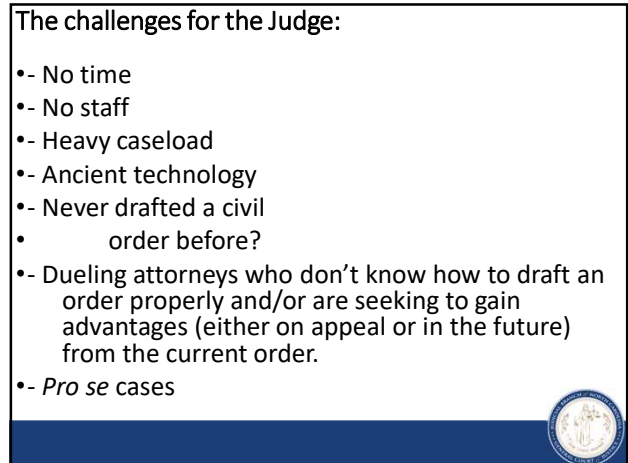
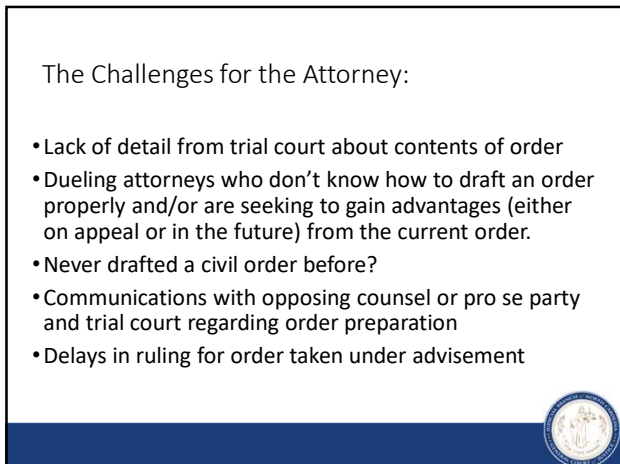


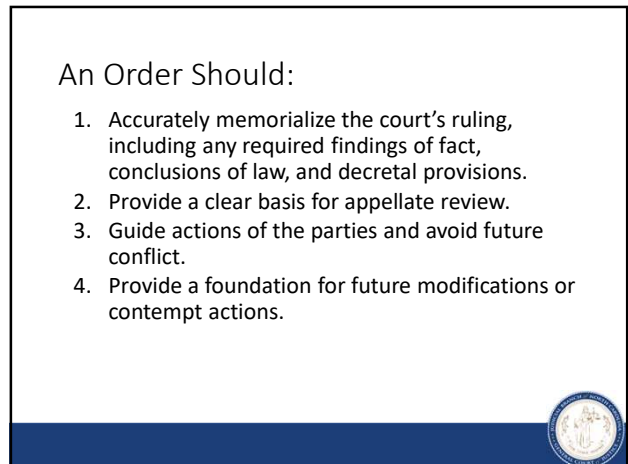
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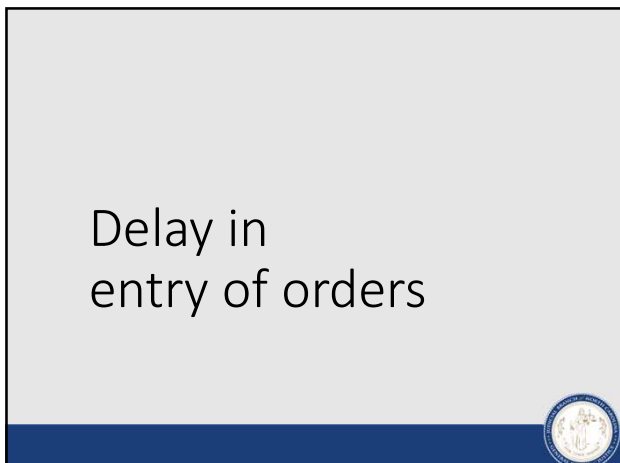
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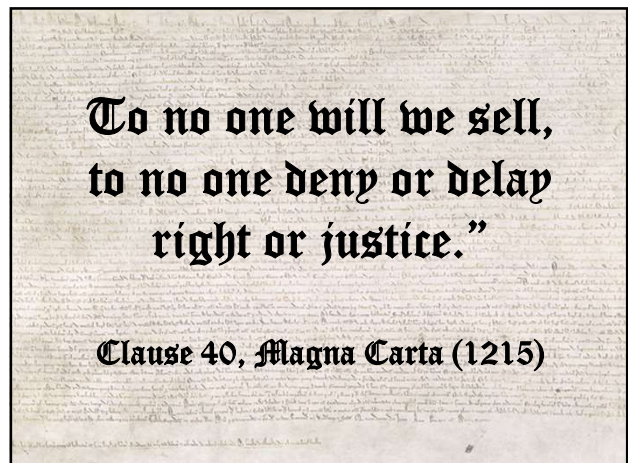
3



4




5



6

All courts shall be open;  
 every person for an injury done him in his  
 lands, goods, person, or reputation shall have  
 remedy by due course of law;  
 and right and justice shall be administered  
 without favor, denial, or delay.

