
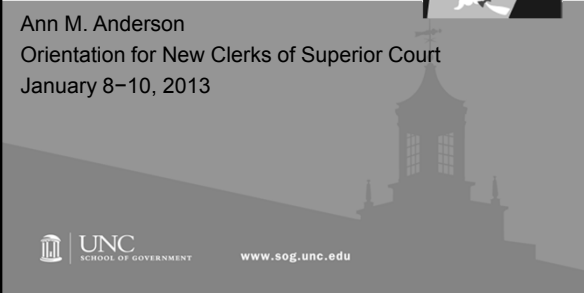


## Introduction to Contested Hearings



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Orientation for New Clerks of Superior Court  
January 8–10, 2013



UNC  
SCHOOL OF GOVERNMENT  
www.sog.unc.edu

## Clerk's Authority

The Clerk is a judicial officer of the Superior Court.

G.S. 7A-40

UNC

## Contested Hearings

- Hearing "Basics"
- Special Topic: "Estate Proceedings"
- Evidence Issues
- Drafting Orders

UNC

## "BASICS"

UNC

## Adversarial Hearings

- "Estate Proceedings"
- Trust Proceedings
- Incompetency
- Foreclosures (*sometimes*)
- Certain Special Proceedings
  - Partition (actual or sale in lieu)

UNC

## Clerk's Authority

- Many powers associated with role of judicial officer:
  - Issue subpoenas to compel testimony or documents
  - Administer oaths
  - Issue citations and orders to show cause
  - Enforce orders and decrees
  - Certify documents received in evidence
  - Preserve order in court; hold persons in contempt

G.S. 7A-103

UNC

## Appellate Review

Orders of the clerk after hearing are final acts of a superior court judicial officer.

If the party wants the order to be reviewed, the party must appeal.



## Appellate Review

**In Estates, trusts, and guardianship matters:**

**Review is by the Superior Court, and it is “on the record”.**



## Appellate Review

### § 1-301.3(d)

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.



## Appellate Review

**Special Proceedings and Foreclosures:**

**Appeal is to Superior Court, and it is heard “*de novo*”.**



## Appellate Review

### § 1-301.2.

[A] party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing *de novo*.



## Appellate Review

**Incompetency determinations:**

**Appeal is to the Superior Court, and it is heard “*de novo*.”**



## Appellate Review

### § 35A-1115.

Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals.

(But the appointment of a guardian is “on the record.” §1-301.3)

## Responsibilities of Clerk

No *ex parte* contacts  
with parties or their attorneys  
about the hearing.

## Responsibilities of Clerk

Must disqualify himself or herself  
if there is a conflict of interest.

## Responsibilities of Clerk

- Disqualification required if he or she:
  - Has an interest by distribution, will, as creditor, or otherwise.
  - Is related to a person claiming an interest in the matter such that he would not be qualified as a juror, and a party objects
  - Has a spouse who's party or subscribing witness, and the document not yet admitted to probate
  - Clerk or clerk's spouse is executor or trustee and the will not yet admitted to probate
  - Other grounds justifying disqualification of a judge.

G.S. 7A-104.

## Responsibilities of Clerk

- Hear the matter fairly and deliberately.
- Accord the parties the right to be heard according to the law.
- Maintain order and decorum in the proceedings.

## Courtroom Decorum of Counsel

In court, North Carolina lawyers are “at all times to conduct themselves with dignity and propriety.”



Gen. R. Prac. 12

## Courtroom Decorum of Counsel

### Demeanor toward the clerk:

- Should address the clerk from a standing position behind counsel table (except objections).
- Should not approach the clerk's table or bench except with the court's permission or request.
- Should not address matters directly to opposing counsel during the proceedings.
- Should "yield gracefully" to the clerk's rulings.



Gen. R. Prac. 12



## Courtroom Decorum of Counsel

### Demeanor toward witnesses:

- Should examine witnesses from a seated position behind counsel table.
- Should not approach witnesses except to present, inquire about, or examine a document.
- Should treat adverse witnesses with fairness and due consideration.



