

**THE POWER TO ACT: UNDERSTANDING
THE TRIAL COURT'S PLENARY JURISDICTION**

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CHAPTER 11



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The Power to Act: Understanding the Trial Court's Plenary Jurisdiction

Plenary power refers to that period of time in which a trial court may vacate its judgment by granting a new trial, or in which it may modify or correct its judgment. *In re Gillespie*, 124 S.W.3d 699, 702 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (Guzman, J.) (en banc). A trial court has a finite period during which it may substantively change its judgment, and that period is governed primarily by Texas Rule of Civil Procedure 329b.

As Professor Carlson noted in an oft-cited article on finality of judgments:

Finality of judicial decisions fulfills our psychological need for repose, furthers our political desire to end government intervention in people's lives as soon as possible, and promotes the judicial system's need for stability. . . . While trial courts should be given the time and leeway necessary to correct errors in their orders, at some point parties (and third persons) must be able to rely on a judgment that cannot be changed by the trial court.

Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953, 961 (2000) (quotations and citations omitted).

Ensuring the finality of judgments is, as legendary retired Justice David Peeples noted, essential to justice:

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.

David Peeples, *Trial Court Jurisdiction and Control Over Judgments*, 17 ST. MARY'S L.J. 367, 368 (1986).

This paper explores the parameters of the trial court's authority to alter its judgment.

I. Plenary Power – minimum 30 Days

Plenary power is the power of a court to change its judgment. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993). A trial court has plenary power over its judgments until they become final. *See id.*; *Mathes v. Kelton*, 569 S.W.2d 876, 878 (Tex. 1978).

Rule 329b of the Texas Rules of Civil Procedure provides that a trial court also has thirty days “to grant a new trial or to vacate, modify, correct, or reform” a final judgment, regardless of whether an appeal has been perfected. TEX. R. CIV. P. 329b(d); *Jackson v. Van Winkle*, 660 S.W.2d 807, 808 (Tex. 1983). Thus, if no motions are filed by any party that operate to extend the court's plenary power, the court loses power over its judgment at the end of thirty days. *See* TEX. R. CIV. P. 329b(d); *Jackson*, 660 S.W.2d at 808; *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 617 n.44 (Tex. App.—Dallas 1998, pet. denied).

II. Extending Plenary Power – up to 105 Days

Certain post-judgment motions will extend the trial court's plenary power up to 105 days after judgment. The specific date the trial court's jurisdiction ends depends on whether (and when) the motion is denied or granted.

If the trial court denies the motion by written order, it retains plenary power for 30 days from the date of the order. TEX. R. CIV. P. 329b(e). If the motion is not resolved within 75 days after the judgment is signed, it will be overruled by operation of law. TEX. R. CIV. P. 329b(c). In that event, the trial court's plenary power would expire 105 days after judgment—the longest that the trial court's plenary power may extend. TEX. R. CIV. P. 329b(e); *L.M. Healthcare, Inc. v. Childs*, 920 S.W.2d 285, 288 (Tex. 1996).

III. Motions that Extend Plenary Power

Not all post-judgment motions extend the trial court's plenary power. But any motion – no matter what it is called – that is filed within the time limits for a motion for new trial will extend plenary power if it seeks a substantive change in the judgment.

Motions that will extend plenary power:

