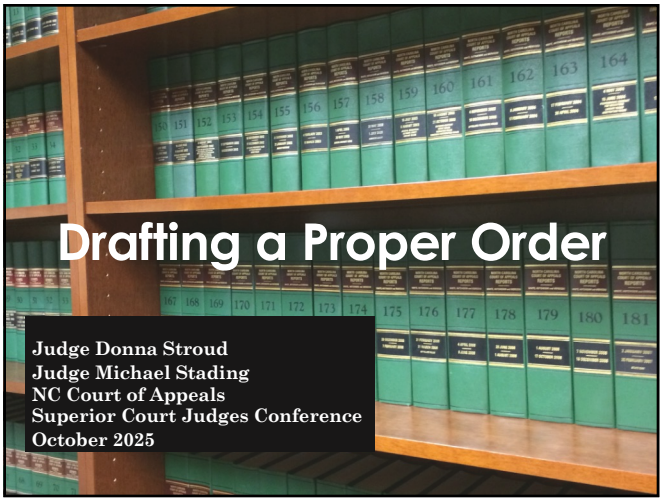


Drafting a Proper Order

Judge Donna Stroud
Judge Michael Stading
NC Court of Appeals
Superior Court Judges Conference
October 2025

1

We only get to comment on the orders appealed…

Beyond that, the trial court made many more findings—which we need not address in detail here—to support its conclusions. **In fact, we must commend the trial court's very well-organized and thorough order. The findings clearly delineate the circumstances at the time of the prior order, at the time of the current hearing, and the specific findings which the trial court found to support its conclusion of a change of circumstances.**

Laprade v. Barry, No. COA16-11, 2017 WL 1632607, at *7 (N.C. Ct. App. May 2, 2017)

2

And some appeals challenge everything but the…

"**In this fourth appeal**, Defendant argues that the trial court's latest order suffers from seventeen separate reversible errors. This brings to mind an observation from the U.S. Court of Appeals for the Sixth Circuit which, faced with a similar situation, observed that **"[w]hen a party comes to us with nine grounds for reversing the district court, that usually means there are none.**" Fifth Third Mortg. Co. v. Chi. Title Ins. Co., 692 F.3d 507, 509 (6th Cir.2012)."

Bodie v. Bodie, 239 N.C. App. 281, 282, 768 S.E.2d 879, 880 (2015)

3

The Challenges for the Attorney:

- Lack of detail from trial court about contents of order
- Dueling attorneys who don't know how to draft an order properly and/or are seeking to gain advantages (either on appeal or in the future) from the current order.
- Communications with opposing counsel or *pro se* party and trial court regarding order preparation
- Delays in ruling for order taken under advisement or delays by the attorney who is supposed to draft the order

4

When good judges talk too much…

In rendition of rulings, follow

The Goldilocks Rule

5

MASTERPIECE CAKESHOP, LTD., ET AL. v. COLORADO CIVIL RIGHTS COMMISSION ET AL

The commissioner stated:

"I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, **whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11–12.**

The Supreme Court said:

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The **commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.** 584 U. S. ____ (2018) at 13.

6


He Did it! He Did It!

7


Do you need help getting your orders done?

8


North Carolina Judicial Fellowship
Judicial Fellows provide independent, confidential, and timely legal services for the judges.

9

Delay in entry of orders

10

To no one will we sell, to no one deny or delay right or justice."

Clause 40, Magna Carta (1215)

11

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

12

Delay in Entry of Orders is a common reason for complaints to the Judicial Standards Commission

1. Delay in entry of order- How long is too long?

2. Ex Parte Communications regarding orders.

13

Give us everything we need in an Order:

- Introduction
- Findings of Fact
- Conclusions of Law
- Decree

So we don't have To throw it back!

14

An Order Should:

1. Accurately memorialize the court's ruling, including any required findings of fact, conclusions of law, and decree provisions.
2. Provide a clear basis for appellate review.
3. Guide actions of the parties and avoid future conflict.
4. Provide a foundation for future modification or contempt actions.

15

Know the law so the order covers everything it should.

