no writ).

37. There is an important difference between a severance and an order for separate trials. In *Hall v. City of Austin,* 450 S.W.2d 836 (Tex. 1970), the supreme court drew the following distinctions:

> A severance divides the lawsuit into two or more separate and independent causes. When this has been done, a judgment which disposes of all parties and issues in one of the severed causes is final and appealable. An order for a separate trial leaves the lawsuit intact but enables the court to hear and determine one or more issues without trying all controverted issues at the same hearing. The order entered at the conclusion of a separate trial is often interlocutory, because no final and appealable judgment can properly be rendered until all of the controlling issues have been tried and decided.

Id. at 837-38.

38. *See, e.g.,* Parker v. Holland, 444 S.W.2d 581, 582-83 (Tex. 1969) (default judgment after severance of question of nature and extent of undivided interest was final adjudication); Corso v. Carr, 634 S.W.2d 804, 809 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (when trial court granted individual defendant new trial and then granted nonsuit as to him, it effectively made judgment final and appealable); Howard Gault & Son, Inc. v. First Nat'l Bank, 523 S.W.2d 496, 498-99 (Tex. Civ. App.—Amarillo 1975, no writ) (when there are several defendants, judgment concerning one is not final until there is judgment concerning all, unless

wants to pursue the remaining part of his case, or when it is a defendant who has prevailed and wants the partial judgment to become final. The judge may grant a severance for the purpose of expediting an appeal, while the rest of the case remains pending in the trial court, but the appellate courts disapprove of this practice, which burdens them with fragmented appeals.[39]

Procedural rules can have harsh jurisdictional consequences, and this is especially true when a severance carves one lawsuit into two. In *Philbrook v. Berry,*[40] for example, the trial court had signed a $2.5 million default judgment against one of several defendants, and on the same day had severed the cause against that defendant from the remainder of the case.[41] Thirty days later, the defaulted defendant filed a motion for new trial, but the motion was filed in the original lawsuit instead of the new cause created by the severance.[42] On the 53rd day, the trial court granted the motion for new trial and set the judgment aside.[43] The Texas Supreme Court ordered the trial judge to reinstate the default judgment.[44] The court reasoned that the trial judge lost jurisdiction after 30 days because the motion for new trial, having been filed in the wrong cause, was ineffective to extend the trial court's plenary jurisdiction under Rule 329b.[45]

4. Merger

When none of the above steps has been taken, the court retains jurisdiction over all interlocutory rulings until it grants complete re-

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there is a severance); *see also* Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982) ("no appeal will lie from a partial summary judgment unless there is an order of severance").

39. *See* Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525-26 (Tex. 1982) (after rendition of summary judgment denying reformation of deed, it was not an abuse of discretion to expedite appeal by severing that issue from remaining declaratory judgment issue, although it would have been "preferable" not to sever); Rutherford v. Whataburger, Inc., 601 S.W.2d 441, 442-43 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (court strongly disapproved of severance "granted for the express purpose of obtaining an advisory opinion prior to trial on merits").

40. 683 S.W.2d 378 (Tex. 1985); *see also* Philbrook v. Berry, 679 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1984) (denying plaintiff's request for writ of mandamus), *mand. granted conditionally,* 683 S.W.2d 378 (Tex. 1985).

41. *See* Philbrook v. Berry, 683 S.W.2d 378, 379 (Tex. 1985).

42. *See id.* at 379.

43. *See id.* at 379.

44. *See id.* at 379.

45. *See id.* at 379. The court ruled that "[i]n addition to being filed timely, the motion for new trial must be filed in the same cause as the judgment the motion assails." *Id.* at 379.

lief in the case. Ultimately, when the court disposes of the rest of the issues and parties, all interlocutory decisions as to certain parties or issues merge and become final and appealable.[46] In other words, when piecemeal rulings finally add up to a complete disposition of the lawsuit, the timetable for plenary jurisdiction begins to run on all the rulings when the last order is signed.

Ordinarily, one judgment will memorialize all the rulings in the case, but the principle of merger also applies when the various rulings are contained in different instruments. This is true even if the order that finally winds up the case does not specifically mention the earlier interlocutory order.[47] Because the trial court retains continuing control over interlocutory rulings, the court may change its mind and set its previous orders aside as long as a judgment remains interlocutory.[48] The judge's modification of an earlier interlocutory ruling need not be explicit, because the rendition of an inconsistent final judgment implicitly sets aside the prior interlocutory ruling.[49]

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46. *See* Webb v. Jorns, 488 S.W.2d 407, 408-409 (Tex. 1972); Runnymede Corp. v. Metroplex Plaza, Inc., 543 S.W.2d 4, 5 (Tex. Civ. App.—Dallas 1976, writ ref'd). *See generally* Walker, *Amalgamation of Interlocutory Orders Into One Final Judgment,* 3 ST. MARY'S L.J. 207, 207 (1971) (series of interlocutory and unappealable orders often disposed of by the last of such orders).

47. *See* Runnymede Corp. v. Metroplex Plaza, Inc., 543 S.W.2d 4, 5 (Tex. Civ. App.—Dallas 1976, writ ref'd). Runnymede sued Metroplex and Tom Terhagen, but on May 6, 1975 Metroplex was granted an interlocutory summary judgment. On February 24, 1976, the court sustained Terhagen's plea in abatement and dismissed the suit without reference to either Metroplex or the previous interlocutory summary judgment. Considered together, these two separate rulings granted complete relief in the case. A "final judgment" was signed on June 17, 1976 which expressly incorporated both orders, and an appeal bond was filed on July 9th. The court of appeals ruled that the judgment of February 24th was final even though it did not mention the previous judgment. *See id.* at 5. Thus the order of June 17th was a nullity and no appeal could be taken from it, because the trial court had lost jurisdiction 30 days after the February order. *See id.* at 5.

