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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE CONSERVATORSHIP OF CHRISTINA BLOCK, A Minor, et al.,	)	**Filed August 29, 1985**
	)	
FARMLAND INDUSTRIES, INC.,	)	5-207 84-933
Appellant.	)	

Appeal from the Iowa District Court for Clinton County, James R. Havercamp, Judge.

A nonparty in conservatorship proceedings appeals from the order dismissing its petition to intervene and modifying a nunc pro tunc order. ORDER VACATED, REMANDED.

Gerald T. Sullivan and William H. Roemerman of Crawford, Sullivan, Read & Roemerman, Cedar Rapids, for appellant.

Glenn L. Norris of Hawkins & Norris, Des Moines, for appellees.

Heard by Oxberger, C.J., Donielson, and Schlegel, JJ.

On May 11, 1981, a 4-H meeting was under way at the home of Donald and Betty Burzlaff in Grand Mound, Iowa, when there was an explosion and fire, allegedly as the result of ignition of LP gas. A number of persons at the home were injured, including the wards of twenty-one conservatorships A settlement and release was executed between the conservatorships and three defendants, including a release of the appellant, Farmland Industries, Inc In a later nunc pro tunc order the court removed appellant from those released and Farmland Industries has appealed. We vacate the order and remand.

The agreement to settle was presented by the attorney for the conservatorships to the court and recommended for approval. Pursuant to Iowa Code section 633.647, the court must approve or disapprove compromises and settlements reached by the conservators. The agreement named as settling parties Don and Betty Burzlaff, DeWitt Farmland Cooperative, a local co-op which supplied the LP gas and gas tank, and Robert Fisher d/b/a Grand Mound Plumbing and Heating, the seller and installer of the furnace. The release included these three potential defendants, along with the insurer, Farmland Mutual, and Farmland Industries. Farmland Industries was a supplier of the local co-op, De Witt, and had a close relationship with the company. The policy limits were offered under the settlement and totaled $2,850,000. Farmland Mutual apparently told the attorney for the conservators that Farmland Industries' only involvement was a paper transaction and not substantive, and Farmland Industries was then included in the release. From the record presented it is undisputed that Farmland Industries was purposefully included in the release and the attorney for the conservatorships knew the company was included. According to the appellee, although Farmland Industries confirmed there was no indemnification agreement between De Witt and Farmland Industries, Farmland Mutual decided to keep

Farmland Industries on the release "thinking there might be another contract which required indemnity."

The appellees say that sometime later it discovered Farmland Industries allegedly physically handled the LP gas and picked it up at the pipeline, delivering it to DeWitt. A federal action has been commenced concerning the validity of the release. A year and three months after approval of the original settlement, a petition was filed by appellees requesting a nunc pro tunc order to remove Farmland Industries from the release. No notice was given to Farmland Industries and it did not appear at the hearing on the matter. The three defendants filed affidavits declining to resist the petition and on April 19, 1984, the petition was granted. Farmland Industries attempted to invervene in a motion denied April 27, 1984.

On appeal Farmland Industries asserts: (1) it has a right to intervene; (2) entry of the order without notice to Farmland Industries was a violation of its due process rights; (3) the request to modify the settlement order was not timely made by appellees; and (4) the court's action was not the proper subject of a nunc pro tunc order.

Our review in this equitable action is de novo. Iowa R. App. P. 4.

I.

The appellees contend that Farmland Industries has no right to intervene since such action is allowed pursuant to Iowa Rule of Civil Procedure 75 which permits intervention "before trial." Appellees claim Farmland's intervention after entry of the nunc pro tunc order is too late.

Farmland points out that under our probate code, section 633.37 provides for review of any court order "at any time prior to entry of the order approving the final report." Other cases involving probate action have permitted intervention after an order is made by the court on behalf of an interested party.

See, e.g., In re Matter of Guardianship of Sams, 256 N.W.2d 570, 572 (Iowa 1977)(mother allowed to intervene to attack ex parte order appointing grandfather as guardian and conservator); In re Smith's Estate, 240 Iowa 499, 36 N.W.2d 815, 822 (1949)(heirs allowed to intervene to attack claim approved in prior order by court); Hobson v. Dempsey, 232 Iowa 1226, N.W.2d 896 (1943)(in probate action stranger to divorce attacked nunc pro tunc order regarding divorce); In re State of Davenport,85 Iowa 293, 52 N.W. 197 (Iowa 1892)(heirs allowed to attack prior order entered by court).

The statute and cases indicate it is proper to allow intervention regarding a court order prior to filing of the final report, and intervention should be allowed in this case.

Appellees also argue that if Farmland Industries was to intervene it should have done so prior to the December hearing. However, as appellant points out, the right which Farmland Industries is asserting was not created until the December hearing, and it had no reason to attack an order in its own favor until the nunc pro tunc order was entered.

II.

As a result of our decision allowing intervention by Farmland Industries, we find it unnecessary to discuss its claim that not allowing intervention is a violation of its due process rights. We note, however, that if our conclusion had been different, appellant's assertion appears to have merit, in light of holdings that when a nunc pro tunc order relies on extraneous evidence, notice should be given to the adversely affected party. See Hobson v. Dempsey, at 1232, 7 N.W.2d at 899.

III.

Farmland Industries says the motion to modify the settlement order, made fifteen months after the December order, is untimely. It says section 633.36

of the Code provides probate orders are final to those parties having notice or appearing, and that Iowa Rule of Civil Procedure 253(a) puts a one-year time limit on such motions.