Gen. R. Prac. 12



## General Order of Evidence

- **Petitioner's Evidence**
  - Petitioner has burden of proof!
- **Respondent's Evidence**



## General Order of Examination

### **Parties represented by Counsel**

- Witness takes stand
- Direct examination
- Cross-examination by opposing counsel
- Redirect examination
- Re-cross examination by opposing counsel

### **Parties Unrepresented**

- Witness takes stand
- Witness testifies
  - Clerk often asks questions
- Opposing party/ies may cross-examine
- Witness may give clarifying testimony
- Opposing party/ies may re-cross



## 2011 Legislation: "Estate Proceedings"



## Original Jurisdiction

Estates Proceedings:  
Administration, distribution,  
or settlement of an estate.



## Original *and Exclusive*

- Probate of wills
- Letters
- Elective share
- Every other estate proceeding

-Except...

## Original *but Not Exclusive*

- Proceedings to
  - Ascertain heirs or devisees
  - Approve family settlement agreements
  - Determine questions of will construction
  - Determine creditor priority
  - Determine whether person in possession of estate property
  - Order recovery of property
  - Determine immunity, power, privilege, duty, or right.

## No Jurisdiction

- Actions by/against creditors (except claims against estate)
- Monetary damage claims (fraud, etc.)
- Caveats
- Proper venue
- Fraudulent transfers by decedent.

## Procedure

## Petition

- In existing estate file
- “Short and plain statement”
- “Simple, concise, and direct”

## Summons

- To respondents and anyone else clerk deems appropriate
- NEW FORM: ESTATES PROCEEDINGS SUMMONS (AOC-E-102).



## Service

- Summons/petition: Rule 4
- Subsequent filings: Rule 5

## Response

- 20 days to respond
- Clerk/party may then calendar hearing

## Hearing

- Evidentiary (competent evidence)
- Written findings/conclusions required

## Extensions of Time

## Before Expiration

- Clerk may extend “for cause shown”
- In clerk’s discretion
- With or without motion/notice.

## Before Expiration

- 10 days maximum unless “good cause shown”
- Then, “to the extent...justice requires.”

## After Expiration

- Clerk may allow the act if failure was “excusable neglect”

## Stipulations

- Parties may agree to extend time (without clerk approval) up to 30 days.

## Rules of Civil Procedure

## Some Rules Apply

- 4 – Process
- 5 – Service of subsequent pleadings and other papers
- 6(a), (d), (e) – Time
- 18 – Joinder of claims
- 19, 20 – Necessary/Permissive joinder of parties
- 21 – Procedure upon misjoinder/nonjoinder
- 24 – Intervention
- 45 – Subpoenas
- 56 – Summary judgment
- 65 – Injunctions

## Others *May* Apply

- Upon motion of party or clerk, other Rules of civ pro shall apply.
- Includes discovery rules.

## Settlement Agreements

## NEW!!

- Clerk has authority to approve settlement if:
  - (i) matter is in clerk's jurisdiction
  - (ii) controversy arose in good faith
- Not if it modifies terms of will.

## Caveats

- Clerk has no authority to approve settlement of a caveat.
- Only superior court judge has this authority.

## EVIDENCE

## What rules apply?

- **The North Carolina Rules of Evidence apply in hearings before the clerk:**

### Rule 1101. Applicability of rules.

- (a) Proceedings generally. – Except as otherwise provided...by statute, these rules apply to all actions and proceedings in the courts of this State.

## What do the Rules do?

Govern what kind of evidence is admissible to prove the issues in the case.

## Why?

- **Fairness, efficiency, finding the truth.**

### Rule 102. Purpose and construction.

- (a) In general. – These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.



Findings of fact must be based on competent evidence.