48. *See, e.g.,* Kone v. Security Fin. Co., 158 Tex. 445, 450, 313 S.W.2d 281, 285-86 (1958) (interlocutory default judgment against one party set aside by trial judge after jury verdict); Burroughs v. Leslie, 620 S.W.2d 643, 644 (Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.) (in rendering summary judgment for defendants, trial court did not err in vacating earlier default judgment and granting motion for new trial); Dickson & Assoc. v. Brady, 530 S.W.2d 886, 887-88 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (partial take-nothing summary judgment did not become final and appealable until one year later when remainder of cause dismissed for want of prosecution).

49. *See, e.g.,* Hill v. Robinson, 592 S.W.2d 376, 384 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (take nothing judgment after jury trial set aside prior interlocutory default judgment against one defendant); Dickson & Assoc. v. Brady, 530 S.W.2d 886, 887 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (final judgment that is inconsistent with prior interlocutory judgment implicitly sets aside the earlier ruling); Dickerson v. Mack Financial Corp.,

III. NUNC PRO TUNC CORRECTION OF JUDGMENTS

After the trial court loses plenary jurisdiction, it can no longer simply change its mind about the case and modify its judgment accordingly. Unless a petition for bill of review is filed, seeking to set aside a judgment on equitable grounds, the court can correct only clerical errors in the entry of its judgments.[50]

Because of the massive amount of paperwork that flows through the trial courts, mistakes are inevitably made by lawyers and by judges. Almost every judgment on the books was drafted and presumably proofread by a lawyer. Many were also reviewed and approved as to substance or form by the opposing attorney. All were duly signed by a judge. Yet, in spite of the many opportunities to discover and correct errors in judgments, mistakes are made and not detected until after the judgment has become final.

It is hard to draft rules that permit the correction of genuine mistakes without opening the door to potential revision of every term in every judgment whenever the judge has second thoughts. Each expansion of trial court power to correct judgments will be greeted with requests by lawyers to exercise that power. To the extent that trial courts can freely reopen or alter their judgments, the finality of judgments generally is threatened.

A. *The Rules Governing Nunc Pro Tunc Correction of Judgments*

Rules 316 and 317, literally interpreted, appear to grant broad authority to correct mistakes and misrecitals in the judgment records.[51]

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452 S.W.2d 552, 555 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (final judgment impliedly sets aside earlier inconsistent interlocutory judgment). In contrast, when the earlier judgment is not interlocutory but final, a subsequent inconsistent judgment must *expressly* set aside the earlier one. *See* note 117 *infra.*

50. *Cf.* Reavley & Orr, *Trial Court's Power to Amend Its Judgments,* 25 BAYLOR L. REV. 191, 194-98 (1973) (general overview of judgment nunc pro tunc); Note, *Clerical or Judicial Error—A Reminder to the Courts of the Purpose of the Nunc Pro Tunc Entry and the Basic Distinction That Serves as a Guide for Its Application,* 2 ST. MARY'S L.J. 100, 102-03 (1970) (discussing clerical-judicial distinction).

51. Rules 316 and 317 provide:

Rule 316. Correction of Mistakes.

Mistakes in the record of any judgment or decree may be amended by the judge in open court according to the truth or justice of the case after notice of the application therefor has been given to the parties interested in such judgment or decree, and thereafter the execution shall conform to the judgment as amended.

The opposite party shall have reasonable notice of an application to enter a judgment nunc pro tunc.

But the apparent breadth of these rules has been narrowed by supreme court holdings that only clerical errors in the entry of judgments may be corrected nunc pro tunc, and that courts cannot correct judicial errors in rendition.[52]

The general rule therefore may be stated as follows: After its plenary jurisdiction has expired, the trial court may correct only clerical errors in the entry of judgment, and not judicial errors in rendition.[53] It is often said that a judgment nunc pro tunc may only correct the record to conform to the judgment that was actually rendered.[54]

1. Rendition and Entry

The nunc pro tunc rules make a distinction between rendition and entry of judgment. Judgments are *rendered* by the judge. Those judgments are subsequently *entered* in the court's minute book by the court's clerk.[55] It is not entirely clear whether the rendition of judgment must be in writing or whether it may be done orally. In *Dunn v.*

Rule 317. Misrecitals Corrected.

Where in the record of any judgment or decree of a court, there shall be any omission or mistake, miscalculation or misrecital of a sum or sums of money, or of any name or names, if there is among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended, it shall be corrected by the court, wherein such judgment or decree was rendered, or by the judge thereof in vacation, upon application of either party, according to the truth and justice of the case. The opposite party shall have reasonable notice of the application for such amendment.

TEX. R. CIV. P. 316, 317.

52. *See* Mathes v. Kelton, 569 S.W.2d 876, 877-78 (Tex. 1978); Universal Underwriters Inc. Co. v. Ferguson, 471 S.W.2d 28, 30 (Tex. 1971); Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970); Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968). It is occasionally said that a clerical error is one that does not result from judicial reasoning or determination. *See* Mogford v. Mogford, 616 S.W.2d 936, 942 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.); Nolan v. Bettis, 562 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1978, no writ).

53. *See* Mathes v. Kelton, 569 S.W.2d 876, 877-78 (Tex. 1978); Universal Underwriters Inc. Co. v. Ferguson, 471 S.W.2d 28, 30 (Tex. 1971); Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 58 (Tex. 1970).

54. *See* Ortiz v. O. J. Beck & Sons, Inc., 611 S.W.2d 860, 863 (Tex. Civ. App.—Corpus Christi 1980, no writ) (court may correct clerical error that causes "the official records of the court to reflect inaccurately the judgment actually rendered"); *In re* E.S.M., 550 S.W.2d 749, 752 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ) ("clerical error occurs where minutes of court do not correctly recite judgment actually rendered"); Reintsma v. Greater Austin Apartment Maint., 549 S.W.2d 434, 436 (Tex. Civ. App.—Austin 1977, writ dism'd) (proper purpose of judgment nunc pro tunc is "to cause the record to speak the truth"); Perry v. Nueces County, 549 S.W.2d 239, 242 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) ("judgment nunc pro tunc does not disturb the initial judgment" but "brings the court records into conformity with it").