N.C. Const. art. I, § 18




7

**Most frequent complaints** to Judicial Standards Commission about entry of orders:


1. **Delay** in entry of order- How long is too long?
2. **Ex Parte Communications** regarding orders.

Communications about order preparation should be shared with both sides.



8

Avoiding common order problems



9




The Order starts before or during the trial.

10

**Know the law so the order covers everything it should.**

Where to find *quick* help with an Order:


1. Statutes
2. District Court Bench Books
3. UNC School of Government publications
4. Use checklists!



11

**Start at the Beginning....**  
 Make sure the preliminary issues are covered.

- Jurisdiction?
- Standing?
- What was heard and what wasn't?
- Prior orders to consider?
- Other related cases?
- Any pending motions remaining?
- Were they abandoned or dismissed?
- Service or notice issues?
- Stipulations?
- Pretrial orders?



12

## Jurisdiction

### Verification of a Petition to Terminate Parental Rights

*In re O.E.M.*, 379 N.C. 27, 2021-NCSC-210  
(Vacated and Remanded).



13

## Indian Child Welfare Act

*In re A.L.*, 378 N.C. 396, 2021-NCSC-92  
(Affirmed in Part and Remanded).

*In re M.L.B.*, 337 NC 335, 2021-NCSC-51  
(Reversed and Remanded).



14

### Exercising Jurisdiction Over or Conducting a Hearing for a Termination Proceeding While a Case is on Appeal

*In re J.M. & J.M.*, 377 N.C. 298, 2021-NCSC-48  
(Vacated in Part, Affirmed in Part).

*In re B.B., S.B., S.B.*, 2022-NCSC-67 (Affirmed)



15

## Standing

*In re A.A.*, 2022-NCSC-66 (Affirmed).



16

### Adjudicating Grounds Not Alleged in the Petition

*In re D.R.J.*, 2022-NCSC-69 (Reversed).



17

### Ineffective Assistance of Counsel:

#### Failure of Respondent to Demonstrate Prejudice


*In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121 (Affirmed).



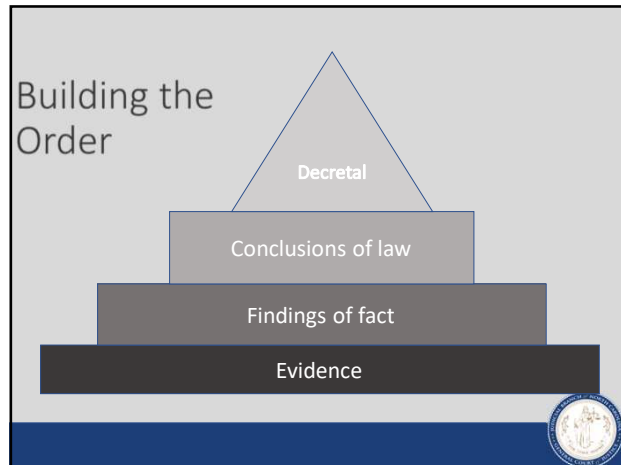
18

### A Very Basic Order Outline:

- 1. Introduction
  - Who– Judge, parties
  - Where– Court identification
  - What– motions, issues heard
  - When – date(s) of hearing
- 2. Why -- Findings of Fact
- 3. Why -- Conclusions of law
- 4. How-- Decree– Concisely states the court’s ruling and directs **exactly** who is required to do what by when.
- 5. Signature




19



20

“While stream of consciousness is a well-recognized literary style, it is not well suited to court orders.” *Peltzer v. Peltzer*, 732 S.E.2d 357, N.C. App. 2012.





21

“This case appears to embody all of the flaws that could possibly create an abominable appeal of an equitable distribution judgment.”

