

WHAT THE COURT OF APPEALS WANTS YOU TO KNOW ABOUT DRAFTING ORDERS IN SUPERIOR COURT

Judge Donna Stroud
Associate Judge
North Carolina Court of Appeals

Revised July 2025



Judge Donna S. Stroud is the senior judge of the 15 judges on the North Court of Appeals, having served since 2007. From 2021 to 2023, she served as Chief Judge of the Court of Appeals. She graduated from Campbell University with a BA in Government in 1985; from Campbell University's School of Law in 1988; and in 2014 from the Duke University School of Law LL.M. program in Judicial Studies.

Judge Stroud spent 16 years in private practice before her election in 2004 as a District Court Judge in Wake County, where she served as a Family Court judge. While in private practice, Judge Stroud was also a certified Superior Court mediator and a District Court arbitrator. Judge Stroud has served as the first Chair of the Chief Justice's Rules Advisory Commission and in many other groups devoted to improving North Carolina's judicial system, including the Chief Justice's Commission on Professionalism, the Family Court Advisory Commission, the North Carolina Courts Commission, the Dispute Resolution Commission, and the Governor's Task Force on Mental Health and Substance Use. Judge Stroud is also an Adjunct Professor at Campbell University School of Law where she teaches Judicial Process.

This manuscript was originally developed for District Court judges and later versions have been revised for attorneys and Superior Court judges. Special thanks are due to former Court of Appeals Judges Mark Davis and Lucy Inman for their contributions during their service on the Court of Appeals to revisions addressing issues which commonly arise in Superior Court orders.

What the Court of Appeals wants you to know about drafting orders in Superior Court

I. INTRODUCTION

In law school, we take many substantive classes—constitutional law, evidence, contracts, real property, and wills and estates. We practice drafting complaints, contracts, wills, deeds, and many other legal documents. We learn about civil procedure, criminal procedure, and administrative procedure. We research and write and argue in appellate advocacy classes. We compete on various types of trial and appellate advocacy teams and client counseling teams. We study ethics and law practice management. After we become attorneys, we continue to learn about the areas of substantive law we practice through continuing legal education seminars. Most of what we learn is aimed toward effective presentation of our client's case before some sort of tribunal, whether a judge and jury or an administrative agency. Usually, the primary goal is a ruling by that tribunal, hopefully in our client's favor. That ruling will take the form of a written order or judgment. But our legal education rarely addresses how to draft that order or judgment. That document is the culmination and completion of the case, but we spend very little time learning how to draft it properly.

When I have assisted with training on drafting orders for both Superior and District Court judges, they often tell me I need to talk to the attorneys, because the attorneys draft most of their orders. I have also presented this program to attorneys, and they tell me I need to talk to the judges, because the judges are responsible for

the orders. I agree with both the judges and the attorneys, because they work together in getting orders done and everyone needs to know how to draft them properly.

Most of a trial court's rulings on substantive claims or issues are first announced orally in court; we call this rendition of the order. The ruling is usually later reduced to writing, in an order or judgment filed in the office of the Clerk of Superior Court; in civil cases (and sometimes criminal cases) we call this entry of the order.¹ The importance of these documents cannot be overstated. While the parties are likely concerned primarily with the practical outcome, the trial court is also concerned with the contents of the order. The order determines the parties' rights and sometimes dictates the parties' future behavior. The order may serve as a guide to the court in future proceedings in the same case and as the basis for appellate review by the Court of Appeals and Supreme Court.