Where to find <u>quick</u> help with an Order:

Superior Court Bench Books

UNC School of Government Publications

Statutes

Judicial Fellows

Use Checklists

16

Avoiding common order problems

17

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

18

Building the Order

19

Start at the beginning…

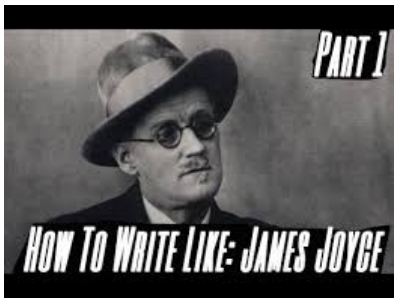
Make sure the order is clear on preliminary issues.

- 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?

20

21

"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.



22

Findings of Fact

Just the facts, mam. Just the facts.

23

You can't make findings of fact if there is no evidence to support any findings.

Findings of fact must be supported by the evidence.

The evidence must be presented to the trial court at the hearing.

Therefore…..

If it happened after or outside the hearing (or record), the trial court can't make a finding of fact about it.

How to deal with changes between the hearing and the entry of the order?

- Stipulations, assuming the parties can agree.
- Motion to modify
- New hearing (if appropriate)

24

Recitations of evidence are not findings!

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

- Officer 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

Finding of Fact or recitation of evidence?

1. Ms. Jones testified that a flying saucer landed in her back yard and two little green men got out.

28

Plaintiff v. Two Extraterrestrial Lifeforms: The Evidence

Counsel: What happened on January 10th of this year?

Plaintiff: I was just sitting on my back porch, and all of a sudden a shiny metal flying saucer came down out of the sky. It burnt up my grass and knocked some branches out of my tree on the way down. It landed in my back yard, and two little green men walked out and stood in my yard.

Counsel: Were you expecting them?

Plaintiff: No. My yard is private, no one but me is allowed back there. I don't let anyone into my back yard. I even have a tall fence around it – but that didn't help with a flying saucer!

Counsel: How much damage did they cause to your yard?

Plaintiff: I had to hire a landscaping company to take down the tree and plant new grass. It cost $3,000.00 to fix my yard.

29

Plaintiff v. Two Extraterrestrial Lifeforms: The Law

This is a trespass case, and "[t]he elements of trespass to real property are:

(1) possession of the property by the plaintiff when the alleged trespass was committed;

(2) an unauthorized entry by the defendant; and

(3) damage to the plaintiff from the trespass." Keyzer v. Amerlink, Ltd., 173 N.C. App. 284, 289 (2005).

30

Ultimate facts and Evidentiary facts

FN 3

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....

....

... **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. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. 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.**

When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, *i.e.*, the final facts on which the rights of the parties are to be legally determined.

Woodard v. Mordecai, 234 N.C. 463, 470, 472, 67 S.E.2d 639 (1951) (citations omitted). To avoid confusion in the future, we overturn our prior caselaw to the extent it misuses the term "ultimate fact" and clarify that, as Justice Ervin wrote in *Woodard* and consistent with well-established precedent, an ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning.

Matter of G.C., 884 S.E.2d 658, 661 (N.C. 2023)

31

"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. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn…."

An "ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning."

32

"[E]videntiary facts are those subsidiary facts required to prove the ultimate facts."

33

Example from Matter of G.C., 384 N.C. 62, 66, n.3, 884 S.E.2d 658, 661:

Findings of Evidentiary Facts:

- Glenda lived in the same residence as her mother, respondent and Gary.
- Respondent provided care and supervision for Glenda as he had for her brother Gary until his death.

Findings of Ultimate Facts:

- Glenda lived in an environment injurious to her welfare.
- Glenda does not receive proper care, supervision, or discipline.

Conclusion of Law:

- Glenda is a neglected juvenile.

34

Plaintiff v. Two Extraterrestrial Lifeforms: Evidential Findings of Fact

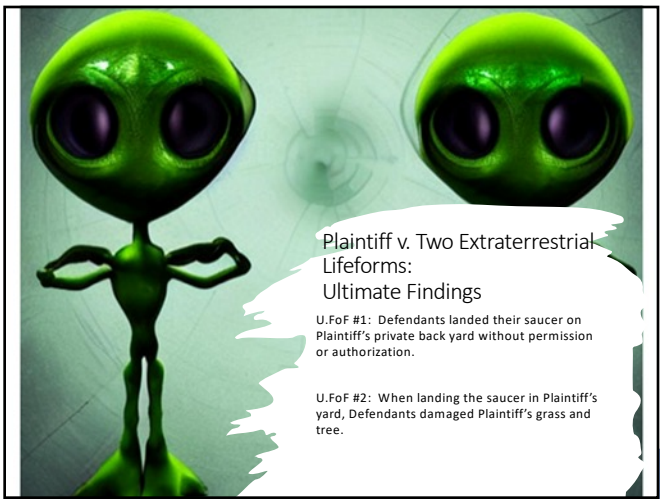
FoF #1: On 10 January 2023, a metal saucer landed in Plaintiff's yard and two little green men walked out of the saucer onto Plaintiff's yard.