55. *See* Burrell v. Cornelius, 570 S.W.2d 382, 384 (Tex. 1978); Ortiz v. O. J. Beck & Sons,

Dunn,[56] the supreme court held that rendition occurs when the judge pronounces judgment orally in court,[57] but that holding has been qualified by later developments. In *Walker v. Harrison,*[58] the court considered *Dunn's* approval of oral pronouncements but said that for purposes of plenary jurisdiction, rendition occurs when a written judgment is signed.[59] Rule 306a, recently rewritten to clarify the concept of "rendition," now provides that for purposes of plenary trial court jurisdiction and perfection of appeal, rendition must be in writing.[60]

In view of Rules 306a and 329b, an orally rendered judgment can-

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Inc., 611 S.W.2d 860, 863-64 (Tex. Civ. App.—Corpus Christi 1980, no writ). In *Burrell,* the supreme court stated:

> Judges render judgment; clerks enter them on the minutes. . . .The entry of a judgment is the clerk's record in the minutes of the court. "Entered" is synonymous with neither "Signed" nor "Rendered."

Burrell v. Cornelius, 570 S.W.2d 382, 384 (Tex. 1978); *see also* Reavley & Orr, *Trial Court's Power to Amend Its Judgments,* 25 BAYLOR L. REV. 191, 192 (1973) (rendition and entry are separate functions and may result in judgments differing in content). *See generally* 1A. FREEMAN, LAW OF JUDGMENTS § 46, at 75 (1925) (rendition of judgment is judicial act, entry by clerk only ministerial).

56. 439 S.W.2d 830 (Tex. 1969).

57. *See id.* at 832-33 . In *Dunn,* the court had pronounced judgment orally from the bench in a divorce case. Two days later, the defendant died, and the plaintiff then filed a motion to dismiss the case because of the death of a party before rendition of a written judgment. The trial court denied the motion to dismiss and signed a written judgment. The supreme court held that the oral judgment was valid, and the signing of a written judgment was only a "ministerial act." *See id.* at 832.

58. 597 S.W.2d 913 (Tex. 1980).

59. *See id.* at 915. In *Walker* the trial court dismissed a case for want of prosecution, but orally reinstated it within thirty days of the written dismissal order. The court did not sign a written order of reinstatement until several months later. The supreme court held that the oral reinstatement within the 30-day period of jurisdiction under Rule 165a was ineffective, and the written ruling came too late. *See id.* at 915. Referring to *Dunn's* approval of oral judgments, the *Walker* court held:

> While it is true that orders and judgments may be orally pronounced in open court, a different rule applies when there is a time limit placed on the court's jurisdiction to act on a matter. When there is a time limit within which the court has jurisdiction to act, the order must be in writing, specific, and signed by the trial judge.

Id. at 915.

60. Rule 306a(1) provides in part:

> Beginning of periods. The date a judgment or order is signed as shown of record shall determine the beginning of the periods prescribed by these rules for the court's plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order and for filing in the trial court the various documents in connection with an appeal, including, but not limited to an original or amended motion for new trial, an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof, and bills of exception, and for filing of the petition for writ of error if review is sought by writ of error, and for filing in the

not have much permanence, and the significance of oral rendition seems questionable.[61] Under those rules, an oral judgment amounts to little more than a tentative expression of the judge's intentions. An oral judgment cannot be final or binding. It is by definition interlocutory — subject to change at any time by the trial court and not appealable to any appellate court.[62] Until a written judgment is signed, the trial court's 30-day period of plenary power does not even begin to expire. Yet, in spite of these principles, courts still cite *Dunn* and make broad and incorrect statements that a written judgment is not a prerequisite to finality.[63] On the contrary, as the rules are now worded final rendition cannot occur until the judgment is reduced to writing and signed.

Because oral pronouncements from the bench are often tentative and incomplete, they can be reconsidered, supplemented, or modified by the written judgment. Judges are not forever bound by their oral pronouncements from the bench. When the writing adds to or differs from the oral judgment first announced, it is presumed to be what the judge intended.[64] The written judgment may expressly change the

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appellate court of the transcript and statement of facts; but this rule shall not determine what constitutes rendition of a judgment or order for any other purpose.

TEX. R. CIV. P. 306a(1).

61. When *Dunn v. Dunn,* 439 S.W.2d 830 (Tex. 1969), was decided in 1969, Rule 306a directed attorneys, clerks, and judges to ensure that judgments were reduced to writing and signed, but provided that failure to do so "shall not invalidate any judgment or order." *See* TEX. R. CIV. P. 306a (Vernon 1977). *Dunn* stressed the wording of Rule 306a in concluding that oral judgments pronounced from the bench are valid. *See* Dunn v. Dunn, 439 S.W.2d 830, 832 (Tex. 1969). *Walker v. Harrison,* 597 S.W.2d 913 (Tex. 1980), qualified *Dunn* by holding that judgments must be in writing and signed for the purpose of trial court jurisdiction. *See id.* at 915. Since *Walker,* Rules 306a and 329b have been amended to require in clear language that none of the timetables begin until a written judgment is signed. *See* TEX. R. CIV. P. 306a(1) (requiring that written judgment be signed before timetables begin); *id.* 329b(a)-(e) (trial court control over judgment does not begin to expire until judgment *signed).*

62. *See, e.g.,* Bray v. Bray, 618 S.W.2d 93, 96 (Tex. Civ. App.—Corpus Christi 1981, writ dism'd) (court can render written judgment that differs from oral pronouncement); Verret v. Verret, 570 S.W.2d 138, 140 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ) (plenary jurisdiction not affected by prior oral decision or by death of party); Austin v. Austin, 553 S.W.2d 9, 11 (Tex. Civ. App.—Eastland 1977, writ dism'd) ("trial court retains control over a cause, irrespective of a prior oral decision, until 30 days after the written order is entered"); *cf.* Louwien v. Dowell, 534 S.W.2d 421, 422 (Tex. Civ. App.—Dallas 1976, no writ) (under *Dunn v. Dunn,* oral pronouncement valid, but only so long as it is not set aside).

