Opinion issued March 27, 2018.

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00777-CV

MALCOLM EDWIN LEBLANC, Appellant

V.

JEANNE DIANE LEBLANC, Appellee

On Appeal from the 247th District Court
Harris County, Texas
Trial Court Case No. 1995-19942

MEMORANDUM OPINION

Appellant Malcolm Edwin LeBlanc appeals from the trial court's granting of appellee Jeanne Diane Hartranft's motion for judgment nunc pro tunc. Malcolm raises nine points of error on appeal. The central issue is whether or not the court

correctly found that a clerical error existed in an order of the court issued January 31, 2005, which failed to record a ruling of the court setting an amount of child support. In his first, second, third, fourth, fifth, and eighth points of error, Malcolm argues that the trial court erred by concluding that a clerical error existed in the judgment because a copy of that judgment was not admitted into evidence during the hearing on Jeanne's motion for judgment nunc pro tunc. He also challenges the legal sufficiency of the evidence supporting several of the court's fact findings underpinning the court's legal conclusion. In his sixth, seventh, and ninth points of error, Malcolm argues that the trial court erred by entering the judgment nunc pro tunc because he proved his defense of laches, which applies to judgments nunc pro tunc. We affirm the trial court's judgment.

Background

Malcolm and Jeanne were divorced in 1995 and Malcolm was appointed as their children's sole managing conservator. In June 2004, Jeanne filed a petition to modify the parent-child relationship in which she asked the trial court to appoint her as sole managing conservator and order Malcom to pay child support. After a hearing on August 27, 2004, the trial court entered temporary orders in which it ordered Malcolm to pay $419.04 per month in child support and $80.07 per month in medical support beginning in September 2004.

On April 8, 2016, Jeanne filed a motion for judgment nunc pro tunc. According to Jeanne, the trial court signed a final order in her modification suit on January 31, 2005, and although the court had rendered judgment requiring Malcolm pay $435.00 per month in child support, and $108.92 in medical support, the January 31, 2005 order mistakenly omitted the amount of child support. Jeanne attached copies of the January 31, 2005 order, a February 3, 2005 "Employer's Order Withholding From Earning for Child Support," and the docket sheet in support of her motion.

A January 31, 2005 docket sheet entry states in part, "Reimb her for med ins $108.92 C/S 435." $108.92 per month in medical support, plus $435 per month in child support equals $543.92 per month in total support obligations. Although the January 31, 2005 order requires Malcolm to pay the $108.92 per month in medical support, the amount of child support awarded was left blank.

The Withholding Order attached to Jeanne's motion orders Malcolm's employer of record to withhold $543.92 per month to satisfy Malcolm's current support obligations. Malcolm's employer is also ordered to withhold an additional amount of Malcolm's earning for twenty-four months to satisfy his arrearages.

Malcolm and Jeanne both testified during the hearing on Jeanne's motion for judgment nunc pro tunc. Jeanne testified that she appeared in court in January 2005 for the final hearing in her modification suit, but Malcolm did not attend the hearing.

Jeanne testified that the trial court granted her petition to modify during the hearing and awarded her child support, but she did not recall the exact amount of support awarded.

Jeanne also testified that she began receiving paperwork from the Attorney General when the temporary orders were signed in August 2004 and made multiple attempts to initiate enforcement of Malcolm's child support obligations over the years. The first time she tried to enforce Malcolm's child support obligations the AG's office told her that there were no arrears. Believing that the AG's office had made a mistake, Jeanne tried a second time and was told that she was not supposed to receive anything. The third time she tried to enforce Malcolm's child support obligations the AG's office told her that there was a problem with the paperwork. She further testified that she knew that Malcolm was unemployed at times between 2005 and 2016 and that she did make any additional efforts to enforce Malcolm's child support obligations because she thought he would go to jail if he could not pay, and her children did not want their father to go to jail because he was in poor health.

Malcolm testified that he appeared for the August 2004 hearing in Jeanne's modification suit and that he knew that an order would be sent to his employer to garnish his wages as a result of that hearing. The January 31, 2005 order and a docket entry for August 27, 2004 indicate that the court entered temporary orders on August 27, 2004 in which it awarded Jeanne $419.04 per month in child support and $80.07

per month in medical support. Malcolm testified that he lost his job two weeks after the August hearing and that he was unemployed for eight or nine months. Malcolm did not attend the final hearing in January 2005.