- A motion for new trial. TEX. R. CIV. P. 329b(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, 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.”). A motion for new trial may be filed solely to extend deadlines. *Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993) (“The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary.”). The motion will also extend plenary power even if it is defective. *Rabb Int’l, Inc. v. SHL Thai Food Serv., LLC*, 346 S.W.3d 208, 210 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (document filed in court by a non-attorney purportedly on behalf of a corporation was defective but still extended time to file appeal).
 - A motion to modify, correct, or reform the judgment. TEX. R. CIV. P. 329b(g) (“A motion to modify, correct, or reform a judgment . . . , if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial.”); *see also Padilla v La France*, 907 S.W.3d 454, 458 (Tex. 1995).
 - A motion for sanctions to be incorporated in the judgment. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 2000) (“[A] motion made after judgment to incorporate a sanction as a part of the final judgment does propose a change to that judgment. Such a motion is, on its face, a motion to modify, correct or reform the existing judgment within the meaning of Rule 329b(g).”).
 - A motion for remittitur. *Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc.*, 813 S.W.2d 497, 499 (Tex. 1991) (“Landmark's motion for remittitur, under these circumstances, in effect requested the trial court to correct its error in granting summary judgment for an amount not established by the evidence as a matter of law.”)
 - A motion for judgment notwithstanding the verdict. *See Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011) (“A JNOV motion can constitute a ‘motion to modify the judgment’ . . . if it assails the later-entered judgment.”).
 - A verified motion to reinstate. TEX. R. CIV. P. 165a(3) (“A motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney. It shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a.”); *see also McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990) (orig. proceeding).
- Motions that will not extend plenary power:
- A motion nunc pro tunc or any motion seeking only clerical change to judgment. *Lane Bank*, 10 S.W.3d at 313 (“A motion to modify, correct or reform a judgment was always intended to embody something other than a motion for judgment nunc pro tunc. That distinction continues in the express language of Rule 329b(g) today. . . . [A] motion seeking a purely clerical change cannot qualify under Rule 329b(g).”).
 - A request for findings of fact and conclusions of law. *In re Gillespie*, 124 S.W.3d at 703; *Pursley v. Ussery*, 982 S.W.2d 596, 599 (Tex. App.—San Antonio 1998, pet. denied). Note, however, that a request for findings, if required or properly considered by an appellate court, will extend the appellate timetables. TEX. R. APP. P. 26.1(a)(4).
 - A motion for sanctions for failure to comply with a judgment. *Guajardo v. Conwell*, 30 S.W.3d 15, 16 (Tex. App.—Houston [14th Dist.] 2000), *aff’d*, 46 S.W.3d 862 (Tex. 2001) (distinguishing *Lane Bank* because the sanctions were not sought to be included in

the judgment but were sought for failing to comply with the judgment).

- Motion for judgment on the verdict. *Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 129 (Tex. App.—Dallas 1987, no writ).
- Unverified motion to reinstate. *In re Valliance Bank*, 422 S.W.3d 722, 725 (Tex. App.—Fort Worth 2012, orig. proceeding). See also *In re Strickland*, No. 01-01-00972-CV, 2002 WL 58482 (Tex. App.—Houston [1st Dist.] Jan. 17, 2002, orig. proceeding) (refusing to treat reinstatement motion as motion for new trial because “a litigant may not circumvent the verification requirements of rule 165a(3) by labeling a motion one for new trial”).

The courts of appeals are split on whether a motion to enforce judgment will extend a trial court's plenary power. *Guajardo v. Conwell* involved a motion to enforce coupled with a motion for sanctions for failure to comply with the judgment. 30 S.W.3d 15 (Tex. App.—[14th Dist.] 2000), *aff'd*, 46 S.W.3d 862 (Tex. 2001). The request for sanctions did not seek a substantive change in the judgment, as it had in *Lane Bank*, because the sanctions were not sought to be included in the judgment. *Id.* at 16. No change in the judgment was sought; the movant simply sought sanctions for failing to comply with the original judgment. *Id.* The Court also stated, matter-of-factly: “A motion to enforce the judgment is not a motion that will extend the appellate deadlines.” *Id.*

Similarly, the Dallas court of appeals held that a motion to enforce does not extend the trial court's plenary power because it does not seek a substantive change in the trial court's judgment. *Miranda v. Wilder*, No. 05-09-00976-CV, 2010 WL 4612082 (Tex. App.—Dallas Nov.16, 2010, no pet.). In *Miranda*, the parties' agreed order required payment to the defendant *or* his insurer. The check was written to the defendant *and* his insurer, language that made the check non-negotiable because the defendant was deceased. Within 30 days of the dismissal of the suit, the defendant's attorney filed a motion to enforce, requesting the trial court to order the plaintiffs' attorney to re-issue a check, and a motion for sanctions. About 60 days after judgment, the trial court granted the motion to enforce and ordered the

plaintiff's attorney to re-issue the check. The court of appeals vacated the order. “The motion did not seek modification, correction, or reformation of the trial court's judgment and did not otherwise request a substantial change of the trial court's judgment. Because the motion for sanctions did not seek to alter the judgment, but instead sought sanctions for the attorney's fees required to prepare, file, and prosecute the ‘motion to enforce mediated settlement agreement,’ the motion for sanctions did not extend the appellate timelines or the trial court's plenary power.” *Id.* at *2.

