

## No More Nunc Pro Tunc in Civil Cases?

*Nunc pro tunc* is a phrase used in an order or judgment when the court wants the order or judgment to be effective as of a date in the past rather than on the date the judgment or order is entered into the court record. Black's Law Dictionary defines the term "*nunc pro tunc*" to mean "now for then; [a term signifying] 'a thing is now done which should have been done on the specified date.'" Recent cases from the North Carolina Court of Appeals have made it clear that *nunc pro tunc* is a tool available only in extremely limited circumstances.

### Judgment/Order Must Have Been *Decreed or Signed* in the Past

In [Whitworth v. Whitworth, 222 NC App 771 \(2012\)](#), the court of appeals reminded us that *nunc pro tunc* only can be used if an order actually was "decreed or signed" on the date in the past. Because *nunc pro tunc* is a tool to correct the court record to reflect an event that actually occurred in the past, it cannot be used to give an order retroactive effect when the order was not in fact entered in the past.

The trial court in [Whitworth](#) entered an equitable distribution judgment in a case involving a marital corporation. At some point during the equitable distribution proceeding, the marital corporation filed a motion to intervene. The trial court indicated on the record that it would sign an order allowing intervention but a written order was not signed. Several years after the final equitable distribution judgment was entered, the court signed a written consent order granting the corporation's motion to intervene *nunc pro tunc* to the date the court indicated on the record that it would allow the motion.

The court of appeals vacated the consent order, holding that *nunc pro tunc* can be used only if the trial court determines:

1. An order/judgment *actually was decreed or signed* on the date in the past;
2. The order/judgment was not entered on the record due to accident, mistake, or neglect of the clerk; **and**
3. No prejudice will result if the order is entered *nunc pro tunc*.

The order allowing intervention in [Whitworth](#) clearly had not been signed in the past. So what does "actually decreed" mean? The court does not explain but held that the intervention order had not been actually decreed in this case because:

- "...any rendition in open court did not precisely set out the trial court's order on the motion to intervene. ...the court merely stated [that it would sign an order if one was presented by the attorney.]
- Thus, the trial court made no oral findings of fact, although the written order contained specific findings. ...

- Further, ... the trial court did not state in open court on which basis it was allowing the intervention. ...
- It is apparent that the trial court expected the details of the order granting intervention to be fleshed out in a written order. This non-specific ruling is not a sufficient rendering to support the entry three years later of a detailed written order *nunc pro tunc*."

[Whitworth](#).

### **Judgment/Order Must Have Been Signed in the Past**

The most recent opinion by the court of appeals restricts the use of *nunc pro tunc* even further. In [Dabbondanza v. Hansley](#), NC App (August 16, 2016), the court of appeals held that even if a court orally decreed or rendered a civil judgment in open court, an order or judgment cannot be given retroactive effect unless the order or judgment was reduced to writing and signed by the judge on the date in the past. The court of appeals stated that "a judge does not have the authority to enter an order *nunc pro tunc* if that judge did not previously sign a written order."

In [Dabbondanza](#), the trial judge orally directed the clerk of court in open court and on the record, pursuant to [Rule 70 of the Rules of Civil Procedure](#), to sign a deed that husband failed to sign after being ordered to do so in an equitable distribution judgment. The order directing the clerk to sign the deed was not reduced to writing until a number of years later, after wife had transferred her interest in the real property to plaintiffs. The trial court entered the [Rule 70](#) order *nunc pro tunc* to the date the judge orally directed the clerk to sign.

In ruling that the trial court's attempt to give the [Rule 70](#) directive retroactive effect was invalid, the court of appeals explained that, before 1994, an oral rendering of judgment in open court may have supported the use of *nunc pro tunc* in appropriate circumstances. However, in 1994, [Rule 58 of the Rules of Civil Procedure](#) was amended to provide that a judgment/order is not entered until it is reduced to writing and signed by the judge. Because *nunc pro tunc* cannot be used "to accomplish something which ought to have been done but was not done," the court of appeals held that "after the 1994 amendment to [Rule 58](#), a judge does not have the authority to enter an order *nunc pro tunc* if that judge did not previously sign a written order."

### **So When Can We Use *Nunc Pro Tunc*?**

At least in civil cases, these opinions show use of *nunc pro tunc* should be extremely rare. In a footnote, the court in [Whitworth](#) stated "an argument could be made that after 1994, a trial judge has the authority to enter a *nunc pro tunc* order if he or she signed a written order, but, due to mistake, accident, or neglect of the clerk, the original written order was not filed." Of course, in addition, the court must find no prejudice will result from the retroactive application of the judgment.

Maybe we also can use *nunc pro tunc* in situations involving some Memorandums of Judgment.

*Buckingham v. Buckingham*, 134 NC App 82 (1999), held that an MOJ hastily written following a court hearing but signed by the judge and filed with the clerk is a judgment entered pursuant to [Rule 58](#), even though the MOJ clearly anticipates that a more ‘formal’ order will be substituted for the MOJ in the near future. Can the formal judgment be entered *nunc pro tunc* to the date of the MOJ? I think the [Whitworth](#) analysis probably would allow it – assuming the ‘formal’ judgment supplements the original MOJ and does not change the terms.

What do others think?