63. *See* Odom v. Odom, 683 S.W.2d 135, 136 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.) (written signed judgment not a prerequisite to finality); *see also* Liberty Mut. Ins. Co. v. Woody, 640 S.W.2d 718, 721 (Tex. App.—Houston [1st Dist.] 1982, no writ) (judgment rendered when decision affirmatively announced; written judgment not prerequisite to finality).

64. *See* Kostura v. Kostura, 469 S.W.2d 196, 198-99 (Tex. Civ. App.—Dallas 1971, writ

terms that were rendered orally. In *Allen v. Allen,*[65] for example, the oral judgment granted all the real property to the wife and all the retirement plan to the husband.[66] The written judgment, however, divided the realty between the parties and gave a percentage of the retirement plan to each.[67] The appellate court held that the written judgment had effectively changed the terms that were announced orally.[68] Similarly, in *Comet Aluminum Co. v. Dibrell,*[69] the supreme court held that a written judgment granting prejudgment interest necessarily superseded the earlier oral pronouncement that had not awarded the same relief.[70]

2. Clerical or Judicial Error

It is difficult to draw a bright line distinction between clerical and judicial errors, since an error is not considered clerical merely because it originated with an attorney or a clerk.[71] When the written judgment correctly sets forth the judge's intentions at rendition, and the judge later learns that he acted upon false information, the error is considered judicial. In *Universal Underwriters Insurance Co. v. Ferguson,*[72] the trial court had dismissed a lawsuit for want of prosecution without giving proper notice to the plaintiff's attorney.[73] Even though the lack of notice resulted from the clerk's mistake in addressing notices to the lawyers, the supreme court held that this was a

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dism'd); *cf.* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 59 (Tex. 1970) (written judgment granting prejudgment interest constituted rendition of judgment on that issue and necessarily prevailed over previous oral rendition from bench which did not mention prejudgment interest).

65. 646 S.W.2d 495 (Tex. App.—Houston [1st Dist.] 1982, no writ).

66. *See id.* at 495-96.

67. *See id.* at 496.

68. *See id.* at 496 (because court has inherent power to vacate its own judgment within proper time limits, there was no abuse of discretion in setting aside prior oral decision).

69. 450 S.W.2d 56 (Tex. 1970).

70. *See id.* at 58-59.

71. *See* Dikeman v. Snell, 490 S.W.2d 183, 185-86 (Tex. 1973) (language erroneously written into judgment by attorney becomes part of the judgment and constitutes judicial error). *See generally* 1A. FREEMAN, LAW OF JUDGMENTS § 145-156, at 281-306 (1925) (reporting various examples of distinctions between clerical and judicial errors based on facts of individual cases); Reavley & Orr, *Trial Court's Power to Amend Its Judgments,* 25 BAYLOR L. REV. 191, 195-98 (1973) (general rule is simple to state — clerical errors correctable, judicial errors not — but difficult to apply).

72. 471 S.W.2d 28 (Tex. 1971).

73. *See id.* at 29.

judicial error.[74] The error was not clerical because it was not a mistake or omission that prevented the judgment as entered from accurately reflecting the judgment that was rendered.[75] Similarly in *Finlay v. Jones*,[76] the trial court, believing the defendant had not answered, granted a default judgment, unaware that a timely answer had been filed with the papers of a different case by a negligent clerk.[77] After losing plenary jurisdiction, the trial judge had granted judgment nunc pro tunc correcting the first judgment's erroneous recital that defendant had not filed an answer.[78] The supreme court held the nunc pro tunc judgment improper because the erroneous recital was a judicial mistake, even though it all started with the clerk.[79] Thus, clerical mistakes that cause the rendition of an improper judgment are judicial errors which cannot be corrected by a judgment nunc pro tunc.

B. *Application of the Rules*

A review of the cases reveals a great disparity between theory and practice, because the rules seem to assume that mistakes are inherently either judicial errors in rendition or clerical errors in entry, and that the court's task is simply to classify them correctly. In reality, the courts seem to consider not only the nature of the alleged error but also the character and persuasiveness of the proof that a mistake really occurred in translating the judge's intentions into writing.

1. Clerical Errors

Surely no one would criticize nunc pro tunc correction of names that have been erroneously stated,[80] or typographical errors that cre-

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74. *See id.* at 30.

75. *See id.* at 29-30. In *Ferguson*, the plaintiff had a petition for bill of review pending in the trial court. The supreme court stated that in the bill of review proceeding, it would be necessary "to decide whether the facts of this case satisfy, or warrant the modification or relaxation of, the rules ordinarily governing the right to a bill of review." *Id.* at 31.

76. 435 S.W.2d 136 (Tex. 1968).

77. *See id.* at 137.

78. *See id.* at 137.

79. *See id.* at 138-39. The supreme court felt the erroneous jurisdictional decisions made by the trial court were not clerical because "the court has no more solemn judicial obligation than that of seeing that no litigant is unjustly saddled with a judgment in the absence of notice and a hearing." *Id.* at 139. Thus, the trial judge had a judicial duty to determine whether proper service was effected and whether an answer was on file, and once such a determination was made, albeit mistakenly, the nature of the error became judicial. *See id.* at 139.

80. *See* Whicker v. Taylor, 422 S.W.2d 609, 610 (Tex. Civ. App.—Waco 1967, no writ) ("W. E. Wicker" changed to "E. W. Whicker").

ate a variance between a jury verdict and the judgment,[81] such changes being specifically authorized by Rule 317.[82] Likewise, it is hard to quarrel with nunc pro tunc corrections of the date of signing,[83] provided the trial court is not trying to resurrect plenary jurisdiction that has expired or permit the belated perfection of an appeal.[84] Since few attempts to modify previously rendered judgments are so universally accepted, the case law must be consulted to decide what will constitute a permissible nunc pro tunc change.

When more substantial modifications have been upheld as clerical, the courts have properly scrutinized the evidence and required solid proof that a genuine mistake actually happened.[85] Thus, a summary

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81. *See* Wingfield v. Bryant, 560 S.W.2d 785, 786 (Tex. Civ. App.—Austin 1978, writ dism'd) (appellate court ordered nunc pro tunc change of "25 feet" to "75 feet" as found by jury), *on remand,* 614 S.W.2d 643 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.); Wedgeworth v. Pope, 12 S.W.2d 1045, 1047-48 (Tex. Civ. App.—Fort Worth 1928, writ ref'd) (proper to change judgment from $12,008 to $1208, under statute which preceded Rule 317).