## • Key Evidence Rules

- Relevance
- Personal Knowledge
- Hearsay

## Essential Questions

- Is this information relevant to the outcome?
- Does the witness have personal knowledge of this?
- Is this hearsay? Can I consider it anyway?

## • Key Evidence Rules

- Relevance
- Personal Knowledge
- Hearsay

## RELEVANCE

- **Relevant evidence is evidence that aids the finder of fact in making a determination about the matters in issue.**

### Rule 401.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

## RELEVANCE

- **If the evidence is not relevant, it is not admissible.**

### Rule 402.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

## RELEVANCE

Example:

Testimony in incompetency hearing:

“Grandma has been seeing lots of younger men over the past year, and she’s spent at least \$25,000 buying them stuff.”

## RELEVANCE

Example:

Testimony in incompetency hearing:

“Grandma dated lots of men when she was younger. Folks thought she was kind of “loose”.”

## RELEVANCE

Example:

Testimony in incompetency hearing:

“Grandma has not paid her insurance premiums for the last four months.”

## • Key Evidence Rules

- Relevance
- Personal Knowledge
- Hearsay

## PERSONAL KNOWLEDGE

- **A witness’s testimony must be based on that witness’s personal knowledge.**

### **Rule 602. Lack of personal knowledge.**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

## PERSONAL KNOWLEDGE

Example:

Testimony in guardianship hearing:

“Grandma has not paid her insurance premiums for the last four months.”

## PERSONAL KNOWLEDGE

If you're not sure, what can you do?

- **Rule 614.**

...

(b) Interrogation by court. – The court may interrogate witnesses, whether called by itself or by a party.

## • Key Evidence Rules

- Relevance
- Personal Knowledge
- Hearsay

## HEARSAY

### **Rule 802.**

Hearsay is not admissible except as provided by statute or by these Rules.”

Why?

RELIABILITY

ABILITY TO CROSS-EXAMINE

2 Questions:

- Is it hearsay?
- Is there an exception to the hearsay rule?

What is hearsay?

- **Rule 801(c).**

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

## What is hearsay?

- An assertive statement
  - Oral or written
- Made outside of the present hearing
- Offered into evidence to prove that the statement is true.
  - If offered for another reason, it is *not* hearsay in the first place.

## What is hearsay?

So...

An out-of-court statement.  
Made to prove what it says.



## Example 1



- At issue is Lee's fitness to administer his brother's estate.
- Lee's nephew alleges that Lee is untrustworthy when it comes to money.
- The nephew testifies, "Lee's ex-wife told me he wasted all of their savings on gambling."

## Example 2

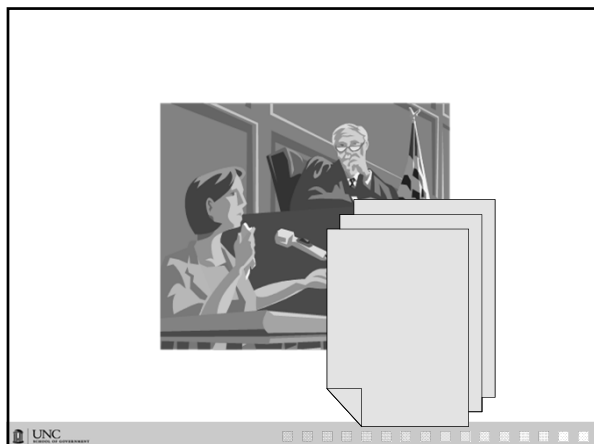
- At issue is whether a nursing home attendant, Lisa, stole a ring from a resident.
- The daughter testifies that she asked her Mom who took her ring. She says, "Mom pointed right at Lisa."
- Is Mom's pointing hearsay?



## Example 3

- P has sued D, owner of the only red Maserati in town, for damage to her car that happened while she was parked in a parking lot.
- P attempts to introduce a piece of paper into evidence.
- The paper is a note that was left on her windshield. The note states, "I saw a red sports car hit your car and drive away. Thought you'd like to know."
- Hearsay?