FoF #2: As the saucer landed, it burnt Plaintiff's grass and broke branches off Plaintiff's tree in her back yard.

FoF #3: Plaintiff did not give the little green men permission to land in her yard.

FoF #4: Plaintiff paid $3,000 to repair her yard as a result of the damage caused by the saucer.

35



Plaintiff v. Two Extraterrestrial Lifeforms: Ultimate Findings

U.FoF #1: Defendants landed their saucer on Plaintiff's private back yard without permission or authorization.

U.FoF #2: When landing the saucer in Plaintiff's yard, Defendants damaged Plaintiff's grass and tree.

36

Plaintiff v. Two Extraterrestrial Lifeforms: Conclusions of Law

1. Defendants trespassed on Plaintiff's property and damaged her property.
2. Plaintiff is entitled to recover $3,000 in damages from Defendants for the trespass on her property.

37

Don't do a finding there is "no evidence" of a disputed fact.

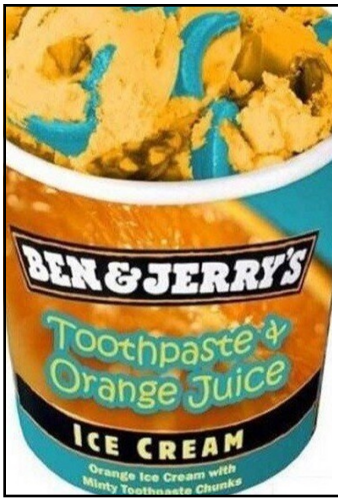
- **The Finding**: "[T]he evidence shows that plaintiff was able to perform the UPC label position satisfactorily before her injury, and there was no evidence that plaintiff sought **medical attention** or otherwise was not **mentally or physically able to perform** the UPC labeler position after her recovery from the [carpal tunnel syndrome] surgery."
- **The Evidence**: "Plaintiff testified that she **had trouble with her hands while labeling**, and the Commission acknowledged, in finding of fact number six, that she also had "**residual symptoms**." In addition, the Court notes that plaintiff made a return visit to her **medical doctor** on 13 April 1999, and that less than a month later, on 10 May 1999, the physician issued further **restrictions on her duties**."

38

Use the trial judge's magic word: "Credible"

"There is no *credible* evidence of ….."

39



But some orders should NOT have findings of fact…

THINGS THAT DO NOT GO TOGETHER:

Orange juice and toothpaste

Orders for 12(b)(6) dismissal

Orders for Summary Judgment*

Orders for Judgment on the pleadings

*Except for summary judgment divorces under NCGS §50-10(d)

40

Summary judgment orders don't have findings of fact.

- The purpose of the entry of findings of fact by a trial court is **to resolve contested issues of fact**. …

By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those "uncontested facts" that form the basis of their decision. When this is done, any findings should clearly be denominated as "uncontested facts" and not as a resolution of contested facts.

- War Eagle, Inc. v. Belair, 204 N.C.App. 548, 694 S.E.2d 497 (2010)

41

Be Careful with Shortcuts.

42

Shortcuts? Use with caution.

1. **Judicial Notice**. What can be judicially noticed? What is the legal basis for the notice? Standard of proof?

2. **Incorporation by reference**. Incorporation by reference is useful but not a substitute for findings.

3. **Déjà vu?** (But the judge already heard -and decided- this case!)

43

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.

44

1st Trip to COA: Reversed and Remanded

Crocker v. Crocker, 190 N.C.App. 165, 660 S.E.2d 212 (2008)

[W]ife argues that the trial court erred in entering its order of permanent alimony where it failed to make required findings of fact pursuant to N.C.G.S. § 50-16.3A. **The court purported to make extensive findings of fact by taking judicial notice of the postseparation support order, the consent judgment regarding equitable distribution, the child custody and support order, and various wage affidavits and amended alimony affidavits and incorporating by reference the facts in these documents.** As we previously noted, when determining an alimony award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors." Skamarak, 81 N.C.App. at 128, 343 S.E.2d at 561. **The general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony.** Therefore, these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C.G.S. § 50-16.3A

…

Orders for postseparation support and alimony are reversed and remanded for additional findings.