82. *See* TEX. R. CIV. P. 317 at note 51 *supra.*

83. *See* Ortiz v. O. J. Beck & Sons, Inc., 611 S.W.2d 860, 863 (Tex. Civ. App.—Corpus Christi 1980, no writ) (resolution of jurisdictional issues requires determination of when judgment actually rendered; date of judgment is type of error correctable nunc pro tunc); Cyrus v. State, 601 S.W.2d 776, 777 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (subsequent order of trial judge correcting date of rendition of judgment was valid nunc pro tunc change).

84. *See* Anderson v. Casebolt, 493 S.W.2d 509, 510 (Tex. 1973) (trial judge may not enlarge time for appeal by signing second judgment that merely affirms but does not change earlier one).

85. The prevailing view is that nunc pro tunc changes must be justified by "clear, satisfactory, and convincing evidence." *See, e.g.,* Wood v. Griffin & Brand, 671 S.W.2d 125, 129, 132 (Tex. App.—Corpus Christi 1984, no writ) (proof of clerical errors must be "clear, satisfactory, and convincing"); Davis v. Davis, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ) ("judgment nunc pro tunc should be granted only if the evidence is clear, satisfactory, and convincing"); Stuart v. City of Houston, 419 S.W.2d 702, 703 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (nunc pro tunc change "should be granted only if the evidence is clear, satisfactory, and convincing that a clerical error has been made"). An exception to the cited authorities is *South Texas Tire Test Fleet, Inc. v. Long,* 594 S.W.2d 540 (Tex. Civ. App.—San Antonio 1979, no writ). There, a default judgment for the plaintiff had also expressly, and in great detail, denied defendant's counterclaim for an injunction. More than four months later when the judgment had become final, the judge signed a nunc pro tunc order to "correct" his "clerical errors" — his granting the default judgment and his denial of the counterclaim. The court of appeals, after observing that the record did not disclose the testimony that a clerical error had occurred, concluded that the trial judge's "personal recollection of the judgment he had actually rendered . . . must be accepted as true." *See id.* at 542. This acquiescent attitude stands in stark contrast to the approach of all the other reported decisions in Texas, and falls far short of the requirement of "clear, satisfactory and convincing evidence." Moreover, *South Texas Tire* does not cite and cannot be reconciled with supreme court precedents. *See* Lone Star Cement Co. v. Fair, 467 S.W.2d 402, 405-406 (Tex. 1971) (court could not correct recital that defendant, though duly and legally cited and served, failed to appear and answer); Finlay v. Jones, 435 S.W.2d 136, 137-39 (Tex. 1968) (erroneous recital that de-

judgment that granted recovery for the interest on a note but not for the principal was held correctable nunc pro tunc, when supported by a docket entry, the judge's recollection, and a summary judgment affidavit.[86] Similarly, one court has held that failure to award attorney's fees was a clerical error, where a letter from the judge to the attorneys showed that he had intended to award them.[87] It has also been held proper to correct the child custody terms of a divorce decree that transposed "Petitioner" and "Respondent," where the decree itself contained contradictions and the conduct of the parties confirmed that the names had been reversed.[88] These cases are by no means exclusive, as numerous other cases echo the "solid proof" requirement.[89]

2. Judicial Errors

The cases characterizing attempted nunc pro tunc changes as judicial and therefore void fall into three categories. In the first group of cases, the correction appears to be an afterthought by the trial judge and not a real mistake in writing the judgment. Typically, only the scantest of evidence suggests that a mistake was made in reducing the judgment to writing. For example, after nine months a trial court was not allowed to change its earlier final judgment, which commanded a litigant to build a fence of brick, to specify that the fence be built of

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fendant had been served and had not answered was a judicial error and not correctable nunc pro tunc).

86. *See* Petroleum Equip. Fin. Corp. v. First Nat'l Bank, 622 S.W.2d 152, 154 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (personal recollection of judge raises presumption supporting finding of clerical error).

87. *See* Hutcherson v. Lawrence, 673 S.W.2d 947, 950 (Tex. App.—Tyler 1984, no writ).

88. *See* Bockemehl v. Bockemehl, 604 S.W.2d 466, 469 (Tex. Civ. App.—Dallas 1980, no writ). In *Bockemehl,* it was the judge's recollection, confirmed by his docket notation, that the Respondent wife would have custody. The decree appointed Petitioner husband as managing conservator, but then contradicted itself by ordering Petitioner to pay child support and reciting that the best interest of the child would be served by appointing Respondent managing conservator. *See id.* at 469-70.

89. *See, e.g.,* Davis v. Davis, 647 S.W.2d 781, 784 (Tex. App.—Austin 1983, no writ) (trial court's recollection and docket entry were bolstered by evidence at trial; nunc pro tunc order upheld after comprehensive review); Holway v. Holway, 506 S.W.2d 643, 646 (Tex. Civ. App.—El Paso 1974, no writ) (docket notation, which was consistent with judge's customary practice, supported nunc pro tunc change despite judgment's being six years old); Zamora v. Salinas, 422 S.W.2d 249, 251-52 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.) (trial court within authority in changing dismissal from "with prejudice" to "without prejudice," even though 13 months had gone by, where motion for dismissal and transmittal letter to court confirmed mistake made).

wood.[90] Similarly, a court was powerless in 1979 to delete from a 1975 agreed order one of the heirs to an estate under the earlier judgment.[91] In addition, when a judgment against a business entity proved hard to collect, the trial court was not allowed to add individual partners as defendants and grant relief against them.[92] Nor could a trial court use a nunc pro tunc order simply to change its award of a disputed item of personalty[93] or to alter its decision about prejudgment interest.[94]

Of similar import is the second class of cases, in which the judge has rendered judgment upon an erroneous factual conclusion. The Texas Supreme Court has held that when the original judgment mistakenly recited that defendant had not answered and thus a default judgment was rendered, the erroneous recitals could not be corrected nunc pro tunc.[95] Similarly, it was improper for a judge to change his mind about granting a $1300 offset simply because he later learned that the jury had already deducted that amount in reaching its verdict.[96] These decisions are sound because after plenary jurisdiction has expired, erroneous rulings on the law or the facts should be corrected only by the appellate courts. If the rule were otherwise, there would be no time limits on the presentation of new facts or authorities to the court. Judgments would be forever vulnerable if the law allowed nunc pro tunc revision whenever a mistake of fact or law was later made known to the judge.

