

NOT DESIGNATED FOR PUBLICATION

No. 110,220

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

DONALD G. ARENSMAN,  
*Petitioner (Deceased),*

(PEGGY ARENSMAN AND PEGGY ARENSMAN,  
AS EXECUTRIX FOR THE ESTATE OF DONALD ARENSMAN),  
*Appellees,*

and

JANA L. ARENSMAN,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Saline District Court; JEROME P. HELLMER, judge. Opinion filed July 25, 2014.  
Affirmed.

*Nathanael Berg*, of Hampton & Royce, L.C., of Salina, for appellant.

*Robert S. Jones*, of Norton, Wasserman, Jones & Kelly, L.L.C., of Salina, for appellees.

Before MALONE, C.J., BRUNS, J., and HEBERT, S.J.

*Per Curiam:* On April 26, 2005, Donald Arensman and Jana Arensman concluded a protracted divorce proceeding with the filing by the district court of a "Journal Entry Confirming Separation Agreement." The district court's order incorporated by reference the terms and provisions of a separation agreement dated April 25, 2005. In May 2013, on the motion of Peggy Arensman, executrix of Donald Arensman's estate, the district

court entered an order nunc pro tunc correcting the legal description of real estate included in the 2005 separation agreement. Jana Arensman appeals from the order nunc pro tunc.

We find no error and affirm the judgment of the district court.

#### FACTUAL BACKGROUND

Donald Arensman and Jana Arensman commenced a divorce proceeding in 2003. In August of 2003, they entered into a separation agreement which, along with other property, set over to Donald the following described real estate:

"The house and 34 acres located in Brookville, Kansas, the common address is 2465 Highway 140, Brookville, Kansas, legally described as follows:

"All that part of the West Half of the Southeast Quarter (W/2 SE/4) in Section Thirteen (13), Township Fifteen (15) South, Range Seven (7) West of the 6th P.M., lying South and West of the East right of way of an established road which center line is described as follows:

"Beginning at a point on the West line of said W/2 SE/4 of section 13, said point being 124.6 feet south of the Northwest corner of said W/2 SE/4; thence with a width of 150 feet lying 75 feet on each side in a southeasterly direction making an angle of 53 degrees with West line of W/2 SE/4, 168.19 feet to a point of 100 feet east of said West line of the W/2 SE/4; thence with a width of 150 feet lying 75 feet on each side, continuing on the last described course, 925.02 feet to a point 650 feet east of said West line of the W/2 SE/4; thence with a width of 100 feet lying 50 feet on each side, southerly parallel to said West line of the W/2 SE/4, to said South line of the W/2 SE/4; the end of the center line herein described."

This is the legal description of the portion of a quarter section of land which is separated from the remaining 126 acres, more or less, of the quarter section.

On joint motion of the parties, the district court set aside this 2003 agreement so that they could make a more complete accounting of their property. In 2005, Donald filed a motion to confirm a settlement agreement which the parties had negotiated with the assistance of a mediator. Attached to the motion was a copy of the "proposed property division" to which they had agreed. The document was marked with an "H" on the line listing "2465 Hwy 140, Brookville" and on the immediately following line listing "122 acres/residence." Prior to the scheduled hearing on the motion to confirm, the parties executed a formal separation agreement based on the proposed property division. That Agreement, dated April 25, 2005, described the following property to be received by Donald:

"20. The real estate located at 2465 Highway 140, Brookville, Kansas, legally described as follows:

"All of the Southeast Quarter (SE/4) of Section Thirteen (13), Township Fifteen (15) South, Range Seven (7) West of the 6th P.M., Ellsworth County, Kansas, EXCEPT the following described real property previously conveyed lying south and west of the East right of way of an established road which center line is described as follows: Beginning at a point on the West line of said W/2SE/4 of Section 13, said point being 124.6 feet south the other Northwest corner of said W/2 SE/4; thence with a width of 150 feet lying 75 feet on each side in a southeasterly direction making an angle of 53 degrees with the West line of W/2SE/4, 168.19 feet to a point 100 feet east of said West line of the W/2SE/4; thence with a width 150 feet lying 75 feet on each side, continuing on the last described course, 925.02 feet to a point 650 feet east of said West line of the W/2SE/4; thence with a width of 100 feet lying 50 feet on each side, southerly parallel to said West line of W/2SE/4, to said South line of the W/2SE/4; the end of the center line herein described."

