HOW TO ENTER AN ORDER CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

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1. Requirements of Rule 52 of the N.C. Rules of Civil Procedure:

(a) *Findings.*—(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. (2) Findings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

2. What is the Purpose of making Findings of Fact and Conclusions of Law?

"The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E. 2d 26, 29 (1977); *see, e.g., Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967)."

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

3. Distinctions between evidentiary findings of fact, ultimate findings of fact, and conclusions of law:

"There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts."

Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951)

"Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. *Christmas v. Cowden*, 44 N.M. 517, 105 P. 2d 484; *Scott v. Cismadi*, 80 Ohio App. 39, 74 S.E. 2d 563. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. 54 C.J., Trial, section 1151. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. *Rhode v. Bartholomew*, 94 Cal. App. 2d 272, 210 P. 2d 768; *Citizens Securities & Investment Co. v. Dennis*, 236 Ill. 307; *Mining Securities Co. v. Wall*, 99 Mont. 596, 45 P. 2d 302; *Christmas v. Cowden*, *supra*; *Oregon Home Builders v. Montgomery Inv. Co.*, 94 Or. 349, 184 P. 487. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. *Maltz v. Jackoway-Katz Cap. Co.*, 336 Mo. 1000, 82 S.E. 2d 909; *Tesch v. Industrial Commission*, 200 Wis. 616, 229 N.W. 194."

Woodard v. Mordecai, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)

"The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, see *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, see *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951))."

In re Helms, 127 N.C. App. 505, 510**,** 491 S.E.2d 672, 676 (1997).

"Rule 52(a) does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. 'Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the court, and filed therein, and essential to support the decision and judgment rendered thereon.' 76 Am. Jur. 2d Trial § 1251 (1975). In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." 89 C.J.S. Trial § 627 (1955).

Quick v. Quick, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

"A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties. *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E. 2d 138 (1971). A conclusion of law must be based on the facts found by the court and must be stated separately. *Williams v. Williams*, 13 N.C. App. 468, 186 S.E. 2d 210 (1972). The conclusions of law necessary to be stated are the conclusions which, under the facts

found, are required by the law and from which the judgment is to result. 89 C.J.S., Trial, § 615b (1955)."

Montgomery v. Montgomery, 32 N.C. App. 154, 157, 231 S.E.2d 26, 28-29 (1977)**.**

4. Problems areas with findings of fact and conclusions of law.

a. Recitation of the evidence rather than making findings of fact.

The role of the trial judge, sitting without a jury is to hear the evidence, determine the credibility of witnesses, and assign weight to the various pieces of evidence before it. This role is not fulfilled if the trial court merely recites the testimony of the various witnesses.

"[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984).

Example:
12. That collaterals state that [B.F.] has a history of cocaine and crack use.
13. That collaterals also state that [B.F.] has a bad temper, he is inpatient, he hollers at the baby and slaps her on her hands.
14. That collaterals state that B.F. only wants the child, so he won't have to pay child support.
15. That collaterals stated that [the] paternal grandmother, states that she is unwilling to help to baby-sit the child while she is in her home.

"A more appropriate example of an 'ultimate finding of fact' would have been for the court to state that 'B.F. has a history of cocaine and crack use' or that 'B.F. has a bad temper, he is impatient, he hollers at the baby and slaps her on her hands,' if it found these facts were true." *In re O.W.* ___ N.C. App. ___, 596 S.E2d 851, 854 (2004).

b. Care should be taken in revising findings of fact in orders. In *Baker v. Baker,* 102 N.C.App. 792, 404 S.E.2d 20 (1991) the trial court originally made a finding that defendant "engaged in a course of adultery with the nurse in his office.", and then removed the offensive finding at the request of defendant's attorney. This resulted in error.