In Superior Court, many cases are resolved by jury trials, and in those cases, there may be no need to prepare detailed orders. But in many motion hearings and in Superior Court bench trials, orders are necessary, and those orders are frequently the subject of appeals. Considering the importance of court orders, it may seem odd

¹ The details of when an order is "entered" for purposes of noticing an appeal under the North Carolina Rules of Appellate Procedure are different in civil and criminal cases. In civil cases, under Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58. In criminal cases, "a judgment or an order is entered . . . when the clerk of court records or files the judge's decision regarding the judgment or order." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012). Entering a judgment or an order is "a ministerial act which consists in spreading it upon the record." *Seip v. Wright*, 173 N.C. 14, 17, 91 S.E. 359, 361 (1917) (citation omitted); see also *Stachlowski v. Stach*, 328 N.C. 276, 278-79, 401 S.E.2d 638, 640 (1991).

that the vast majority of North Carolina’s trial courts have no staff to assist in preparing such orders. As a general rule, only our business courts have law clerks to assist the judges in order preparation, but each District and Superior judges may handle hundreds or thousands of cases each year and many cases require complex and lengthy orders. Besides the limited staff assistance and a heavy caseload, trial judges may have outdated computer technology—years behind what most attorneys have in their offices—and have very little time in chambers to prepare orders.

The Court of Appeals has recognized these realities of order preparation:

First, the order is the responsibility of the trial court, no matter who physically prepares the draft of the order. . . .

We also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation. Considering the lack of adequate staff to address the increasing number of cases heard by our District Courts, some mistakes are inevitable.

In re A.B., 239 N.C. App. 157, 167, 768 S.E.2d 573, 579 (2015) (internal citations omitted).

As a former trial judge and from my state-wide vantage point on the Court of Appeals, I have observed that in many cases, issues which may lead to reversal or remand for additional proceedings frequently arise from problems in the drafting of the orders. Even when the trial judge reached a proper result under the facts and law, if an appellate court must reverse or remand because of deficiencies in the order, the costs to the parties, both financial and emotional, from the delay may be

substantial. The costs to the judicial system are substantial, too, as trial courts need to be handling new cases rather than revisiting old ones.

Although trial judges frequently rely on the attorneys to prepare drafts of proposed orders, sometimes the judges fail to give the drafting attorney much guidance beyond “Your motion is allowed; please prepare an order.” Even when a trial judge gives more detailed guidance, sometimes the attorneys continue fighting after the judge has rendered a ruling by preparing competing orders for the judge’s consideration. Some judicial districts have adopted local rules which provide some guidance and time requirements for order preparation.² But many of North Carolina’s judicial districts do not have local rules addressing order preparation and submission. And in the ever-increasing numbers of *pro se* cases, the trial judges themselves have to prepare the orders, leaving them less time and patience to deal with those attorneys who are fighting over order provisions.

The trial courts could use more staff to assist with these duties, but that is unlikely to happen in the foreseeable future due to budgetary constraints. So we must work with what we have, and attorneys can help both their clients and our judicial system by learning more about drafting orders. And judges can help the attorneys do a better job on drafting orders.

² When the first version of this manuscript was prepared in July 2015, Judicial Districts 3A (Pitt); 5 (New Hanover and Pender); 10 (Wake), 15B (Orange); 18 (Guilford); 21 (Forsyth); 22 (Davidson), 26 (Mecklenburg), 27A (Gaston); 28 (Buncombe) had at least one rule addressing order preparation and presentation. Some rules addressed both Superior Court and District Court while some did not. The rules vary substantially in time requirements and details of method of submission. The attorney should always check the local rules of the district to determine if there are any requirements regarding order preparation and submission.

In general, a good order must accomplish several goals, depending upon the specific issues addressed. The order must:

1. Accurately memorialize the court's ruling, including any required findings of fact, conclusions of law, and decretal 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 modifications or contempt actions, if these are a possibility.

The process of preparing the order begins before and during the trial.

II. DURING THE TRIAL

- A. Know the required findings of fact and conclusions of law that must be included in the order.

It may seem obvious that the attorneys and the judge should know the law relevant to the order, but sometimes it seems that this first step was not addressed. Depending on the issue in the case, either a statute or case law may set forth specific requirements for findings of fact and conclusions of law that the trial court must address. If the attorneys have not provided the applicable law, have them do the research. And if you still have questions, do your own research. The Superior Court Benchbooks produced by the UNC School of Government, available online at <http://benchbook.sog.unc.edu/>, are a good starting point. (The Benchbook addresses criminal orders here: <http://benchbook.sog.unc.edu/judicial-administration-and-general-matters/findings-fact-and-conclusions-law>. For orders in civil cases, see: <http://benchbook.sog.unc.edu/civil/findings-fact-and-conclusions-civil-orders>.)