II. Observations Concerning This Appeal

1. Defendant filed no brief
2. Hearings held on 4 different days
3. No transcript for one day, just a “cursory narrative of plaintiff’s testimony, which is written from plaintiff’s point of view to which Defendant did not object.
3. Paper transcripts filed, not electronic
4. Over 70 exhibits submitted to trial court, but not in COA record (although this did not stop Plaintiff from referring to them in brief.)
5. Order “combines evidentiary findings of fact, ultimate findings of fact, and conclusions of law, without any attempt to make them separate portions of the order.”

*Hill v. Hill*, --- S.E.2d ----, 2013 WL 5183757 N.C.App. 9-17-2013

22

## Findings of Fact



23

### The Judge Who Presided Over the Hearing Must Make the Findings of Fact

*In re E.D.H.*, 2022-NCSC-70 (Affirmed).



24

## Recitations of evidence are not findings!

**If it starts like this, it's probably not a finding of fact:**

- Mrs. Jones testified that ....
- The plaintiff presented evidence that showed...
- There is a dispute about ...
- The parties disagree about...
- Defendants contended that ...
- Plaintiff claims that ..., while defendant claims that .....



25

## Recitation of Testimony

*In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106 (Reversed and Remanded).

In evaluating the validity of this aspect of respondent-father's challenge to Finding of Fact No. 9, we begin by noting that, at an absolute minimum, the first and last sentences contained in Finding of Fact No. 9, which state that **the maternal grandfather "testified that the juvenile has resided with the [maternal grandparents] since April 2010" and that the maternal grandparents had "further testified that the juvenile is a healthy and happy child,"** take the form of recitations of the testimony that was provided at the termination hearing by the maternal grandfather rather than proper findings of fact



26

## Turn it into a finding:

~~the maternal grandfather "testified that the juvenile has resided with the [maternal grandparents] since April 2010" and that the maternal grandparents had "further testified that the juvenile is a healthy and happy child,"~~



27

Use your magic word:  
"Credible"



28

## Determination of Credibility

*In re D.L.W.*, 368 N.C. 835 (2016) (Reversed).

Although there was conflicting testimony regarding the details of these encounters,<sup>3</sup> **the trial judge had the responsibility to "pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom."** *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (citation omitted).

*Matter of D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167-68 (2016)



29

## Sufficient Findings to Conduct Meaningful Appellate Review

*In re B.F.N.*, 2022-NCSC-68, (Vacated and Remanded).



30

## Required Findings

*In re L.B.L.B.*, 377 N.C. 311, 2021-NCSC-49 (Remanded).

We therefore believe that the appropriate remedy for the trial court's error here is to remand this matter to the trial court for the entry of additional findings in contemplation of N.C.G.S. § 7B-906.2(d)(3). Cf. *In re N.K.*, 375 N.C. 805, 825, 851 S.E.2d 321 (2020) (remanding for findings on the trial court's compliance with the Indian Child Welfare Act (ICWA)); *State v. Peterson*, 344 N.C. 172, 177–178, 472 S.E.2d 730 (1996) (holding no error in part as to \*327 the judgment but remanding in part for further findings on suppression issue).

Matter of L.R.L.B., 2021-NCSC-49, ¶ 37, 377 N.C. 311, 326–27, 857 S.E.2d 105, 118



31

## N.C.G.S. § 7B-1111. Grounds for Terminating Parental Rights



32

§ 7B-1111(a)(1): “The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.”



33

## Likelihood of Repetition of Neglect

*In re B.R.L.*, 2022-NCSC-49 (Affirmed).

*In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119 (Reversed and Remanded).



34

## Failure to Make Progress in Completing a Case Plan Is Indicative of a Likelihood of Future Neglect

*In re M.J.S.M.*, 257 N.C. App. 633 (2018).

*In re M.A.*, 374 N.C. 865 (2020) (Affirmed).



35


(a)(2): “The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under those circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.”



36

**There Must Be a Finding that the Child Was in Foster Care or Placement Outside the Home for More than 12 Months**


*In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111 (Reversed).



37

**Willfulness is a Finding of Fact that Does Not Require Fault by the Parent**


*In re A.M.L.*, 377 N.C. 1, 2021-NCSC-21 (Affirmed).



38


**Reasonable Progress in Correcting the Conditions that Led to the Child's Removal**

*In re A.M.*, 377 N.C. 220, 2021-NCSC-42 (Affirmed).



39


**(a)(3):** “The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.”



40

**Findings Concerning the Relevant Six Month Period**


*In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102 (Reversed).



41

**Ability to Earn**


*In re J.M.*, 373 N.C. 352 (2020) (Affirmed).



42

**(a)(6):** “That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future.”


\*N.C.G.S. § 7B-101(9) defines a dependent juvenile as one whose “parent ... lacks an appropriate alternative child care arrangement.”