More recently, the San Antonio court rejected the reasoning of both *Guajardo* and *Miranda*. See *Matinee Media Corp. v. Falcon*, No. 04-12-00133-CV, 2012 WL 3104530 (Tex. App.—San Antonio Aug. 1, 2012, no pet.). *Matinee* also involved a dismissal pursuant to settlement. The parties settled their dispute in September and, consistent with the settlement, the trial court dismissed the suit. Within 30 days of judgment, one of the parties filed a motion to enforce the settlement agreement, seeking an order retraining certain conduct and compelling others. The trial court granted the motion about 80 days after the original judgment. The issue on appeal was whether the order on the motion to enforce was void because it was issued outside of the trial court's plenary power.

The San Antonio court rejected the broad statement in *Guajardo* that a motion to enforce the judgment is categorically not a motion that will extend deadlines. *Id.* at 2. It also distinguished *Guajardo*; the motion under review before it sought not just sanctions, but also injunctive and declaratory relief, which, according to the court, undoubtedly sought a change in a judgment dismissing the suit. *Id.* *Miranda*, the court concluded, was just “unpersuasive.” The Dallas court mistakenly focused on the nature of the sanctions sought, it reasoned, and not “whether changing the trial court's existing order from an order of dismissal to an order requiring the plaintiffs' attorney to re-issue a check would constitute a substantive change.” *Id.* Having rejected both cases, the San Antonio court ultimately concluded that because the “motion to enforce sought a substantive change in the trial court's existing dismissal order, the motion extended the trial court's plenary jurisdiction.” *Id.* at 3.

Because of this split of authority, litigants should be extremely cautious in relying on a motion to enforce to extend a trial court's plenary power.

Note: so long as the enforcement order is consistent with the original judgment, the trial court should have jurisdiction to enter the order under its enforcement power. *See infra*, Section VI.

IV. Premature, Second, and Amended Motions

a. Premature Motions

The filing of a premature motion intended to assail the court's final judgment extends both the appellate timetables, *Padilla*, 907 S.W.2d at 458 (motion for reconsideration of interlocutory summary judgment), and the trial court's plenary power, *Tex. Capital Bank–Westwood v. Johnson*, 864 S.W.2d 186, 189 (Tex. App.—Texarkana 1993, orig. proceeding) (motion for rehearing of abatement order operated as a premature motion for new trial extending plenary power following final judgment because “the motion for rehearing assails the specific ground upon which the judgment was rendered”). The motion is deemed filed the day of, “but subsequent to the time of signing of the judgment the motion assails.” TEX. R. CIV. P. 306c.

The effect of a premature motion to reinstate on plenary power is less settled. A verified motion to reinstate filed within thirty days of dismissal extends plenary power for the same amount of time as a motion for new trial. *See* TEX. R. CIV. P. 165a(3). Some courts have held that a *premature* motion to reinstate operates only to extend appellate timetables; it does not extend the trial court's plenary power. *See, e.g., Brim Laundry Mach. Co. v. Washex Mach. Corp.*, 854 S.W.2d 297, 301 (Tex. App.—Fort Worth 1993, writ denied); *Christopher v. Fuerst*, 709 S.W.2d 266, 268 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Hales v. Chubb & Son, Inc.*, 708 S.W.2d 597, 599 (Tex. App.—Houston [1st Dist.] 1986, no writ). Others have more recently recognized that a premature motion to reinstate should have the same effect as a premature motion for new trial or to modify judgment. *In re Bokeloh*, 21 S.W.3d 784, 788 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding) (recognizing that a “prematurely filed motion to reinstate extends the appellate timetables and the trial court's plenary jurisdiction.”); *In re Strickland*, 2002 WL 58482, at *1 (same).