The Benchbooks don't cover every single issue you will encounter, but they are a wonderful resource and will direct you to the applicable statutes and cases in most instances. In addition, many publications from the School of Government are available online, including CJE presentations from prior Superior Court Conferences. And pattern jury instructions are another good source for clear statements of required findings and conclusions, even in a bench trial where jury instructions won't be used.

- B. In bench trials, have the attorneys prepare summaries of evidence, spreadsheets, timelines, etc. (with references to exhibit numbers and witness testimony) as appropriate to the case.

Often, especially in a more complex case, you may take the case under advisement. You may have many cases under advisement and little time to work on them. When you finally return to a case—often weeks after the trial—summaries of the evidence can be extremely useful. You don't want the order reversed on appeal just because you couldn't find a particular bit of evidence in your notes or among the exhibits. Instead of waiting until the closing argument to request summaries of important evidence, have the attorneys prepare summaries or spreadsheets as the evidence is presented. This allows you to annotate them with your own thoughts a more easily recall which parts of the evidence you found most useful or credible.

- C. In complex or long bench trials, have the attorneys prepare proposed findings of fact and do the math if needed.

One trial judge told me that in bench trials which extend over several days, he has each attorney prepare proposed findings of fact from the evidence presented each day. So by the end of the trial, he has proposed findings from both sides for each day

while the evidence is still fresh in his mind and he can decide which version of those facts he finds to be credible and should be included in his order.

In cases involving mathematical calculations, have the attorneys “do the math” and provide the calculations, with references to the exact exhibits or testimony from which the numbers are derived. You will determine if their numbers are correct and make the final call on which numbers to use and how to use them, but assistance from counsel may help you clarify the evidentiary basis for the numbers in the final order and avoid mathematical errors. If the findings are not detailed enough for the appellate court to determine how a number was calculated, the appellate court may not be able to review it properly and must remand. If a draft order from an attorney does not make the source of the numbers clear, the trial judge can ask the attorneys how the calculations were done. But on appeal, we have no one to ask for clarification, and if we can’t figure it out from the order and record, we must remand.

For example, in *Vadala v. Vadala*,¹⁴⁵ N.C. App. 478, 550 S.E.2d 536 (2001), an alimony case, the Court of Appeals could not determine how the plaintiff’s income was calculated. The Court noted:

The trial court did make findings as to plaintiff’s income in its finding of fact number 1[;] however, this finding is not sufficiently detailed. Finding of fact number 1, reads: “The Plaintiff has been employed as a medical transcriptionist for fifteen years, and has a gross income of \$2,075 per month; and, after taxes, her net income is \$1,572 per month.” This may be so, but we have no way to confirm or deny this finding as it gives no indication as to how it was calculated. Indeed, the parties themselves dispute this finding of fact with each arguing different methods for calculating this income. In addition, the trial court found no facts regarding defendant’s income whatsoever.

Id. at 480, 550 S.E.2d at 538.

In the proposed findings of fact, have the attorneys cite the exhibits or testimony which support the proposed findings of fact; use this information for your own reference as specific citations to evidence do not need to be – and probably should not be -- included in findings themselves. This is very helpful if a hearing or trial goes on for several days, especially if those days are spread out over weeks or months. And in addition to the proposed findings of fact, you may also request that the attorneys prepare proposed conclusions of law based upon the findings and the relevant law. You can then decide which proposed findings and conclusions to use (if any) and revise as needed.

III. AFTER THE TRIAL

A. Rendition of the order: Follow the Goldilocks rule.

When announcing your ruling in court after the hearing or trial and directing an attorney to draft an order, make sure to give the attorneys sufficient detail about your ruling. This will inform the attorney drafting the order what you want. And it will also help the parties and attorneys understand the ruling. You don't have to address every single fact or conclusion, but it is important to address the most hotly disputed facts and the crucial legal conclusions. If you just ask the prevailing attorney to prepare an order, you may be inviting the attorneys to continue fighting about the order. Eventually, you will have to spend more time getting the order right. In some cases, you may want to give the attorneys written notes about the main findings or conclusions you want in the order.