This description covers all the area of the quarter section, excepting the 34 acres described in the 2003 agreement as "2465 Highway 140, Brookville, Kansas."

The next entry in the 2005 separation agreement describes additional property to be received by Donald:

"21. The real estate currently being purchased under contract for sale legally described as follows:

"The Southeast Quarter (SE 1/4) of Section Thirteen (13), Township Fifteen (15), Range Seven West (7W) of the Sixth P.M., Ellsworth County, Kansas. Less 34.6 acres, beginning 40' N of the SW corner SE4, the East 700', N 660' S; NWLY to W line SE 4; then S to PO. Subject to easements, covenants and mineral reservations of record and herein contained."

However, Paragraph 21, in essence, describes the same property described in Paragraph 20—all of the quarter section except the 34 acres in the southwest corner—thereby conveying the same property *twice* to Donald. The excepted 34 acres which had been described in the 2003 agreement as set over to Donald were not granted to either party in the 2005 agreement.

The district court entered a "Journal Entry Confirming Separation Agreement" which was filed on April 26, 2005. The journal entry incorporated the 2005 separation agreement and made its terms and provisions "the orders of this court as if specifically set forth hereinafter."

Donald died thereafter, and in 2012, Peggy Arensman, as executrix of his estate, moved the district court for a nunc pro tunc order to correct the property descriptions to include the southwest corner of the quarter section which had been excluded from the 2005 agreement. Jana responded with a claim that the exclusion was not in error and that

the parties intended to remain tenants in common for that portion of the property. Jana further argued that a nunc pro tunc order under K.S.A. 2013 Supp. 60-260(a) was inappropriate since Peggy was arguably requesting relief from a final judgment due to mistake under K.S.A. 2013 Supp. 60-260(b), which relief was barred by the 1-year limitation set forth in K.S.A. 2013 Supp. 60-260(c).

After receiving briefs from the parties and conducting a nonevidentiary hearing, the district court held that the incorrect legal description was "clearly nothing more than a clerical error" and that "there was never an intention of the parties that this property be anyone's property other than Mr. Arensman." The court issued an order nunc pro tunc correcting the court's journal entry regarding the 2005 separation agreement to grant the southwest portion of the quarter section to Donald's estate.

Jana timely appealed from this order.

*The District Court Did Not Err in Issuing a Nunc Pro Tunc Order Correcting the Legal Description*

Jana first argues that the district court erred in issuing a nunc pro tunc order to correct the legal description of 2465 Highway 140. She would, instead, characterize the motion filed by the executrix as a request for relief pursuant to K.S.A. 2013 Supp. 60-260(b)(1) due to mistake, inadvertence, surprise, or excusable neglect, which relief would now be barred by the 1-year time limitation set forth in K.S.A. 2013 Supp. 60-260(c).

Regarding an order nunc pro tunc, K.S.A. 2013 Supp. 60-260(a) provides:

*"Corrections based on clerical mistakes; oversights and omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order or other part of the record. The court may do so on motion, or*

on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave."

"The purpose of a nunc pro tunc order is to provide a means of entering the actual judgment of the trial court which for one reason or another was not properly recorded. The right to make the order is based on the failure to accurately reflect the court's decision." *Wallace v. Wallace*, 214 Kan 344, 348-49, 520 P.2d 1221 (1974). "K.S.A. 60-260(a), however, is limited to clerical mistakes by its plain language as well as by statutory history and case law. In other words, to instances where the order fails to accurately reflect the judgment actually rendered." *In re Marriage of Leedy*, 279 Kan. 311, 315, 109 P.3d 1130 (2005).