Almost 30 exceptions to hearsay rule.

But don't panic!

### 3 categories

- Statements by “party-opponent”
- Statements that are more reliable by their nature
- Statements that need to come in because they are important and the speaker can't testify  
(Speaker deceased, mentally ill or infirm, refuses to testify, exempt from testifying because of a privilege)

### Statements by Party-Opponent

- A statement by the other party (opponent) is admissible if it is offered into evidence against him or her.

### Reliable Statements

- Present Sense Impression
  - “That car *just* ran a red light.”
- Excited Utterance
  - “You hit him!”
- Mental, Emotional, or Physical Condition of the Speaker
- Statements for Purpose of Medical Diagnosis or Treatment

### Reliable Statements

- Certain type of documents:
  - Business Records
  - Public Records and Reports, Vital Statistics
  - Records of Religious Organizations
  - Marriage, Baptismal Certificates, Family Records
  - Property Records
  - Treatises
- Certain statements of reputation
- Other exceptions (a “catch-all”)

## Declarant Unavailable

- Former testimony the opponent had an opportunity to cross-examine
- Statement under belief of impending death
- Statement against the speaker's interest
- Statement of personal or family history
- Other exceptions (another catch-all)

## Back to Example 2

- At issue is whether a nursing home attendant, Lisa, stole a ring from a resident.
- The daughter testifies that she asked her Mom who took her ring. She says, "Mom pointed right at Lisa."
- Mom died minutes later.
- *Exception to hearsay rule?*



## DRAFTING ORDERS

## Appellate Review

In Estates, Trusts, and Guardianship matters:

Review is by the Superior Court, and it is "on the record".

## Appellate Review

In Estates, Trusts, and Guardianships:

**§ 1-301.3(d)**

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining the following:

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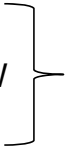
## The Law

- In estates, trusts, and guardianships:

– "In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." G.S. § 1-301.3

Components of an Order

- INTRODUCTORY PARAGRAPH
  - Nature of Matter and Hearing;  
Jurisdiction
- ★ FINDINGS OF FACT
- CONCLUSIONS OF LAW
- ORDER/DECREE



Why findings and conclusions?

Provides a basis for review by Superior Court and Court of Appeals.

Why findings and conclusions?

Gives parties better understanding of your decision.

Why findings and conclusions?

Encourages you to make a careful review of the evidence.

Why findings and conclusions?

Helps ensure you address all relevant issues.

What is “finding fact”?

Determining what the facts are from the disputed evidence.

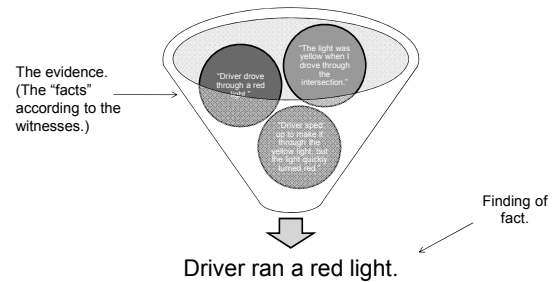
(This is the clerk’s job.)

## What is “finding fact”?

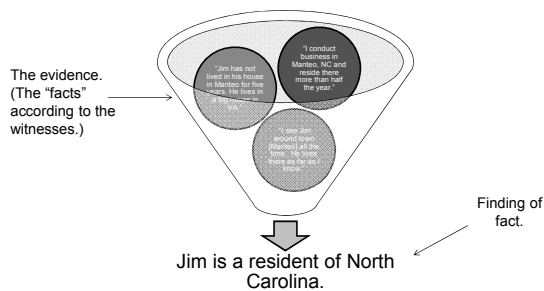
### Steps:

- Take all the admissible evidence on both sides.
- Decide (“find”) what the “facts” are among the disputed evidence.
- State in your order the facts necessary to determine all the issues in the case
  - The “controlling” or “ultimate” facts.