But there is also the risk of talking too much when rendering a ruling. “Usually error comes from talking too much rather than too little.”³ The trial judge’s statements in court can lead to issues on appeal, even though the written order might not have raised an issue but for the judge’s comments.

The oral rendition and the written order rarely are identical. A discrepancy between the two does not necessarily warrant reversal. “The general rule is that the trial court’s written order controls over the trial judge’s comments during the hearing.” *Durham Hosiery Mill Ltd. P’ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) (quoting *Fayetteville Publ’g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008)). The written order as entered is the controlling order. But significant discrepancies between the oral rendition and written order could raise an issue on appeal if the trial court appears to have failed to make the required findings or conclusions.

In re B.S.O., a case dealing with termination of parental rights, exemplifies this sort of discrepancy. *See* 225 N.C. App. 541 740 S.E.2d 483 (2013). There, the Court of Appeals first noted that Rule 52 of the North Carolina Rules of Civil Procedure provides that “[i]n 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. Rule 52 applies to termination of parental rights orders.” *Id.* at 544, 740 S.E.2d at 485 (citation

³ *Daughtry v. Cline*, 224 N.C. 381, 389, 30 S.E.2d 322, 327 (1944) (Stacy, Chief J., dissenting).

omitted).

After a termination hearing on the mother's and two fathers' parental rights, the trial court seemed to make a partial oral rendition of its order regarding the mother's parental rights but took some issues under advisement:

[T]oward the end of the termination hearing . . . the trial court made a number of remarks that suggested it could find certain grounds for termination. The court also instructed the YFS attorney to include certain findings of fact in the "proposed order" he was told to draft. The court even appears to have started to determine that termination would be in the children's best interests. However, the court then stopped and took the matter under advisement instead:

[Trial judge:] All right, I'm not going to dictate this, but Mr. Smith [the YFS attorney] go ahead and prepare a proposed order making the findings of fact that concern the history of this case including the prior referrals that were made with respect to the family and the lack of supervision, what the case plan in this case has been, what efforts both parents have made to complete the plan.

. . . .

Well, anyway, all right. So, as far as the Court is concerned, *I think the evidence—Well, no, the evidence does establish that it would be in the best interest to terminate parental rights, so but we'll—Just go ahead and draft that Mr. Smith, and I'll take this under advisement and continue to consider it and see exactly what the result's going to be. But the Department will have to continue her visitation with the children until I order otherwise, and reasonable efforts.*FN4

FN4. These remarks appear to have been in whole or in large part regarding Respondent-mother's parental rights. When asked by the YFS attorney, "And as to the fathers?", the trial court responded, "Well, the fathers, you know—I don't know." The court went on to make some remarks that could be construed as suggesting the presence of grounds

which would justify termination, but never spoke about the children's best interests as regards determination of the rights of any of the fathers.

Although the court orally summarized some of the evidence presented regarding the alleged grounds for termination, and suggested the existence of some grounds for termination, the court explicitly stated that the question of whether termination would be in the children's best interests would be taken "under advisement and [the court would] continue to consider it and see exactly what the result [was] going to be." Thus, at the conclusion of the termination hearing, the trial court had plainly not yet made the best interests determination required to terminate parental rights. See N.C. Gen. Stat. § 7B-1110. Accordingly, the court cannot have terminated Respondent's parental rights. That nothing had been reduced to writing or filed with the clerk of court is beside the point. Not only had the trial court failed to enter an order terminating parental rights, it had not even made a ruling on the question. FN5 Indeed, the court ordered YFS to continue visitation and reasonable efforts toward reunification which it could not have done had Respondent-mother's parental rights been terminated.