When asked how he would be harmed by Jeanne delaying the enforcement of the January 31, 2005 order, Malcolm testified that he had worked for several different employers between 2005 and 2016 and that none of his employers had garnished a portion of his wages. He further testified that he was unemployed or earned less money than he was earning in 2004 for portions of this eleven-year period and that, had he known the final, specific amount of child support he was ordered to pay, he would have petitioned the court to reduce his support obligations during these periods. Malcolm also testified that, as a result of Jeanne's delay, he could be charged interest on his past-due support obligations.

Malcolm acknowledged, however, that he had a duty to support his children during this time and when asked whether he had made any effort to find out the final amount of his child support obligations, Malcolm testified, "All I remember from court was, it would be sent to my employer to garnish my wages." Malcolm also admitted that he never notified Jeanne, the trial court, or the Attorney General's office of the various changes in his employment status even though he knew that he was required to do so.

The docket sheet Jeanne had attached to her motion was the only item admitted into evidence.

Judgment Nunc Pro Tunc

In his first, second, third, fourth, fifth, and eighth points of error, Malcolm argues that the trial court erred by concluding that a clerical error existed in a January 31, 2005 judgment that was not admitted into evidence during the hearing on Jeanne's motion for judgment nunc pro tunc, and he challenges the legal sufficiency of the evidence supporting several of the court's fact findings, underpinning this legal conclusion.

A. Standard of Review and Applicable Law

Once a trial court loses plenary jurisdiction over a case, it may enter a judgment nunc pro tunc to correct any mistakes or misrecitals in a judgment, but only if the errors to be corrected are clerical rather than judicial. *Dep't of Transp. v. A.P.I. Pipe & Supply*, 397 S.W.3d 162, 167 (Tex. 2013); *see generally* TEX. R. CIV. P. 316 & 329b(f). A clerical error is a discrepancy between the judgment entered into the record and the judgment that was actually rendered. *Barton v. Gillespie*, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A judicial error, on the other hand, is an error arising from a mistake of law or fact in the judgment as rendered that requires judicial reasoning to correct. *Id*. Rendition occurs when the

trial court's decision is officially announced either by a signed memorandum filed with the clerk of the court or orally in open court. *Id*.

Whether an error in the judgment is clerical or judicial is a question of law which we review de novo. *Escobar v. Escobar*, 711 S.W.2d 230, 232 (Tex. 1986). Before deciding the legal question of whether the error is clerical or judicial, however, the trial court must first make a fact finding that an error exists by determining (1) that the trial court had previously rendered a judgment, (2) the contents of that judgment, and (3) that an error was made recording the contents of that judgment. *Weido v. Weido*, No. 01-15-00755-CV, 2016 WL 1355764, at *2 (Tex. App.—Houston [1st Dist.] Apr. 5, 2016, no pet.) (mem. op.) (citing *Dickens v. Willis*, 957 S.W.2d 657, 659 (Tex. App.—Austin 1997, no pet.)). These fact findings must be supported by "clear, satisfying, and convincing" evidence. *Id*. We may review such fact findings for legal and factual sufficiency of the evidence. *Id*.

B. Analysis

Malcolm does not contend that any error in January 31, 2005 judgment was judicial rather than clerical. Malcolm argues instead that Jeanne failed to prove the existence of a clerical error in the 2005 order by clear and convincing evidence because she neither introduced the order into evidence nor asked the trial court to take judicial notice of the order.

All orders or judgments in this case are part of the court's record. It is well established that an appellate court may presume that the trial court took judicial notice of its record without any request being made and without announcing that it has done so. *See In re B.D.A.*, — S.W.3d —, No. 01-17-00065-CV, 2018 WL 761313, at *14 (Tex. App.—Houston [1st Dist.] Feb. 8, 2018, no pet. h.); *see also In re K.F.*, 402 S.W.3d 497, 504 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). A "trial court is presumed to judicially know what has previously taken place in the case tried before it, and the parties are not required to prove facts that a trial court judicially knows." *In re J.J.C.*, 302 S.W.3d 436, 446 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (internal quotations and citation omitted). In this case, however, we do not need to presume that the trial court took judicial notice of the 2005 judgment because the record reflects that the trial court actually considered the judgment for purposes of Jeanne's motion for judgment nunc pro tunc. Specifically, the trial court recited in its findings of fact and conclusions of law that the court had "considered the written documents, *the judgment*, docket entries, and oral testimony." (Emphasis added.) Because the trial court was entitled to take judicial notice of its record sua sponte, it was not necessary for Jeanne to have the judgment admitted into evidence or ask the trial court to take judicial notice of the order, and the court did not err by considering the 2005 judgment, or the other written documents included in the record, for purposes of Jeanne's motion for judgment

nunc pro tunc. *See In re B.D.A.*, 2018 WL 761313, at *14; *see also In re J.J.C.*, 302 S.W.3d at 446.

