The Clerk and Nunc Pro Tunc

At the end of a hearing, the clerk who is the presiding judicial official orally announces (or "*renders*") her decision from the bench in favor of the petitioner seeking relief from the court. The clerk instructs the attorney for the petitioner to prepare an order with appropriate findings of fact and conclusions of law and to return the order to the court for review within two weeks. The clerk receives the order from the attorney ten days later. The clerk reviews the written order, makes a few changes to some findings of fact (*remember*, in the end it is the court's order and not the attorney's order who drafted it), and then signs and files it. Next to the clerk's signature on the order is the date the order is signed and the earlier date of the hearing along with the words "*nunc pro tunc*."

Does the clerk generally have the authority to enter an order *nunc pro tunc*? What is the meaning of this phrase? What is the clerk's authority to enter an order *nunc pro tunc* in these specific circumstances? That's the subject of today's post.

Does the clerk have the authority to enter an order *nunc pro tunc*?

Yes. The clerk of superior court is authorized to "[o]pen, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court." GS 7A-103(9). This language has been interpreted to be the clerk's authority to enter orders *nunc pro tunc*. *See* In re Estate of English, 83 N.C. App. 359, 363 (1986). However, the clerk's authority is limited to when the law allows a court of general jurisdiction to enter such orders. *See* Russ v. Woodard, 232 N.C. 36, 41 (1950).

What is *nunc pro tunc*?

Nunc pro tunc is a phrase meaning "now for then." An order or judgment entered *nunc pro tunc* has retroactive effect from the date the order is actually entered on the court record. Dabbondanza v. Hansley, 791 S.E.2d 116, 120 (2016). It signifies a thing is now done which *should have been done in the past*. Whitworth v. Whitworth, 222 N.C. App., 771, 777 (2012). It is descriptive of the inherent power of the court to make its records speak the truth where an event occurred in the past but was omitted from or mistakenly reflected in the record.

Generally, the court's authority to enter an order *nunc pro tunc* is narrow. The court may not use *nunc pro tunc* to do in the present what the court did not do in the past. *See* Rockingham County DSS v. Tate, 202 N.C. App. 747, 751 (2010). The court also may not enter an order *nunc pro tunc* where giving retroactive effect to the order would result in prejudice to any intervening rights. Long v. Long, 102 N.C. App. 18, 22 (1991).

When does the clerk have the authority to enter an order *nunc pro tunc*?

There is no clear authority for the clerk to enter an order *nunc pro tunc* in the circumstances described at the start of this post. The crux of the court's *nunc pro tunc* authority lies where there has been some accident, mistake, or neglect that occurred in the past that resulted in an *error in the court record*. In the example given, there was no accident, mistake, or neglect. The court and the parties simply needed additional time to prepare the order after the hearing date. Therefore, the use of *nunc pro tunc* and giving retroactive effect to the order would not be appropriate under those circumstances.

The clerk's authority to enter an order *nunc pro tunc* under G.S. 7A-103(9) varies depending on the type of proceeding before the clerk and whether the Rules of Civil Procedure, specifically Rule 58, applies to that proceeding. Rule 58 states that an order is "entered" when it is (i) reduced to writing, (ii) signed by the judge, and (iii) filed with the clerk. G.S. 1A-1, Rule 58. Rule 58 was amended in 1994 to require a judicial official to sign a written judgment as a precondition to enforcement. The N.C. Court of Appeals recently held that in light of these amendments, a judicial official does not have the authority to enter an order *nunc pro tunc* if the judicial official did not previously sign a written order. Dabbondanza v. Hansley, 791 S.E.2d 116, 120 (2016). Thus, there are very limited circumstances when a court may use *nunc pro tunc* in a proceeding where Rule 58 applies.

In another 2016 opinion, the N.C. Court of Appeals affirmed the use of *nunc pro tunc* by a clerk in an incompetency proceeding. In re Thompson, 795 S.E.2d 395, 401 (2016). The opinion was the second published opinion from the NC Court of Appeals related to the guardianship case of Mary Ellen Brannon Thompson.

On the first appeal to the N.C. Court of Appeals, the parties to the proceeding agreed that the incompetency proceeding was a special proceeding to which the N.C. Rules of Civil Procedure, including Rule 58, applied. G.S. 1-393; In re Thompson, 232 N.C. App. 224 (2014). At the conclusion of the original incompetency proceeding, the clerk announced her ruling to the parties, reduced the order to writing, and placed the order in the file. On appeal, the N.C. Court of Appeals found that the order was not filed as it lacked any indication of a file stamp or other marking indicating a filing date. Because filing an order or judgment with the clerk is a precondition to entry of the order under Rule 58, the court found that the incompetency order was not entered and was therefore unenforceable. As a result, the guardianship appointment and the guardian's subsequent actions were without legal authority. The court then remanded the matter for further proceedings.