If a premature motion is denied before the final judgment is signed, the denial is deemed denied on the day the final judgment is signed, and the trial court retains plenary power for 30 days. *Linan v. Padron*, No. 13-10-00070-CV, 2010 WL 3180278, at

*1 (Tex. App.—Corpus Christi Aug. 12, 2012, no pet.) (holding that trial court's earlier denial of motion for new trial “became effective” on date of final judgment).

b. Subsequent Motions and Judgments

“If a trial court modifies a judgment after a motion for new trial has been filed, a second motion is still needed to extend the deadlines if the first motion does not ‘assail’ the modified judgment.” *South Tex. GMAC Real Estate v. Cohyco, Inc.*, 124 S.W.3d 321, 325 (Tex. App.—Corpus Christi 2003, no pet.). While a motion for new trial or to modify a judgment filed by any party extends the trial court's plenary power over the final judgment, TEX. R. CIV. P. 329b(e), a post-judgment motion for new trial by a non-party does not extend plenary power. *In re Roberts*, No. 04-12-00160-CV, 2012 WL 2835204, at *3 (Tex. App.—San Antonio July 11, 2012, orig. proceeding).

Filing a notice of appeal does not divest the trial court of plenary power. TEX. R. CIV. P. 329b(d); *Esty v. Beal Bank S.S.B.*, 298 S.W.3d 280, 294 (Tex. App.—Dallas 2009, no pet.). But if the appellate court issues judgment during the trial court's plenary power, the trial court immediately loses its power to modify the judgment. *See Medina v. Benkiser*, 317 S.W.3d 296, 299 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (trial court's plenary power to grant timely filed motion to modify judgment was extinguished by appellate court's judgment affirming trial court's judgment); *Cessna Aircraft Co. v. Aircraft Network, LLC*, 354 S.W.3d 139, 144 (Tex. App.—Dallas 2011, no pet.).

When a timely filed, plenary-power-extending motion is filed but subsequently withdrawn more than 30 days after the final judgment is signed, the trial court's plenary power is immediately extinguished. *In re P.M.G.*, 405 S.W.3d 406, 414 (Tex. App.—Texarkana 2013, orig. proceeding); *Rodgers v. Clinton*, 794 S.W.2d 9, 11 (Tex. 1990) (right to withdraw motion for new trial is absolute and divests trial court of plenary power if more than 30 days after judgment).

c. Amended Motion

“One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or

other order complained of is signed.” TEX. R. CIV. P. 329b(b). “Filing an amended motion for new trial does not extend the court’s plenary power.” *In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998) (orig. proceeding). Moreover, an amended motion for new trial filed within thirty days after final judgment but *after* a prior motion for new trial has been denied is not “timely” and, thus, cannot extend plenary power. *In re Brookshire*, 250 S.W.3d 66, 69–70 (Tex. 2008) (orig. proceeding) (holding amended motion for new trial, filed 29 days after final judgment signed and 28 days after prior motion for new trial was overruled was untimely and thus failed to extend plenary power). The trial court has no power to enlarge the time for filing an amended motion for new trial. *See id.* at 71 & n.4; TEX. R. CIV. P. 5. If a prior motion for new trial has been overruled such that an amended motion for new trial cannot effectively extend plenary power, a party may nonetheless extend the trial court’s plenary power by filing a separate motion to modify, correct or reform the trial court’s judgment, so long as the motion seeks a substantive change in judgment. TEX. R. CIV. P. 329b(g) (providing that the prior overruling of a motion for new trial does not “preclude the filing of a motion to modify, correct, or reform”).

V. Limited Power Following Expiration of Plenary Power

During the court’s period of plenary power, the court’s power to modify its judgments is “virtually absolute.” *See Garza v. Serrato*, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984, no writ). However, any modification by the trial judge must be by “written order that is express and specific.” *McCormack v. Guillot*, 597 S.W.2d 345, 346 (Tex. 1980); *see also In re Fuentes*, 960 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1997, orig. proceeding) (holding letter written by judge, but not entered into record, was not a valid order granting motion for new trial).