FN5. In *In re S.N.H.*, 177 N.C. App. 82, 89, 627 S.E.2d 510, 515 (2006), this Court held "the trial court did not err in directing petitioner's counsel to draft the termination order" based on the trial judge's clear statement "that he [found] by clear and convincing evidence that the ... grounds enumerated in the petition justify termination of parental rights of [respondent] to these . . . children[.]" . . . Although, as here, it is appropriate for a trial court to direct "counsel for petitioner to draft an order terminating respondent's parental rights," such directions are proper when the trial judge "enumerate[s] specific findings of fact to be included in the order." . . . However, all of this assumes that the trial court has already made a termination ruling which had not yet occurred here.

In re B.S.O., 225 N.C. App. 541, 544-46, 740 S.E.2d 483, 485-86 (2013).

So in your oral rendition of an order—and other rulings—follow the Goldilocks rule: Not too much, not too little, but just right. Say everything necessary to resolve the issues presented, but not much more.

B. Set definite deadlines for order preparation, whether you prepare the order or direct an attorney to do so.

Justice delayed is justice denied. Sometimes the delay comes from the trial court postponing its ruling, and sometimes it comes from the attorney's deferred order preparation. To prevent this, always set a deadline for any attorney you direct to prepare the order, regardless of whether the Local Rules set a deadline to submit an order draft or for the judge to prepare an order. And if you are preparing the order, set a deadline for yourself. Depending upon the case's complexity, a thirty-day deadline is generally reasonable. Sooner is better.

For attorneys and judges, the time between a hearing or trial's completion and the court's entry of an order or judgment can present potential ethical pitfalls. Two of the most frequent complaints made to the North Carolina Judicial Standards Commission about trial judges concern issues surrounding order preparation:

1. *Delay in entry of order*

Delay increases a judge's risk of violating Canon 3 of The Code of Judicial Conduct:

Canon 3.

A judge should perform the duties of the judge's office impartially and diligently.

....

A. Adjudicative Responsibilities.

....

(5) A judge should dispose promptly of the

business of the court.

Some judicial districts' local rules also address delays in judges' ruling. For example, Rule 17.1 of the Local Rules of the 10th Judicial District for Civil Superior Court provides:

Cases Under Advisement Attorneys or unrepresented parties should notify the Trial Court Administrator of cases that have been heard and taken under advisement when a period of more than 90 days has passed since the hearing without a ruling. The Trial Court Administrator will then notify the presiding judge in writing of the need for a prompt and fair resolution in the matter. If no decision is rendered by the presiding judge, the Senior Resident Superior Court Judge may then enter an order finding that the presiding judge has relinquished jurisdiction over the matter and instruct the Trial Court Administrator to re-calendar the case before another judge for a hearing *de novo*.

If an attorney is drafting an order for the trial court, she is also required by the Rules of Professional Conduct to complete the draft with “reasonable diligence and promptness.”

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Delays in entering an order also increase the potential for another ethical violation: *ex parte* communications between an attorney or party and the judge.

2. *Ex parte communications about the order*

The Rules of Professional Conduct and the Code of Judicial Conduct both prohibit *ex parte* communications. Rule 3.5(a)(3) addresses the attorney's communications with the court in detail:

(a) A lawyer representing a party in a matter pending before a tribunal shall not:

. . . .

(3) unless authorized to do so by law or court order, communicate *ex parte* with the judge or other official regarding a matter pending before the judge or official;

. . .

(d) For purposes of this rule:

(1) *Ex parte communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.*

(2) A matter is “pending” before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

(Emphasis added.)