"The judge initially found that defendant had committed adultery; the judge then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony. That process violated the sequence required by Rule 52 to the prejudice of the defendant. 'Effective appellate review of an order entered by a trial court sitting without a jury is

largely dependent upon the specificity by which the order's rationale is articulated. . . . Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.' *Coble*, 300 N.C. at 714, 268 S.E.2d at 190. Where, as in the case below, an order's rationale is tainted by a process that violates Rule 52, a new trial of the issues is required. *Baker* at 797, 404 S.E.2d at 22-23.

c. Findings of fact may incorporate documents by reference.
"[T]here is no prohibition against incorporating documents by reference and utilizing the contents of such documents as the trial court's findings of fact. *See Sealey v. Grine,* 115 N.C. App. 343, 444 S.E.2d 632 (1994)(incorporating an exhibit showing costs of court in the trial court's order); *Rogers v. Rogers,* 111 N.C. App. 606, 432 S.E.2d 907 (1993)(incorporating a separation agreement into a divorce judgment); *Cohen v. Cohen,* 100 N.C. App. 334, 396 S.E.2d 344 (1990)(incorporating an affidavit into the trial court's child support order), disc. review denied, 328 N.C. 270, 400 S.E.2d 451 (1991))." *Starco, Inc. v. AMG Bonding & Ins. Servs.,* 124 N.C. App. 332, 336, 477 S.E.2d 211, 214 (1996).
Caveats:

1. The trial court may not delegate its fact finding duty

"In this case, the trial court entered a cursory two page order. It did not incorporate any prior orders or findings of fact from those orders. Instead, the trial court incorporated a court report from DSS and a mental health report on the oldest boy as a finding of fact. In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. *In re Ivey*, 156 N.C. App. 398, 402, 576 S.E.2d 386, 390 (2003); N.C. Gen. Stat. § 7B-907(b) (2003). Despite this authority, the trial court may not delegate its fact finding duty. *Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Consequently, the trial court should not broadly incorporate these written reports from outside sources as its findings of fact." *In re J.S.*, ___ N.C. App. ___, 598 S.E.2d 658, 660 (2004)

2. A trial court's findings must consist of more than a recitation of the allegations.

In re O.W., ___ N.C. App. ___, 596 S.E.2d at 854 (remanding order back to the trial court when it found that the findings of fact were not "specific ultimate facts" from which it could determine if the adjudication of abuse and neglect was adequately supported by competent evidence, where 15 of the trial court's 20 finding of fact were a verbatim recitation of the facts contained in DSS's petition for abuse and neglect.

3. Rule 65(d) provides that temporary restraining orders and injunctions cannot reference other documents in describing the acts enjoined or

restrained.

d. Findings of fact are generally not appropriate in summary judgment orders.

"If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact." *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.,* 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975). *See also Stonestreet v. Compton Motors, Inc.,* 18 N.C. App. 527, 197 S.E.2d 579 (1973).

If the recitation of evidence is necessary to explain the trial court's ruling (but not to resolve issues of fact), then they should be denominated as "undisputed" findings of fact. In *Piedmont Inst. of Pain Mgmt. v. Staton Found.,* 157 N.C. App. 577, 581 S.E.2d 68 (2003), the trial court entered an order granting summary judgment that was 35 pages in length and found 68 undisputed findings of fact. This order was affirmed by the Court of Appeals, and review was denied by the Supreme Court.

5. What happens if findings and conclusions are misidentified?

a. Use of "savings clauses" in orders. Many judges place language in their orders which state that if a finding of fact is misidentified as a conclusion of law or a conclusion of law is misidentified as a finding of fact that the item shall be deemed to be whichever it should be. Such language is appropriate, and is consistent with appellate case law in North Carolina.

b. The trial court's classification as a finding of fact or conclusion of law is not determinative, and the appellate court can reclassify the item and apply the appropriate standard of review. *State v. Barnhill,* ___ N.C.App. ___, 601 S.E.2d 215, 218 (2004) (citing *In re Helms,* 127 N.C. App. 505, 491 S.E.2d 672 (1997)).

c. Making "mixed findings of fact and conclusions of law" together in an order or judgment.