The scope of a trial court’s jurisdiction after its plenary power over a case has expired, on the other hand, is extremely limited. *Panda Energy Corp. v. Allstate Ins. Co.*, 91 S.W.3d 29, 32 (Tex. App.—Dallas 2001, judgment vacated for settlement). The trial court may only correct clerical errors in a final judgment, *see* TEX. R. CIV. P. 316, or “cause its judgments and decrees to be carried into execution,” *see* TEX. R. CIV. P. 308. A trial court also has inherent judicial authority to enforce its orders and

decrees. *Arndt v. Farris*, 633 S.W.2d 497, 499 (Tex. 1982); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979).

Any judicial action taken beyond this authority is a nullity. *Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995). While it is wholly unnecessary to appeal from the trial court’s order—as the order is void—an appeal *may* be taken and the appellate court in such a proceeding may declare the judgment void. *Id.*

a. Clerical v. Judicial Error

A judicial error is one in the rendering, as opposed to the entering, of a judgment. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986). To determine if a correction is judicial or clerical, courts look to the judgment actually rendered, not the judgment that should or might have been rendered. *Id.* A clerical error “is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered, and does not arise from judicial reasoning or determination.” *Hernandez v. Lopez*, 288 S.W.3d 180, 184 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A judicial error, by contrast, results from a mistake of law or fact that requires judicial reasoning to correct. *B.Z.B. v. Clark*, 273 S.W.3d 899, 903 (Tex. App.—Houston [14th Dist.] 2008, no pet.). An error in a judgment that occurs due to a clerical mistake may still be a judicial error if correcting that error deprives a party of a right that it would have possessed if the judgment had been entered correctly while the trial court had plenary jurisdiction. *W. Tex. State Bank v. Gen. Res. Mgmt. Corp.*, 723 S.W.2d 304, 306 (Tex. App.—Austin 1987, writ ref’d n.r.e.) (nunc pro tunc addition of name to default judgment was improper because it deprived added party of substantial right).

A trial court’s determination that an error is clerical is not binding on an appellate court. *See Finlay v. Jones*, 435 S.W.2d 136 (Tex. 1968). Whether an error is clerical or judicial is a question of law. *Finlay*, 435 S.W.2d 138. The question becomes one of law, however, “only after the trial court factually determines whether it previously rendered judgment and the judgment’s contents.” *Escobar*, 711 S.W.2d 232.

Evidence establishing a clerical error must be “clear, satisfactory and convincing.” *Riner v. Briargrove Park Prop. Owners, Inc.*, 976 S.W.2d 680, 683 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *Wood v. Griffin & Brand of McAllen*, 671 S.W.2d

125, 132 (Tex. App.—Corpus Christi 1984, no pet.); *see also In re Broussard*, 112 S.W.3d 827, 833 (Tex. App. —Houston [14th Dist.] 2003, orig. proceeding) (“clear and convincing”). That evidence may be in the form of testimony, written documents, the court’s docket, and the judge’s personal recollection. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ). If the same trial judge who rendered judgment grants the nunc pro tunc motion, a presumption arises that the judge’s personal recollection supports the finding of clerical error. *Id.* Recitations in the nunc pro tunc judgment alone may provide sufficient evidence that court relied upon its recollection. *Claxton v. (Upper) Lake Fork Wather Control & Imp. Dist. No. 1*, 220 S.W.3d 537, 545 (Tex. App.—Texarkana 2006, pet. denied).

Clerical Errors

The following are examples of what courts have deemed to be proper correction of clerical errors through judgments nunc pro tunc after plenary power has expired:

- correcting an award of “attorney’s fees of \$4,00.00” to reflect an award of \$4,000.00, *SLT Dealer Group, Ltd. v. AmeriCredit Fin. Servs., Inc.*, 336 S.W.3d 822, 832-33 (Tex. App.—Houston [1st Dist.] 2011, no pet.)
- correcting judgment date, *Claxton*, 220 S.W.3d at 545 (changed from July 19, 2002 to September 6, 2002); *Traylor Bros., Inc. v. Garcia*, 949 S.W.2d 368, 369 (Tex. App.—San Antonio 1997, no writ) (changed from October 4, 1997 to November 15, 1997); *Ortiz v. Berk & Sons, Inc.*, 611 S.W.2d 860, 865–66 (Tex. Civ. App.—Corpus Christi 1980, no writ) (changed from September 24, 1979 to September 25, 1979)
- correcting judgment that awarded to husband both a payment of \$65,000.00 and a lien in the amount of \$65,000.00 against real property to accurately reflect a single award of \$65,000.00 and a lien securing that award, *Barton v. Gillespie*, 178 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2005, no pet.)
- changing title from “summary judgment” to “default judgment,” *Quick Line Corp v. Ward Jackson, Inc.*, 759 S.W.2d 192, 193 (Tex. App.—San Antonio 1988, no writ)
- correcting dates of missed child support payments in contempt judgment, *Ex parte Hogan*, 916 S.W.2d 82, 84–85 & n.1 (Tex. App.—Houston [1st Dist.] 1996, orig. proceeding)
- changing restriction in divorce decree allowing mother to determine child’s residence within particular county to require mother to obtain permission to move child from a specific residence within county, *Jenkins v. Jenkins*, 16 S.W.3d 473, 482 (Tex. App.—El Paso 2000, no pet.)
- correcting citation to statutory authority, *Gardner v. Estate of Trader*, 333 S.W.3d 331, 334-35 (Tex. App.—El Paso 2010, no pet.)
- correcting language of judgment that mischaracterized a judgment as a summary judgment instead of a final judgment, *Gutierrez v. Elizondo*, 139 S.W.3d 768, 772 (Tex. App.—Corpus Christi 2004, no pet.)
- changing name of business entity against which judgment was rendered from “Carlyle Real Estate Limited Partnership” to “Carlyle Real Estate Limited Partnership-X,” *Carlyle Real Estate Ltd. P’ship-X v. Liebman*, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, no writ)
- adding words “as his separate property” in the award of a house to husband in divorce case, *Mizell v. Mizell*, 624 S.W.2d 782, 784–85 (Tex. App.—Fort Worth 1981, no writ)
- adding award of attorneys’ fees that had been erroneously omitted from judgment, *Hutcherson v. Lawrence*, 673 S.W.2d 947, 948–49 (Tex. App.—Tyler 1984, no writ)

Judicial Errors

The following are examples of situations courts have deemed not correctable by a judgment nunc pro tunc:

- altering judgment granting a fee-simple property interest to instead grant only an easement, *Texas Dep’t of Transp. v. A.P.I. Pipe Supply, LLC*, 397 S.W.3d 162, 167-68 (Tex. 2013)
- changing start date of a child support obligation from January 5, 2006 (a date on which it is *undisputed* that the family household was still intact) to a start date of January 5, 2007 (the date intended by the parties and consistent with the

January 9, 2007 signing of the agreed divorce decree), *Rawlins v. Rawlins*, 324 S.W.3d 852, 855 (Tex. App.—Houston [14th Dist.] 2010, no pet.)

- deleting an erroneously included party from an “agreed judgment,” *In re Villa of Harlingen*, No. 13-12-00570-CV, 2012 WL 7849386 at *3 (Tex. App.—Corpus Christi Nov. 2, 2012, orig. proceeding).
- correcting drafting errors by counsel, *In re Fuselier*, 56 S.W.3d 265, 268 (Tex. App.—Houston [1st Dist.] 2001, orig. proceeding) (judgment, drafted by attorney, dismissed case “with prejudice” instead of “without prejudice”); *Stock v. Stock*, 702 S.W.2d 713, 716 (Tex. App.—San Antonio 1985, no writ) (judgment, drafted by attorney, omitted conservatorship and visitation agreement of the parties to divorce)
- adding an additional party against which judgment could be recovered, *Esse v. Empire Energy III*, 333 S.W.3d 166, 177 (Tex. App.—Houston [1st Dist.] 2010, pet. denied)
- adding additional party name to summary judgment when that party had not moved for summary judgment, *LaGoye v. Victoria Wood Condo. Ass’n*, 112 S.W.3d 777, 783-84 (Tex. App.—Houston [14th Dist.] 2003, no pet.)
- changing one party’s payment obligation in a divorce decree from one-half net retirement benefits to one-half gross retirement benefits, *McGehee v. Epley*, 661 S.W.2d 924, 926 (Tex. 1983)