Malcolm's challenges to the sufficiency of the evidence, supporting the trial court's conclusion that a clerical error existed in the 2005 judgment, are based on his argument that Jeanne had to offer the judgment into evidence or ask the trial court to take judicial notice of the judgment in order for the court to consider the judgment for purposes of her motion. Having determined that the trial court was entitled to consider—and did consider—the 2005 judgment, we reject Malcolm's sufficiency challenges based on the alleged absence of 2005 judgment.

We overrule Malcolm's first, second, third, fourth, fifth, and eight points of error.

Laches

In his sixth and ninth points of error, Malcolm argues that the trial court erred by entering the judgment nunc pro tunc because the doctrine of laches precluded Jeanne from asserting her right to correct an alleged error in the January 31, 2005 order eleven years after the judgment was rendered.

A. Standard of Review and Applicable Law

We review a trial court's decision as to whether a party's assertion of its legal or equitable rights is barred by the doctrine of laches for abuse of discretion. *See Found. Assessment, Inc. v. O'Connor*, 426 S.W.3d 827, 836 (Tex. App.—Fort Worth

2014, pet. denied). A trial court does not abuse its discretion if there is some evidence in the record that reasonably supports the trial court's decision. *Tanguy v. Laux*, 259 S.W.3d 851, 856 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *see also Found. Assessment, Inc.*, 426 S.W.3d at 836.

Laches is an affirmative defense akin to estoppel. *Ft. Worth v. Johnson,* 388 S.W.2d 400, 403 (Tex. 1964); *see* TEX. R. CIV. P. 94. Assuming without deciding that Malcolm may use this affirmative defense to prevent the granting of a judgment nunc pro tunc, Malcolm had the burden to prove the elements of laches. *See Lyle v. Jane Guinn Revocable Trust*, 365 S.W.3d 341, 355 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). The two essential elements are (1) unreasonable delay by one having legal or equitable rights in asserting them, and (2) a good faith change of position by another to his detriment because of the delay. *Id.*; *see also Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989).

B. Analysis

Malcolm offered no testimony to show he would be harmed by correcting a clerical error in the judgment, i.e., the *entry* of a judgment nunc pro tunc. Instead, Malcom testified that he would be harmed by *enforcement* of the corrected order because there were periods of time when he was unemployed or earning less money. He further testified that he could have "protested" the amount, and that he would be

harmed by the "interest that [he would] be charged for back support." Malcolm did not offer any evidence of harm caused by *entry* of the judgment nunc pro tunc.

Furthermore, there is some evidence in the record that any change in position on Malcolm's part was not done in good faith, because he knew that he was obligated to pay child support to Jeanne for both of the children, based in part on the temporary orders entered in the modification suit, and he failed to do so.[1] *See generally In re J.R.*, No. 10-12-00201-CV, 2013 WL 135729 at *8 (Tex. App.—Waco 2013, no pet.) (mem. op.) ("Especially considering laches is an equitable doctrine, we do not believe that appellant can reasonably assert good-faith reliance or surprise based on the clerical error contained in the original disposition order when he was on notice of his registration requirement."). Malcolm testified that he never made any effort to find out the final amount of his child support obligation because he believed that an order "would be sent to [his] employer to garnish [his] wages." Malcolm, however, also testified that he changed employers several times between the entry of the temporary orders in August 2004 and 2016, and he never informed the parties, the trial court, and the AG's office of these changes in his employment status, despite his affirmative obligation to do so.

[1] Malcolm is not challenging the trial court's finding that he "is not surprised with regard to the rendition of child support."

Based on this record, we conclude that that trial court had sufficient evidence before it to conclude that Malcolm had not proven all of the elements of this affirmative defense. Because there is some evidence that Malcolm did not satisfy his burden of proof, the trial court did not abuse its discretion by not applying the doctrine of laches in this case. *See Found. Assessment, Inc.*, 426 S.W.3d at 836 (holding trial court did not abuse its discretion by failing to apply laches doctrine because party failed to prove all elements of her affirmative defense).

We overrule Malcom's sixth and ninth points of error.

Conclusion

We affirm the trial court's judgment.

Russell Lloyd
Justice

Panel consists of Justices Higley, Massengale and Lloyd.