Canon 3 of The Code of Judicial Conduct also prohibits *ex parte* communications:

(4) A judge should . . . except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

If you have taken a case under advisement, do not talk to an attorney about it if you see him during another case or in passing at the courthouse. That's an *ex parte* communication and violates Rule 3.5(a)(3) of the Rules of Professional Conduct and Canon 3(A)(4) of The Code of Judicial Conduct. If the attorneys need to discuss an order's ruling or wording, arrange a time to do this when everyone can be present. Any written communication between the judge and any party or attorney must always be contemporaneously shared with each attorney and party.⁴

IV. CONTENTS OF THE ORDER

A. Make sure the order is clear on preliminary issues.

As Maria sang in *The Sound of Music*, "let's start at the very beginning; a very good place to start."⁵ This is more likely to be a problem in complex cases involving multiple motions or claims. When a case is on appeal, sometimes it is very difficult for the appellate court to determine exactly what the trial court decided and what it did not. For example, a party may have abandoned a claim or motion, but the record

⁴ Rule 3.5, Comment 8 notes that "All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings, a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if unrepresented. Ordinarily, an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client." N.C. R. Prof. Cond. 3.5, cmt. 8.

⁵ R. Rodgers, O. Hammerstein II, *Do-Re-Mi* (*Maria And The Children*).

fails to clearly reflect this, leading the appellate court to believe that outstanding claims or motions remain—which would make the order interlocutory.

Begin by stating what you are deciding. The order should summarize the case's procedural posture. As appropriate for the issues presented, the order should answer these questions:

- Why does the court have subject matter jurisdiction over this case and personal jurisdiction over the parties?
- Which claims, motions, or issues did the court hear, and which did it not hear?
- Do any prior orders affect this order or inform the trial court's consideration?
- Are there related cases?
- Do any pending motions or claims remain?
- Did the parties abandon or dismiss any other claims or motions?
- Were there any service or notice issues?
- Did the parties make any stipulations?
- Is there a pretrial order, and does it limit the issues presented to the court?

B. An organized order is always better.

Although a disorganized order is still an order which the parties must follow and may still be affirmed on appeal, it is more likely to confuse the parties and complicate appellate review. A properly organized order, like any other written document, more likely addresses all the issues and proves easier for everyone to understand.

The order should make the trial court's logical process apparent. As our Supreme Court has explained:

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. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. 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 v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

The Court of Appeals confronted a disorganized equitable distribution order in *Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 (2012), which it nonetheless affirmed. At the outset, the court addressed (1) confusion over the actual percentages of the marital estate awarded to each spouse, and (2) trial court's failure to perform mathematical calculations that are unfortunately necessary in some cases.

First, we note that it appears that defendant has miscalculated the percentages of the marital estate awarded to each party. The trial court found the net marital estate to be \$886,234.00, which is not challenged by defendant. . . . Of this amount, defendant received property and debts with a net value of \$708,161.00. Defendant was also ordered to pay a distributive award of \$220,732.00, secured by the marital residence located in Newton, North Carolina. Therefore, defendant retained \$487,429.00 of the marital estate, amounting to an unequal distribution of 55% to 45% in defendant's favor, rather than the 80% to 20% division in plaintiff's favor, as defendant contends. We also note that it would have been helpful for the order to be more specific as to the distributional percentages; as noted in more detail below, the equitable distribution order is disorganized and quite difficult to

understand, but by using some basic math, we can determine the distributional percentages.

Id. at 788, 732 S.E.2d at 360-61 (internal citation omitted).

The court then addressed the defendant's arguments regarding the trial court's findings of fact.

We concede that picking out the findings which address the factors under N.C. Gen. Stat. § 50-20(c) is challenging, as the order does not address the identification, classification, and valuation of the property and the distributional factors in any logical or organized manner, but instead is written in a style perhaps best described as stream of consciousness. While stream of consciousness is a well-recognized literary style, it is not well suited to court orders. Yet after sifting through the findings, we find that we can match them up with the statutory distributional factors. Findings of fact 26-37, 49-50, 52, 58-60, 66-67, 73, 78, 82-83, and 93 list the parties' income, properties, and liabilities, including their current medical practices, pursuant to the first factor N.C. Gen. Stat. § 50-20(c)(1).

Id. at 789, 732 S.E.2d at 361.