43


## Appropriate Alternative Child Care Arrangement

*In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106  
(Reversed and Remanded).



44


**(a)(7):** “The parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.”



45

## Willful Abandonment


*In re M.E.S.*, 379 N.C. 275, 2021-NCSC-140 (Affirmed)



46

## The Relevant Period

*In re K.J.E.*, 378 N.C. 620, 2021-NCSC-109 (Vacated and Remanded).




47

**§ 7B-906.2. Permanent plans; concurrent planning.**

“(d) At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:


- (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
- (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
- (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
- (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.”



48




Be careful with Shortcuts.



49

Shortcuts? Use with caution.

- **Judicial notice**  
What can be judicially noticed? What is the legal basis for the notice? Standard of proof?
- **Incorporation by reference** is useful but not a substitute for findings.
- **Déjà vu?**  
(But the judge already heard (and decided) this case!)




50

Rule 201. Judicial notice of adjudicative facts

(a) Scope of rule.--This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.--A judicially noticed fact must be **one not subject to reasonable dispute** in that it is either (1) **generally known** within the territorial jurisdiction of the trial court or (2) **capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.** ...

(e) Opportunity to be heard.--In a **trial court**, a party is entitled upon timely request to an **opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.** In the absence of prior notification, the request may be made after judicial notice has been taken.




51

## Judicial Notice

“[T]his Court repeatedly has held that a trial court may take **judicial notice of earlier proceedings in the same case.** Moreover, the trial court “ ‘is presumed to have disregarded any incompetent evidence.’ ”

In re W.L.M., 181 N.C.App. 518, 640 S.E.2d 439 (2007).

But.....



52


## Relying on Evidence from the Dispositional Phase for Adjudicatory Findings

*In re Z.J.W.*, 376 N.C. 760, 2021-NCSC-13 (Reversed in Part, Vacated and Remanded in Part).



53

The Judge’s memory (or lack thereof) is not evidence.



54


**The Judge’s memory is not evidence.**

At the 14 April 2008 hearing on defendant's motion, inter alia, for a new trial, **the trial judge stated that he had presided over the defendant's trial in criminal court** and that at that trial

we weren't beyond a reasonable doubt which is a higher standard in criminal court but in civil court but that we would be to a preponderance of the evidence. That's why I indicated at that time to the defense attorney that it would probably be appropriate that I hear the civil case so that I can enter the Order having already used a lot of Court time hearing the criminal case and indicated at that time that I would more than likely be inclined to enter that Order.

Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must "be taken orally in open court" must be taken in the case which is at bar, not in a separate case which was tried before the same judge. <sup>3</sup> Appellate review of the sufficiency of the evidence to support the trial court's findings of fact is impossible where the evidence is contained only in the trial judge's memory.

Hensley v. Hennessy, 201 N.C.App. 56, 685 S.E.2d 541(2009)



55

*Nunc pro tunc...*


- It sounds official!
- It's Latin!!
- It even sounds really smart!!!
- Why not???




56

**A *nunc pro tunc* order may be entered IF:**


1. Judge actually made and announced (rendered) the judgment (in sufficient detail) on the date that the order says but it has not been formally entered as a written order yet, AND
2. No “intervening rights” will be prejudiced by the late entry of the order.



57


**Be careful with cutting and pasting.**

[W]e clarify today that it is not per se reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. It is a longstanding tradition in this State for trial judges to “rely upon counsel to assist in order preparation.” In re A.B., 768 S.E.2d 573, 579 (2015). It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. **We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose.** 772 S.E. 2d at 251. In re J.W., 772 S.E.2d 249 (2015)



58

**Proofread carefully to see if you any words out.**  
~Author Unknown




59

**And to see if you left the wrong words in....**

But here, the trial court's ultimate conclusion of law concerning the best interests of the juveniles is also internally inconsistent. The court concluded that “it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children.” Certainly, the trial court did not terminate respondent's parental rights under a belief that doing so would harm the juveniles and that emotional harm would be in their best interests.

In re A.B., 768 S.E.2d 573 (N.C. Ct. App. 2015)



60

## Form Orders

1. READ the form
2. Fill it out COMPLETELY
3. Make sure the EVIDENCE supports what the form says.

Make sure that there is competent evidence to support the findings. *Burress v. Burress*, 195 N.C.App. 447, 672 S.E.2d 732 (2009)

The handwritten (or typed) findings you add to the form should not conflict with the printed language of the form. *In re B.E.*, 186 N.C.App. 656, 652 S.E.2d 344 (2007)