Our Supreme Court has visited the issue of clerical error versus judicial error:

"A nunc pro tunc order may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission, or an affirmative action which should have been, but was not, taken by the court, or to show what the court should have decided, or intended to decide, as distinguished from what it actually did decide. The power of the court is limited to making the journal entry speak the truth by correcting clerical errors arising from oversight or omission and it does not extend beyond such function." *Book v. Everitt Lumber Co., Inc.*, 218 Kan. 121, 125, 542 P.2d 669 (1975).

In this case the parties dispute the intentions regarding the legal description of the property labeled 2465 Highway 140. The executrix claims that the intent was always to convey all of these lands to Donald and that the 34 acres were inadvertently excluded due to a scrivener's error in the legal descriptions. This position is supported by the mediation notes of the agreement attached to Donald's motion to confirm the 2005 agreement. Jana claims that the legal description was correct and that the parties intended to hold the 34

acres as tenants in common. This argument seems somewhat disingenuous and fails to suggest why the essential legal description would be set forth in both paragraph 20 and 21 of the 2005 separation agreement or why the intent to hold in common would not have been explicitly set forth rather than simply omitting reference to the 34 acres from the detailed formal 2005 Agreement.

We are presented with a two-part question: First, is the correction of an erroneous legal description an appropriate use of an order nunc pro tunc, and, if so, did the district court appropriately grant the nunc pro tunc order in this case?

The first inquiry presents an issue of statutory interpretation, which is a question of law over which we exercise unlimited review. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013).

Kansas caselaw relating to this issue is somewhat limited. Jana would rely on *Richardson v. Richardson*, 3 Kan. App. 2d 610, 599 P.2d 320 (1979). In that case, a property settlement agreement assigned all property to the husband, unless specifically assigned to the wife. The agreement, however, omitted reference to an undivided one-sixth interest in land which the wife had acquired through inheritance. The trial court granted a nunc pro tunc to set the land over to the wife due to mistake and inadvertence. The appellate court analyzed the wife's request as a request for relief under K.S.A. 60-260(b) rather than as a nunc pro tunc. The court affirmed the district court ruling as correct under K.S.A. 60-260(b)(1) even though it was a modification on the merits and inappropriate for a nunc pro tunc order. *Richardson*, 3 Kan. App. 2d at 611-12.

*Richardson* gives little guidance to the case at hand, however, because there the district substantively modified a property agreement to give the wife property that, under the terms of the agreement, would have gone to the husband. Here, the district court modified a legal description to match the intended conveyance.

The executrix, in turn, looks to a Wyoming case for support. In *Kane v. Kane*, 616 P.2d 780 (Wyo. 1980), the trial court had announced its intent to grant the wife one-half of the property in question, but her counsel failed to include in the legal description of the property all of the land intended. The trial court held that clearly a mistake had been made in drafting the decree and the error was a clerical one, correctable by an order nunc pro tunc. But the district court in the present case made no specific statement regarding the intent of the agreement or what information would be contained in the journal entry; he simply approved the agreement and incorporated the terms by reference.

However, other courts have held that modification of an error in the legal description of a conveyed parcel of land is a clerical error that may be corrected by a nunc pro tunc order. See *In re Village by the Sea, Inc.*, 98 B.R. 93, 95 (Bankr. S.D. Fla. 1989); *Thorn Creek Cattle Ass'n, Inc., v. Bonz*, 122 Idaho 42, 47, 830 P.2d 1180 (1992); *Sarna v. Norcen Bank*, 530 N.E.2d 113, 115 (Ind. App. 1988).

We would find that it is a legally appropriate use of a nunc pro tunc order under K.S.A. 2013 Supp. 60-260(a) to correct clerical mistakes in the legal descriptions of property.