"Surely under Rule 52, a trial court must avoid the use of mixed findings of fact and instead, separate the findings of fact from the conclusions of law. However, in this case the trial judge labeled his order 'Mixed Findings of Fact and Conclusions of Law.' In reviewing this order, it is difficult to discern what indeed is a finding of fact and what is a conclusion of law. The language of Rule 52 is mandatory; in nonjury actions, the trial court shall find the facts specially and state separately its conclusions of law. *See, e.g., DKH Corp. v. Rankin-Patterson Oil Co., Inc.,* 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) (Our Supreme Court held that the mandatory language of Rule 54(b) of the North Carolina Rules of Civil Procedure that stated, "Such judgment shall then be subject to review by appeal," required the appellate court to hear the appeal.). Since the trial court

violated that mandate in issuing the subject order, we are compelled to remand this matter to the trial court to reissue its order in compliance with Rule 52(a)(1)." *Pineda-Lopez v. N.C. Growers Ass'n,* 151 N.C. App. 587, 589-90, 566 S.E.2d 162, 164-65 (2002).

6. What happens when findings of fact are required to be made and they are not.

Where findings are required, the trial court must make them with sufficient specificity to allow meaningful appellate review. "[W]hen the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence..., then the order entered must be vacated and the case remanded . . . ." *Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 661 (1982).

7. What happens when there are no findings made, and neither party requested that findings be made under Rule 52(a)(2).

"In the case before us, the trial court's order contained no findings, but there is nothing in the record to show that either party requested them. Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings. *See Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976)."

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000).

8. Drafting Tips:

a. The orders that you enter belong to the Court. They are *your* orders, not the orders of the parties in a civil action, or the State or defendant in a civil action. If the findings of fact or conclusions of law are inadequate, the appellate decision will not state that one of the parties failed to properly draw the order. It will state that the learned trial judge failed to enter proper findings of fact or conclusions of law.

b. Consider drafting the order yourself, or require counsel to provide a copy of the order on disc in a compatible word-processing format, along with the hard copy. If the order is not drawn properly, then you can edit the order, print it out and sign it.

c. At the beginning of the order make some basic recitations:

(1) Nature of service and basis for the court's jurisdiction.

(2) The Court has had the opportunity to hear the testimony of each witness, to observe the demeanor of each witness, to assess the credibility of each witness, and to determine the weight to be given to the testimony of each witness.

d. In a civil non-jury order recite each of the claims made by the parties, and then the elements that the party must prove to prevail in the case. Then use this as a checklist to make sure that you have disposed of all of the claims pending in the lawsuit, and made all of the ultimate findings of fact necessary for the result reached in the order.

e. If the matter is being heard by the Court, sitting without a jury, clearly state in the order the basis for hearing the case without a jury.

f. Make use of the form orders contained in the Superior Court Judge's benchbook, especially those dealing with criminal *voir dire* hearings.

g. Where a ruling is a discretionary one, the judge should recite in the order that the court is making the ruling "in its discretion."

9. Standard of Review upon Appeal.

a. Findings of Fact.

"Our standard of review of a nonjury trial is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. *Shear v. Stevens Bldg. Co.,* 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary. *Lagies v. Myers,* 142 N.C. App. 239, 246, 542 S.E.2d 336, 341, *review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001); *Chicago Title Ins. Co. v. Wetherington,* 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997), *review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998)."

Pineda-Lopez v. N.C. Growers Ass'n, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002).

If neither party objects to a finding of act made by the trial court, "the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman,* 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

When the Standard of Review is Abuse of Discretion:
The appellate court still looks to see whether the findings of fact are supported by competent evidence. And while a trial court's conclusions of law are generally reviewable *de novo*, where a ruling is vested in the discretion of the trial court, such a ruling "raises no question of law," thus on appeal the appellate courts are limited to reviewing whether the trial court abused its discretion.

Guox v. Satterly, ___ N.C. App. ___, 596 S.E.2d 452, 456 (2004).

"Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527."

State v. Roache, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004).

b. Conclusions of Law

Conclusions of law are fully reviewable on appeal. *Teasley v. Beck,* 155 N.C.App. 282, 288, 574 S.E2d 137, 141 (2002), *disc. review denied*, 357 N.C. 169, 581 S.E.2d 755 (2003).

Mixed questions of law and fact are also fully reviewable on appeal. *Taylor v. Cone Mills,* 306 N.C 314, 320, 293 S.E.2d 189, 193 (1982).

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