45

46

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. [2] 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.

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

47

48

"Nunc pro tunc" does not magically change the past.

"Nunc pro tunc" is defined as "now for then." Black's Law Dictionary 1174 (9th ed.2009**). It signifies " 'a thing is now done which should have been done on the specified date.'…**

Nunc pro tunc orders are allowed only when **"a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk … provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced."…**

See also Rockingham Cnty. Dep't of Soc. Servs. v. Tate, 202 N.C.App. 747, 751, 689 S.E.2d 913, 916 (2010) (holding that when no substantive ruling was made at hearing and written order was prepared long after hearing, "[e]ntry of the order nunc pro tunc does not correct the defect" because "[w]hat the court did not do then … cannot be done now … simply by use of these words")

Whitworth v. Whitworth 731 S.E.2d 707 (N.C. App) 2012.

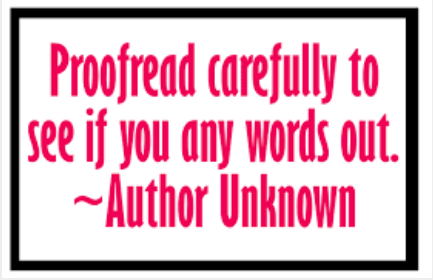
49

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

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

No "intervening rights" will be prejudiced by the delayed entry of the order.

50



51

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)

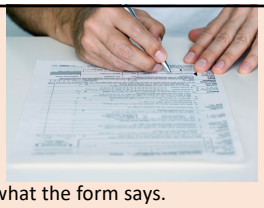
52

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)

53

Form Orders



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

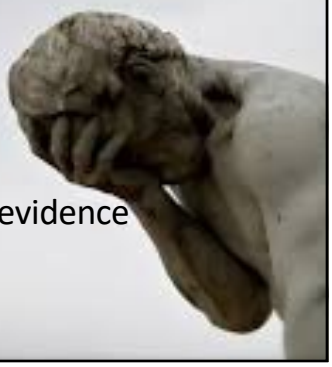
Some frequent flyers in the Court of Appeals…

SBM orders:
Check those boxes! The right ones!
Remember that constitutional issues require MORE
Probation violation orders:
Check those boxes! The right ones!

54

Orders on Motions to Suppress

- DO a written order
- Without delay
- Avoid recitations of evidence



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56

Interlocutory Orders

Include certification for immediate appeal Under Rule 54(b) if appropriate.

Certification is no guarantee the appeal will be heard so use in the proper circumstances.

57

No Attorney Stationery!

We note that [the] order was printed, signed and filed on the ruled stationery of Habitat's trial attorney. 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 stationery bearing the name of the law firm.** Such orders could call into question the impartiality of the trial court. In re TMH, 186 N.C.App. 451, 652 S.E.2d 1 (2007).

Habitat for Humanity of Moore County, Inc. v. Board of Com'rs of the Town of Pinebluff,187 N.C.App. 764, 653 S.E.2d 886 (2007)

58

How about using AI to help with Order Drafting???

Use at your own (and everyone else's) Risk– It's DANGEROUS!!!

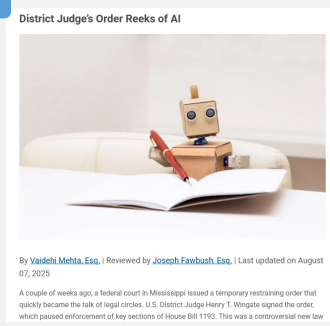
59

"District Judge's Order Reeks of AI"

"Our attorneys have never seen anything like this," an official from the Attorney General's Office told Mississippi Today.

Red Flags:

- Footnote listed as "plaintiffs" organizations which were not parties to the case.
- Statute at issue was mis-quoted as using phrases which do not appear in the statute.
- Refers to the plaintiff's complaint as source for allegations; neither the complaint nor other documents made these allegations.
- Cited to a case that does not exist and no case even remotely similar exists.
- Noted fabricated evidence, citing sworn declarations from people who seem not to exist and exhibits with the stated numbers were not statements from the people identified.



60

Questions?

61