In the third group of decisions, one suspects that the judgment drafted by the lawyers and signed by the judge incorrectly granted or denied relief, but the proof in the record does not demonstrate that the court actually meant to do otherwise. Under these circumstances,

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90. *See* Dikeman v. Snell, 490 S.W.2d 183, 185-87 (Tex. 1973).

91. *See* Humphries v. Chandler, 597 S.W.2d 2, 3 (Tex. Civ. App.—Beaumont 1980, no writ).

92. *See* Caliva v. Texas Constr. Material Co., 380 S.W.2d 641, 644-45 (Tex. Civ. App.—Houston 1964, no writ).

93. *See* Mathes v. Kelton, 569 S.W.2d 876, 877-78 (Tex. 1978). In *Mathes* the trial court's action was upheld as an exercise of its plenary power, even though the judge thought he was acting nunc pro tunc. *See id.* at 878.

94. *See* Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 59 (Tex. 1970) (trial judge not allowed to alter award of prejudgment interest nunc pro tunc).

95. *See* Lone Star Cement Corp. v. Fair, 467 S.W.2d 402, 405 (Tex. 1971); Finlay v. Jones, 435 S.W.2d 136, 138-39 (Tex. 1968).

96. *See* Shelby v. Shelby, 517 S.W.2d 696, 698 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (where recorded judgment correctly states actual decision, mistake in reflecting court's true subjective intent does not justify nunc pro tunc change).

the nunc pro tunc amendment has been termed "judicial" and not allowed. For example, when a judgment *impliedly,* but mistakenly, denied relief under *North East Independent School District v. Aldridge,*[97] it was deemed a judicial error.[98] Further, when a judgment wrongfully but *expressly* granted relief against a party in his individual capacity,[99] or denied relief against others,[100] the error was judicial and not correctable nunc pro tunc.

The cases are difficult to harmonize, but most of them can be explained by this rule: If clear and convincing evidence proves that the court's true intent was incorrectly translated into writing, the error is clerical and may be corrected nunc pro tunc.

C. *Procedure and Evidence*

1. Notice

Rules 316 and 317 require "reasonable notice" of applications to enter a judgment nunc pro tunc.[101] These rules, however, do not specify how much notice must be given or the form it must take. The three-day notice requirement of Rule 21a[102] seems grossly inadequate because the respondent may need to rehire his attorney, evaluate the grounds of the motion, and investigate the evidence. It is also not clear whether the harmless error rule applies when notice was not

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97. 400 S.W.2d 893, 897-98 (Tex. 1966). *Aldridge* held that when judgment is rendered after a conventional trial on the merits, the appellate courts will presume for purposes of appeal that all relief not expressly granted is denied. *See id.* at 897-98.

98. *See* City of Houston v. Deshotel, 585 S.W.2d 846, 850-51 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (judgment granting relief against city but silent about individual defendant, impliedly was take nothing judgment against individual); *see also* Home Ins. Co. v. Greene, 443 S.W.2d 326, 329-30 (Tex. Civ. App.—Texarkana 1969) (judgment granting relief for certain parties, but silent as to others, impliedly denied all other relief), *aff'd,* 453 S.W.2d 470 (Tex. 1970).

99. *See* Shepherd v. Estate of Long, 480 S.W.2d 51, 54-55 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (improper for nunc pro tunc order to delete recovery against estate's temporary administrator in his individual capacity and as sole surviving heir).

100. *See* Travelers Ins. Co. v. Williams, 603 S.W.2d 258, 261 (Tex. Civ. App.—Corpus Christi 1980, no writ) (where agreed judgment denied intervenor's claims for relief, court could not make nunc pro tunc change 18 months later, when alleged error was discovered).

101. *See* TEX. R. CIV. P. 316, 317 at note 51 *supra.*

102. *See* TEX. R. CIV. P. 21a. Rule 21a provides that every notice mandated by the rules, with few exceptions, may be served by delivery of notice to the party or his attorney, either in person or by registered or certified mail. *See id.* 21a. The rule further provides that no matter who effectuates the service, be it attorney, party, sheriff, or other person, three days notice shall be given. *See id.* 21a.

given.[103] Some courts have held that lack of notice was not fatal because there was no showing of harm.[104] Other courts have held that a judgment nunc pro tunc rendered without notice is void.[105]

Perhaps the harmless error rule, which presupposes that the litigants at least had an opportunity to be heard, should be relaxed where there has been an ex parte nunc pro tunc change. The dissatisfied party, however, should be required to detail the evidence he would have presented if there had been a hearing. Only if the evidence raises a fact issue should the matter be remanded for a new hearing.

2. Evidence

Rule 317 appears to permit the correction of judgments only when "there is among the records of the cause any verdict or instrument of writing whereby such judgment or decree may be safely amended."[106] But the reported decisions have not required such tangible proof. In most cases, the alleged mistake is not shown by a written instrument, and the courts have usually accepted the judge's personal recollection and docket notations as evidence of what the judgment was supposed to say.[107]

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103. *See id.* 434. Rule 434 provides that the court of appeals shall not reverse a judgment for a new trial unless the error complained of was "reasonably calculated to cause and probably did cause the rendition of an improper judgment." *See id.* 434. Rule 503 sets forth the same rule for the supreme court. *See id.* 503.