We then turn to the question of whether the district court's order in this case was factually appropriate. The standard of review for such an inquiry has not been directly addressed by a Kansas appellate court. A panel of this court has noted that "[b]ecause K.S.A. 60-260 was modeled on Rule 60 of the Federal Rules of Civil Procedure, courts may look to federal law for guidance." *GFSI Canada Company v. Fletcher Leisure Group, Inc.*, No. 104,378, 2012 WL 2045293, at \*12 (Kan. App. 2012) (unpublished decision). Federal courts have applied an abuse of discretion standard of review to denial of a Rule 60(a) correction of clerical error order. See *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996). It has also been established in Kansas that an appellate



court reviews a trial court decision on a K.S.A. 60-260(b) motion under the abuse of discretion standard. *In re Marriage of Leedy*, 279 Kan. at 314.

Judicial discretion is abused if judicial action (1) is arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.*, if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

A trial court may properly rely upon its own recollection when considering a motion nunc pro tunc. *Book v. Everitt Lumber Co., Inc.*, 218 Kan. 121, 127-28, 542 P.2d 669 (1975).

The district court noted that Donald and his family "occupied the property, paid the rent, upkeep, received the benefit of any income from said property and continued to utilize the property as their own under the terms of the agreement." The district court also noted that Jana never paid any expenses or received any income from the property. The district court said that it was not until this matter arose years after Donald's death that Jana asserted any claim to the property in question under the agreement. The district court stated that the land division "was clearly discussed, it was dealt with, divided, the parties acted upon their agreement and division and continued to treat it as such until the present matter was brought to the Court's attention in this regard." The district court concluded "[i]t was clearly nothing more than a clerical error; there was never an intention of the parties that this property be anyone's property other than Mr. Arensman, all of the actions of the parties are clear that that was the effect given to the agreement by the parties in this regard." The district court's decision, based upon the longstanding treatment of the parties regarding the property, does not appear so arbitrary, fanciful, or unreasonable as to abuse the district court's discretion.

While not a part of the district court's analysis of the issue, it should be noted that the text of the contract itself implicates a clerical error in the drafting. The 2005 separation agreement conveys in point 20 the property listed as 2465 Highway 140 and describes it, in essence, as the area excluding the southwest portion of quarter-section thirteen divided by a road running north, then northwest through the property. Point 21 of the separation agreement conveys "[t]he real estate currently being purchased" that is legally described as the area of quarter-section thirteen excluding the 34.6 acres that are separated off, in the southwest-corner, at a point that coincides with the same road described in Paragraph 20. The agreement conveys the same segment of a quarter-section of property twice as both the 2465 Highway 140 property and the property currently under contract, implying one of the legal descriptions was erroneous. The district court's nunc pro tunc order appropriately changed the description so the two pieces of land do not overlap and instead convey the complete quarter-section of property.

Jana also argues that the district court's order enforcing the separation agreement cannot be changed via motion nunc pro tunc because, "[m]atters settled by an agreement incorporated in the decree, . . . shall not be subject to subsequent modification by the court except: (1) As prescribed by the agreement; or (2) as subsequently consented to by the parties." K.S.A. 2013 Supp. 23-2712(b). This is not issue determinative, however, as the nunc pro tunc order, as it is correctly ordered, is not modification of the separation agreement, but the fixing of a clerical error in the text.

*The District Court Did Not Err by Not Conducting an Evidentiary Hearing Prior to Entering the Nunc Pro Tunc Order*

Although the district court did direct the parties to brief the issues and conducted an oral argument hearing, Jana now argues that the court erred by not granting her an evidentiary hearing prior to issuing the nunc pro tunc order.

The district court may correct a clerical mistake whenever such an error is found, and "[t]he court may do so on motion, or on its own, with or without notice." K.S.A. 2013 Supp. 60-260(a). Here the order was entered based on the district court's recollection. See *Book*, 218 Kan. at 127-28. Jana cites no authority indicating that an evidentiary hearing is required before issuing a nunc pro tunc. It is counterintuitive to suggest that an order correcting a clerical error, which may be entered on the court's own motion, without notice, would require an evidentiary hearing beforehand. The court here did allow the parties to be heard and did not err in denying an evidentiary hearing.

Affirmed.