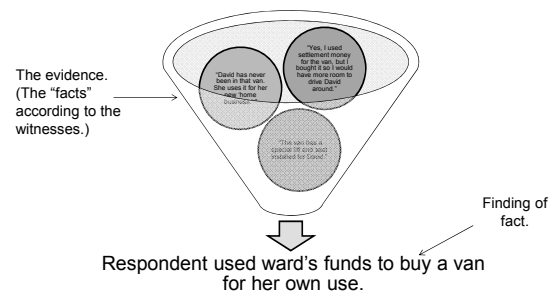
## “Finding” a fact



## “Finding” a fact



## “Finding” a fact



## “Finding” a fact

Findings of fact should not merely recite or recount the evidence.

They present what you have decided the facts are.

## “Finding” a fact

- NO:  
“Mr. Jones testified that Mr. Davis did not see the accounting filed on June 28, 2008.”
- YES:  
“Mr. Davis did not see the accounting filed on June 28, 2008.”



## “Finding” a fact

Findings of fact should not sound equivocal or uncertain.

Avoid leaving the reader with uncertainty about whether you have actually decided the facts.

## “Finding” a fact

- NO:

“It would seem that Mr. Davis did not inform the heirs.”

(“It seems that...”; “It would appear that...”; “The Court is inclined to find that...”; “It appears to the Court that...”)

- YES:

“Mr. Davis did not inform the heirs.”

## “Finding” a fact

How do I get there?

- Listen to the evidence.
- Assess the credibility of the witnesses.
- Weigh the value of the various bits of evidence.
- Make the necessary deductions.
- Have confidence.

How many of the facts do I have to include?

Orders only have to contain “controlling facts”.

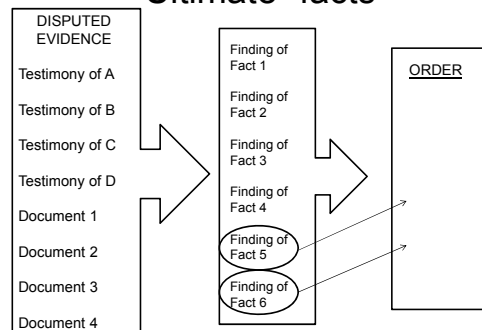
Usually called “ultimate facts”.

## “Ultimate” facts

- “Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense.”

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

## “Ultimate” facts



“Finding” a fact

## EXERCISE: Car accident

What is a conclusion of law?

Application of the law at issue to the facts you have just found.

## Drafting Tips

- Make sure there are conclusions of law to address the questions you must decide.
- Make sure each conclusion of law is supported by findings of fact.

## Drafting Tips

- Okay to have attorneys draft the orders?
  - Yes
- Avoid ex parte contact.
- Review draft orders carefully.
  - Avoid wholesale adoption of one party’s draft of complicated orders.

## Drafting Tips

- Remember appearances!
  - Lack of thorough review
  - Partiality

## Drafting Tips

- *Habitat for Humanity of Moore Co., Inc. v. Pinebluff*, 653 S.E.2d 886, 889 (2007):
  - Trial judge’s order was “printed, signed, and filed on the ruled stationary of [prevailing party’s] trial attorney.”
  - Court of Appeals: “Without deciding whether this practice violates either the Code of Judicial Conduct or the Revised Rules of Professional Conduct, we strongly discourage lawyers from submitting or judges from signing orders printed on attorneys’ ruled stationary bearing the name of the law firm. Such orders could call into question the impartiality of the court.”

EXAMPLE:  
*Kate and Jane's Trust*



- What law applies?
  - What is my authority?
  - Does the law provide the remedy petitioner seeks?
- What does the petitioner need to prove? Has he proven it?
- What are my (fact) findings?
- How does the law apply to those findings?
- What will I order? Is my order supported by my findings/conclusions?