On remand, the clerk entered the incompetency and guardianship orders *nunc pro tunc* back to the date of the original incompetency hearing. On a second appeal to the N.C. Court of Appeals, in part, challenging the clerk's *nunc pro tunc* order, the court affirmed the clerk's actions and held that failing to properly enter the incompetency order by not filing it was a clerical error that the clerk had the authority to correct *nunc pro tunc*. In re Thompson, __ N.C. App. __, __, 795 S.E.2d 395, 401 (2016).

While the court's analysis centered on Rule 58 in the Thompson cases, there are certain proceedings before the clerk where Rule 58 does not apply, including power of sale foreclosure proceedings and estate proceedings. *See* In re Foreclosure of Lucks, 369 N.C. 222, 226 (2016) (holding the N.C. Rules of Civil Procedure do not apply to power of sale foreclosures); G.S. 28A-2-6(e) (stating that certain rules, including Rule 58, do not apply to an estate proceeding unless the clerk directs they apply on the motion of a party or the clerk's own motion).

Where Rule 58 does not apply to a proceeding, then perhaps the clerk has the authority to enter an order *nunc pro tunc* to a previously *rendered* judgment that was not entered on the record by accident, mistake, or neglect of the clerk in the clerk's administrative capacity. *See* Elmore v. Elmore, 67 N.C. App 661 (1984) (applying the law prior to the 1994 amendment to Rule 58). Furthermore, there are decisions from the N.C. Court of Appeals and the N.C. Supreme Court affirming the use of *nunc pro tunc* orders entered by the clerk in estate administration to correct an error that would result in injustice to an innocent party or orders that were entered based on an erroneous misapprehension of the facts. *See* Long v. Long, 85 N.C. 415 (1881) (affirming the clerk's use of *nunc pro tunc* to give retroactive effect to a deficiency judgment related to a widow's year's allowance); In re Estate of Watson, 70 N.C. App. 120 (1984) (affirming a clerk's order changing a final account to an annual account based on an erroneous misapprehension of the facts); In re Estate of English, 83 N.C. App. 359 (1986) (affirming the clerk's closing of an estate *nunc pro tunc* where the estate was erroneously re-opened).

It is not clear that similar orders would be upheld today if challenged given the N.C. Court of Appeals' recent decisions in Dabbondanza and Whitworth. Therefore, clerks should be cautious in employing the use of *nunc pro tunc* and it may be prudent to limit the use of such authority to situations where there was a previously written order that was not entered on the record due to accident, mistake, or neglect of the clerk in the clerk's administrative capacity.

What if the clerk wants the order to be immediately enforceable but needs additional time to draft the order?

If the clerk has concerns about a delay between the date of the hearing and the date the ordered is entered on the record, the clerk could consider entering a memorandum of judgment on the day of or immediately subsequent to the hearing. The MOJ would include the clerk's ultimate directive in the case and makes the clerk's order immediately enforceable. The MOJ could be followed up later with an order, entered *nunc pro tunc*, that includes more complete findings of fact and conclusions of law. This MOJ process is discussed in more detail by my colleague, Cheryl Howell, in her posts here and here.

New Legislation: Rule 5(e)(3) and *Nunc Pro Tunc*

In response to the Thompson cases, the General Assembly passed new legislation in 2017 that attempts to codify the authority of the clerk or a judge to enter an order *nunc pro tunc* where the

order lacks a date or file-stamp. The legislation adds subsection (e)(3) to Rule 5 of the NC Rules of Civil Procedure and states that "[t]he failure to affix a date stamp or file stamp on any order or judgment filed in a civil action, estate proceeding, or special proceeding shall not affect the sufficiency, validity, or enforceability of the order or judgment if the clerk or the court, after giving the parties adequate notice and opportunity to be heard, enters the order or judgment *nunc pro tunc* to the date of filing." G.S. 1A-1, Rule 5(e)(3).

We will have to wait and see how this new legislation plays out. Additional changes from the 2017 legislative session to Rule 5 and Rule 58 in the same session law give the authority to the Director of the NC Administrative Office of the Courts to establish through the Rules of Recordkeeping when an order or judgment is filed for purposes of Rule 58. If something other than the file stamp or other marking indicating a filing date becomes the standard for filing an order or judgment with the clerk, then it is unclear what purpose adding the file stamp or date stamp under the new Rule 5(e)(3) will serve and why the parties would need to enter an order adding the file or date stamp *nunc pro tunc*.

In contrast, if the addition of the file stamp or date stamp is the standard for whether an order is filed with the clerk, then the order is filed when the date stamp or filing date is added to the order. It is unclear under Rule 5(e)(3) how the court using *nunc pro tunc* gives retroactive effect to an order *to the date of filing*, when the date of filing would appear to be the same day the file stamp or date stamp is added to the order.

At a minimum, as a result of this new Rule 5(e)(3), the clerk must first give notice to the parties to the proceeding and give them an opportunity to be heard before entering an order *nunc pro tunc* to add a missing file or date stamp to an order or judgment.

What are your thoughts? One of mine is that it isn't easy being a clerk. We ask a lot of a group that wears many hats, only one of which is to be a judge who determines when it is appropriate to enter an order *nunc pro tunc*. Please leave any comments or questions below.