104. *See Ex parte* Thomas, 536 S.W.2d 583, 585 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (ordinary courtesy demands notice be given, but failure to do so does not make court's order void); Law v. Law, 517 S.W.2d 379, 381 (Tex. Civ. App.—Austin 1974, writ dism'd) (no showing of injury from defect in notice). The only authority cited by the *Thomas* court for its holding is *Payton v. Hurst Eye, Ear, Nose & Throat Hosp. & Clinic,* 318 S.W.2d 726, 734-35 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.). Since *Payton* involved a modification of judgment during the period of plenary power, when the court may make changes on its own initiative, it does not support the holding in *Thomas.*

105. *See* Johnson v. Hanson, 575 S.W.2d 361, 362 (Tex. Civ. App.—Austin 1978, no writ) (because Rules 21a and 316 require notice, failure to give notice makes a judgment nunc pro tunc void); Cargill, Inc. v. Van Deweghe, 284 S.W.2d 216, 217 (Tex. Civ. App.—Texarkana 1964, no writ) (nunc pro tunc judgment without notice a nullity). Because *Johnson* relies on three cases decided before 1941, when the harmless error rule became law and ended the era of presumed error, its reasoning appears questionable. *Cf.* Williams v. Pitts, 151 Tex. 408, 410, 251 S.W.2d 148, 150 (1952) (court refused writ of mandamus to litigant seeking judgment nunc pro tunc, because he had not given notice of his motion in trial court); Go Leasing, Inc. v. Groos Nat'l Bank, 628 S.W.2d 143, 144 (Tex. App.—San Antonio 1982, no writ) (stating that notice must be given but deciding case on other grounds).

106. *See* TEX. R. CIV. P. 317 at note 51 *supra.*

107. *See, e.g.,* Wood v. Griffin & Brand, 671 S.W.2d 125, 130-31 (Tex. App.—Corpus Christi 1984, no writ) (judgment nunc pro tunc may be supported by docket entries and by

Such evidence, however, has its difficulties. Reliance on what the judge personally remembers "subjects erstwhile clear and reliable court records to the undesirable hazard of meaning only what the judge who signed them later recalls to have been his intent at the time."[108] And for some unknown reason, the cases that give credence to docket entries have not mentioned the supreme court's 1977 holding that docket entries "cannot be used to contradict or prevail over a final judicial order."[109]

Whether a mistake is clerical or judicial is a question of law, and the trial court's decision on this issue is not binding on an appellate court.[110] The issue of whether a mistake actually occurred, however, is a question of fact.[111] The original judgment is presumed to be correct as written, and the burden of proving a clerical error rests on the movant.[112] The Texas Supreme Court has not defined the precise evidentiary burden that must be borne, but several appellate cases have stated that the evidence must be "clear, satisfactory, and convincing" to support a judgment nunc pro tunc.[113] While the cases have not

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personal recollection of trial judge); Davis v. Davis, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ) (nunc pro tunc correction of clerical error may be based on judge's personal recollection and docket entries); Bockemehl v. Bockemehl, 604 S.W.2d 466, 469 (Tex. Civ. App.—Dallas 1980, no writ) (findings of clerical error supported by personal judicial recollection and docket notations).

108. *See* Knox v. Long, 152 Tex. 291, 300, 257 S.W.2d 289, 297 (1953) (Garwood, J., dissenting).

109. *See* N-S-W Corp. v. Snell, 561 S.W.2d 798, 799 (Tex. 1977); *accord* Lone Star Cement Corp. v. Rush, 456 S.W.2d 547, 549 (Tex. Civ. App.—Dallas 1970, writ ref'd n.r.e.) (entries on docket sheet cannot be consulted for purpose of modifying "the plain effect of the order actually signed").

110. *See* Lone Star Cement Corp. v. Fair, 467 S.W.2d 402, 405 (Tex. 1971); Finlay v. Jones, 435 S.W.2d 136, 138 (Tex. 1968).

111. *See* Davis v. Davis, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ); Bockemehl v. Bockemehl, 604 S.W.2d 466, 469 (Tex. Civ. App.—Dallas 1980, no writ).

112. *See* Kostura v. Kostura, 469 S.W.2d 196, 198-99 (Tex. Civ. App.—Dallas 1971, writ dism'd) (signed judgment is presumptively what judge intended); *see also* Wood v. Griffin & Brand, 671 S.W.2d 125, 131-32 (Tex. App.—Corpus Christi 1984, no writ) (circumstances of case prevent indulging every presumption in favor of corrected judgment).

113. *See, e.g.,* Wood v. Griffin & Brand, 671 S.W.2d 125, 129, 132 (Tex. App.—Corpus Christi 1984, no writ) (proof of clerical errors must be "clear, satisfactory, and convincing"); Davis v. Davis, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ) ("judgment nunc pro tunc should be granted only if the evidence is clear, satisfactory, and convincing"); Stuart v. City of Houston, 419 S.W.2d 702, 703 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (nunc pro tunc change "should be granted only if the evidence is clear, satisfactory, and convincing that a clerical error has been made"). The necessity for "clear, satisfactory, and convincing" evidence dates back at least to *Stauss v. Stauss,* 244 S.W.2d 518, 519 (Tex. Civ. App.—San Antonio 1951, no writ). Research has not located any authority expressing a lesser

defined the exact meaning of "clear, satisfactory, and convincing," this standard undoubtedly falls somewhere on the continuum between the "preponderance" standard and the "reasonable doubt" standard. In other contexts, clear and convincing has been defined as "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established."[114] Thus, as the courts have expanded the varieties of proof that will support a nunc pro tunc change, at the same time they have properly insisted that the proof rise to a high level of persuasiveness.

3. Interlineation, New Judgment, or Separate Order?

Although there is authority that the nunc pro tunc correction may be made by interlineation,[115] it is preferable to prepare a new judgment or a separate order. Even if only a few words are changed, a new instrument is probably mandatory because the nunc pro tunc order must set forth (1) the procedure that has been followed, (2) the correction that has been made, and (3) the basis for the nunc pro tunc action.[116] Further, it is vital that the corrected judgment specifically vacate the earlier one, because a second judgment that does not vacate the first is a nullity.[117]

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standard of proof, although the court in *South Texas Tire Test Fleet, Inc. v. Long,* 594 S.W.2d 540 (Tex. Civ. App.—San Antonio 1979, no writ), was certainly satisfied with minimal and questionable proof that a clerical mistake had really occurred. *See* note 85 *supra.*

114. *See In re* G.M., 596 S.W.2d 846, 847 (Tex. 1980) (termination of parental rights); State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979) (involuntary civil commitment).