The nature of a nunc pro tunc order is to correct "evident" mistakes of the court. As a result, it may occur at any time, since it merely corrects the record to reflect what actually happened. Feddersen v. Feddersen, 271 N.W.2d 717, 718 (Iowa 1979). "We have long recognized that, after expiration of the statutory period, the use of a nunc pro tunc order is still allowable, but for a more limited purpose," to correct evident mistakes. Id. As in Feddersen, and authorities cited there, we find statutory limitations are no obstacles to the exercise of the power.

IV.

According to the appellant the action by the court in striking its name from the release went beyond the scope of a nunc pro tunc order. The purpose of such an order is to correct the record to show what actually happened. Id. Here, the only mistake upon which the order was corrected was the still unproven allegation that Farmland Industries had no proprietary control over the LP gas. The appellant says cases show the general intent that "justice be done" on the part of the judge is not sufficient to warrant a nunc pro tunc order, and other remedies must be sought. Otherwise, appellant argues, no litigation would ever be at an end.

The appellees respond by saying the judge approving the settlement stated he based his approval of the agreement on the fact full disclosure had been made of the insurance coverage and finances of the released parties and, "Never was it within the Court's contemplation that an unknown, undisclosed and unrepresented party. . . be released by the conservators as a result of the order." Judge Havercamp further stated he never noticed that Farmland Industries was named in the release.

Nunc pro tunc means literally "now for then." In re Marriage of Bird, 332 N.W.2d 123, 124 (Iowa Ct. App. 1983). "It is not the purpose of nunc pro tunc to correct a mistake or misunderstanding of the litigants." Headley v. Headley, 172 N.W.2d 104, 108 (Iowa 1969). Nor is its purpose to correct judicial thinking or conclusions or to correct a mistake of law. Id. Further, "the function of a nunc pro tunc order is not to modify or correct a judgement but to make the record show truthfully what judgment was actually rendered—'not to make an order now for then, but to enter now for then an order previously made.' " Id. The longer the time that passes from the original order of the court, the more evident and manifest the mistake must be. Id.

Several factors have been set out to determine if a mistake warrants correction through a nunc pro tunc order. Those include: (1) that the result is "so unusual as to be startling"; (2) it is the type of mistake easily made and overlooked; and (3) the amount of time which has passed since the mistake occurred. McVay v. Kenneth E. Montz Implement Co., 287 N.W.2d 149, 151 (Iowa 1980). The fact that other procedures may be available to handle the mistake is also considered by the court. Id. Whether a mistake has occurred rests primarily upon judicial intention. In re Marriage of Bird, at 124. In Bird we also noted that when the judge who enters the judgment enters the nunc pro tunc order, as here, we will give the determination weight. Id. at 125. However, we remanded the case to discover more about the judge's intent, noting that if it was nothing more than a desire to substitute one version of the decree for another, it could not be subject to a nunc pro tunc order. Id. at 125. In Bird we provided the nunc pro tunc order would change the manner in which liens against the marital home would be satisfied. Id. at 124. We said the order "clearly realigns the parties' substantive rights. . . " Id. at 125.

In the case here, there are several potential "mistakes" which could be assigned to the nunc pro tunc correction. They include: (1) the allegedly mistaken

belief that Farmland Industries was not directly involved in handling of the LP gas; (2) a mistake regarding existence of an indemnity agreement; or (3) the judge's mistake in approving the settlement when he did not realize it included a release for Farmland Industries.

The first two potential mistakes, asserted by appellees, cannot form the basis of a nunc pro tunc order. As we have stated, a mistake of fact, and a mistake on the part of the litigants cannot be corrected by a nunc pro tunc order. Headley, at 108.

In determining whether the latter mistake is an "evident" one requiring correction we note that over two million dollars passed hands after the order, and Farmland Industries believed for fifteen months it was released by the December order. Inclusion of Farmland Industries in the release is not so unusual as to be startling, nor is it a mistake easily made or overlooked. We find the judge's intent important here, and he has stated he never intended to include a party in the release that could be a potential defendant which had not revealed its finances nor was represented at the hearing. Nevertheless, appellees admit that Farmland Mutual, which was represented at the hearing, was also acting on behalf of Farmland Industries. Appellees agree that Farmland Industries was intentionally included in the release. It was presented to the judge with the intent he approve it in its entirety, including the release of Farmland Industries. The mistake came, then in the reliance by the court on the assertions of the parties at the hearing that the settlement included a release of all parties who had either presented financial information or had no direct liability. The parties and the judge have changed their minds regarding release of Farmland Industries because of the discovery Farmland Industries may have had direct liability. This is a mistake of fact, not capable of correction by nunc pro tunc. Headley, at 108.

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This mistake also involves a fact which has never been proven. A nunc pro tunc order is properly entered only when the "error or errors to be corrected have not been due to the fault of the party who seeks the order." 60 C.J.S. Motions & Orders § 57 (1969). An "evident" mistake is one "clear, noticeable, apparent to observation, or at least, clearly established by evidence." Hamill v Joseph Schlitz Brewing Co., 165 Iowa 266, 285, 143 N.W. 99, 107 aff'd, 165 Iowa 266, 145 N.W. 511, (1913), error dismissed 245 U.S. 676, 38 S. Ct. 13, 62 L. Ed. 542 (1916)(emphasis added). Nunc pro tunc orders should be made with caution and "on the most conclusive evidence. . . it has been held the evidence so constituting the basis for correction of the record be clear and convincing and that the entry by made only where the errors are proved beyond all reasonable doubt." 21 C.J.S. Courts § 227 (1940). Not only is the fact here an error on the part of the litigants, but the fact is unproven.

Although the trial court admirably wished to protect the minors involved here, we find a nunc pro tunc order was not the proper method of addressing the problem. Instead, the issue will be handled in the federal case brought by appellees. We vacate the nunc pro tunc order and remand to allow intervention of Farmland Industries and reinstate the order of December 17, 1982.

ORDER VACATED, REMANDED.