Note: The signing of a new judgment—whether making a substantive change or merely correcting a clerical error—*during* the trial court’s plenary power operates to restart both the appellate timetables and the trial court’s plenary power. *Lane Bank Equipment Co.*, 10 S.W.3d at 313; TEX. R. CIV. P. 306a(1). A judgment nunc pro tunc signed *after* expiration of the trial court’s plenary power starts anew the time periods that run from entry of judgment listed in Rule 306a(1) (e.g., court’s plenary power to grant a new trial or modify judgment, as well as the parties’ deadlines for filing motions for new trial, motion to modify judgment, to reinstate, and requests for findings of fact and conclusions of law), but only with respect to arguments not applicable to the original judgment. TEX. R. CIV. P. 306a(6); *Gutierrez*, 86 S.W.3d at 726 (recognizing that trial court’s plenary power and appellate timetables begin running from

date of judgment nunc pro tunc only as to matters not contained in original judgment).

b. Enforcement Powers

Considerable confusion arises around the trial court’s ongoing enforcement powers. The power to enforce a judgment does not grant a trial court carte blanche to order anything remotely related to the original judgment. Rather, the enforcement power must be exerted in aid of the original judgment. *Milam Co. Oil Mill Co. v. Bass*, 163 S.W. 577, 578 (Tex. 1914) (orig. proceeding) (refusing to issue an order enjoining litigation as beyond the court’s enforcement powers because the order would not be “exerted . . . in aid of the judgment”). The enforcement order’s purpose should be “to secure the benefit of [that] decree,” and “to preserve its operative force.” *Id.*

Given this narrow purpose, a trial court’s power to enforce its judgment typically lasts only until the judgment is satisfied. *See Bahar v. Lyon Fin. Serv., Inc.*, 330 S.W.3d 379, 387 (Tex. App.—Austin 2010, pet. denied) (“[T]he court’s postjudgment power to enforce its judgment and to aid the judgment creditor in his efforts to collect on that judgment can last until the judgment is satisfied.”).

c. Specific Examples

Actions that may be taken after plenary power expires:

- Correct clerical errors. TEX. R. CIV. P. 316.
- Retax costs. *See Wood*, 320 S.W.2d at 813 (“A motion to retax costs is one to correct the ministerial act of the clerk of the court in tabulating costs.”).
- Order release of funds in court registry. *Cook v. Stallcup*, 170 S.W.3d 916, 921 (Tex. App.—Dallas 2005, no pet.).
- Enforce prior orders, so long as the enforcement order is consistent with the original judgment and does not result in a material change in substantial adjudicated portions of the judgment. *Harris Co. Appraisal Dist. v. West*, 708 S.W.2d 893, 896 (Tex. App.—Houston [14th Dist.] 1986, orig. proceeding); *Custom Corporates, Inc. v. Sec.*

Storage, Inc., 207 S.W.3d 835, 839 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

- Modify an order sealing or unsealing records. TEX. R. CIV. P. 76a(7).

Actions that may not be taken after plenary power expires:

- Sanction. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996) (“A trial court's power to decide a motion for sanctions pertaining to matters occurring before judgment is no different than its power to decide any other motion during its plenary jurisdiction. Thus, the time during which the trial court has authority to impose sanctions on such a motion is limited to when it retains plenary jurisdiction.”).
- Enforce settlement agreements whose terms were not made part of an agreed order or dismissal. *See In re Vaishangi, Inc.*, No. 13-0169, 2014 WL 2535996, *2 (Tex. June 6, 2014) (orig. proceeding).
- Award attorneys' fees or reallocate court costs. *Custom Corporates*, 207 S.W.3d at 840.

VI. Setting Aside Judgment after Plenary Power Expires

After the trial court's plenary power over a judgment expires, the judgment may be set aside only by bill of review. *See* TEX. R. CIV. P. 329b(f); *Thursby v. Stovall*, 647 S.W.2d 953, 954 (Tex. 1983). A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer appealable or subject to a motion for new trial. *Wembley Invest. Co. v. Herrera*, 11 S.W.3d 924, 926 (Tex. 1999). For an excellent discussion on bills of view, see Jeffrey L. Oldham, *Preservation of Error Post-Trial*, STATE BAR OF TEXAS, APPELLATE BOOT CAMP (2009), at 24 (updating and presenting an original paper by JoAnn Storey).