115. *See* Rogers v. Allen, 80 S.W.2d 1085, 1086 (Tex. Civ. App.—Eastland 1935, no writ) (better practice is to re-enter corrected judgment, but careful interlineation is acceptable); Berge v. Panhandle Land Co., 145 S.W. 318, 319 (Tex. Civ. App.—Amarillo 1912, no writ) (courts abide but do not approve of interlineation corrections; better method is to vacate or annul defective entry and replace it); *see also* Kollman Stone Indus., Inc. v. Keller, 574 S.W.2d 249, 250 n.2 (Tex. Civ. App.—Beaumont 1978, no writ) (remarking that nunc pro tunc interlineation is proper way of changing an error in initials of party). *See generally* Reavley & Orr, *Trial Court's Power to Amend Its Judgments,* 25 BAYLOR L. REV. 191, 201-202 (1973).

116. *See* Hutcherson v. Lawrence, 673 S.W.2d 947, 948-49 (Tex. App.—Tyler 1984, no writ); Quintanilla v. Seagraves Ford, Inc., 522 S.W.2d 274, 276-77 (Tex. Civ. App.—Corpus Christi 1975, no writ); Stonedale v. Stonedale, 401 S.W.2d 725, 728 (Tex. Civ. App.—Corpus Christi 1966, no writ); Ellison v. Panhandle & Santa Fe Ry Co., 306 S.W.2d 909, 910-11 (Tex. Civ. App.—Amarillo 1957, no writ).

117. *See, e.g.,* City of West Lake Hills v. State, 466 S.W.2d 722, 726-27 (Tex. 1971) (preferable procedure to expressly state first judgment is vacated, but adequate for later judgment simply to show in some way that it vacates the first); Cavazos v. Hancock, 686 S.W.2d 284, 286 (Tex. App.—Amarillo 1985, no writ) (subsequent judgment that does not vacate the first is a nullity); Law v. Law, 517 S.W.2d 379, 381-82 (Tex. Civ. App.—Austin 1974, writ dism'd)

4. Time Limits

There are no definite timetables for seeking a nunc pro tunc judgment in the trial court, or for challenging the trial court's action by mandamus in the appellate courts. Nevertheless, even though the statute of limitations does not apply, an effort to obtain a judgment nunc pro tunc can be barred by laches.[118] Accordingly, the litigant who discovers a clerical error should act promptly to have it set right. In addition, once a clerical error has been corrected nunc pro tunc, under Rule 306a(6) the timetables for trial court plenary jurisdiction and for perfection of appeal as to the corrected portion start anew from the date of the new order.[119] But even if the dissatisfied party lets the time for appeal expire, that alone will not bar a belated action for a writ of mandamus in an appellate court to set aside the void order.[120]

(second judgment, clearly on its face amending original decree, held sufficient to vacate first judgment); *see also* Tunnell v. Otis Elevator Co., 404 S.W.2d 307, 308 (Tex. 1966) (unless record shows judgment vacated or set aside, it is "valid and subsisting until set aside by bill of review").

118. In *Waggoner v. Rogers,* 108 Tex. 328, 330, 193 S. W. 136, 136 (1917) and *Coleman v. Zapp,* 105 Tex. 491, 495, 151 S.W. 1040, 1041-42 (1912), the supreme court held that a nunc pro tunc proceeding is not an "action" within the statute of limitations. Even though limitations cannot be asserted, the supreme court in *Coleman* stated that laches can bar an otherwise valid nunc pro tunc correction:

> While it is our opinion that the right to have the entry of a judgment corrected or amended so as to truthfully speak the judgment as rendered is not affected by statutes of limitation, we do not wish to be understood as holding that it may not be defeated by the laches of the party invoking it, under a correct application of that doctrine. It should be also stated that it can never be availed of to the prejudice of the rights of innocent third parties.

Id. at 495, 151 S.W. at 1043.

The party asserting the affirmative defense of laches must prove "(1) unreasonable delay in asserting a legal or equitable right, and (2) a good faith change of position by another to his detriment because of his delay." Stergios v. Forest Place Homeowners' Ass'n, Inc., 651 S.W.2d 396, 401 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (citing City of Fort Worth v. Johnson, 388 S.W.2d 400, 403 (Tex. 1964)).

119. Rule 306a(6) provides:

> Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316 or 317, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original judgment.

TEX. R. CIV. P. 306a(6). The commentary to the rule makes clear that a nunc pro tunc correction does not "revive the court's expired plenary power with respect to complaints that could have been made to the original judgment." *See id.* 306a(6) Comment 1.

120. *See* Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973) (failure to pursue appeal does not bar application for writ of mandamus in appellate court).

IV. CONCLUSION

Every legal system must reconcile two conflicting goals of the litigation process — ensuring that judgments are just and correct, and at the same time, final and not subject to endless revision. Accordingly, after a judgment has been signed and the lawsuit has apparently been concluded, the rules give the trial judge additional time to reconsider the relief granted while the facts are still fresh in mind. During this period of plenary control, trial courts frequently rethink their decisions and make changes in their judgments.

At some point trial courts must lose jurisdiction, and the search for perfect justice in individual cases must yield to society's requirement that litigation come to an end. Because nunc pro tunc changes are allowed only under limited circumstances — correction of errors in drafting the written judgment, proven by clear, satisfactory, and convincing evidence — they do not really undermine the sanctity of judgments. Nunc pro tunc corrections of final judgments must be strictly scrutinized because every effort to bend or loosen the rules to correct a perceived mistake has the potential to undermine the stability of judgments in general, and that would itself be an injustice to the great mass of litigants whose cases have been concluded.