The Court went on to note the specific findings scattered throughout the *long* equitable distribution order that addressed each of the factors the trial court had to consider under the controlling statute. *Id.* at 789-99, 732 S.E.2d at 362-67. It rejected the appellant's contention that the findings of fact failed to support the order's conclusions of law. *Id.* But in that case, as in many other, the relevant statute itself set out an appropriate organizational framework for findings of fact and conclusions of law. If the order uses that organizational framework, it less likely omits an important finding and more likely survives appeal.

In appeal of another disorganized equitable distribution case, *Hill v. Hill*, 229 N.C. App. 511, 748 S.E.2d 352 (2013), the Court of Appeals reversed and vacated in part and remanded after making general “Observations Concerning This Appeal,” addressing problems in both the trial court’s order and the appellate record. The Court began by noting that “[t]his case appears to embody all of the flaws that could possibly create an abominable appeal of an equitable distribution judgment.” *Id.* at 514, 748 S.E.2d at 355. As for the trial court’s order, the Court observed:

The order of the trial court combines evidentiary findings of fact, ultimate findings of fact, and conclusions of law, without any attempt to make them separate portions of the order. . . .

We acknowledge that our trial courts are overworked and understaffed. However, it is ultimately the responsibility of the trial judge to insure that any judgment or order is properly drafted, and disposes of all issues presented to the court before the judge affixes his or her signature to the judgment or order. This is particularly true in a complex case, such as one involving the equitable distribution of marital property.

Id. at 514-15, 748 S.E.2d at 356.

C. You can’t make findings of fact if there’s no evidence to support the findings.

Another problem arising from delays between a hearing and entry of an order is particularly evident in domestic cases. After a hearing in such cases, life continues and the parties’ circumstances may change from the hearing date to the order’s entry date. For instance, in a child support case, after the hearing ends but before the court enters an order, the parties may move, get new jobs, or experience changes in income and expenses. This issue may also arise when an order is remanded to the trial court for entry of a new order after an appeal.

Orders, however, must be based upon evidence presented in the case, and the trial court has no evidence of events occurring after the hearing's last day. So even if facts have changed since the hearing ended, the order must include findings and conclusions based upon the evidence and the state of affairs as of the hearing's last day. If substantial changes occur that may create a need to modify custody or support, those changes could be addressed by appropriate motions or perhaps by parties' stipulations, but the trial court cannot make findings on post-hearing events without receiving additional evidence.

In *Crews v. Paysour*, the Court of Appeals dealt with a child support order entered after remand where the trial court received no additional evidence yet made findings of fact about the parties' income and other necessary facts based upon events *after* the last hearing date:

It is apparent from the record that much of the difficulty in this child support order was caused by the delay in entry of an order, and certainly the passage of more time for appeals has only made matters worse. The child support hearing was held on 30 September 2014; this was the only evidentiary hearing. On 22 October 2015, a hearing was held to address the fact that it was thirteen months after the hearing and no order had been entered. The first order was entered 7 December 2015, over a year after the hearing. The order on remand was entered almost three years after the hearing. At the time of this opinion, over four years have passed since the hearing. Based upon the variety of issues arising from the trial court's order and the need to remand, we will address a few key concerns of this Court.

II. Lack of Competent Evidence

Here, the trial court did not receive any evidence on remand, but despite the lack of evidence entered findings of fact regarding child support payments. Mother

challenges these findings of fact as unsupported by the evidence, and since the only evidentiary hearing was in September 2014, any findings about any events after September 2014 are obviously unsupported by the record. At the hearing on remand in May of 2017, the trial court discussed the child support payments since the first order with counsel and counsel informed the court about these payments since the prior order. And although counsel discussed the issue with the trial court, the parties did not stipulate to amounts paid since the prior order or agree on how any overpayment by Father should be addressed. And arguments of counsel are not evidence: “It is axiomatic that the arguments of counsel are not evidence.”

Crews v. Paysour, 261 N.C. App. 557, 560-61, 821 S.E.2d 469, 471-72 (2018) (internal brackets and citations omitted).

D. Recitations of evidence are not findings of fact.

We see this all too often at the Court of Appeals. Findings of fact must resolve disputes in the evidence, not just list the evidence. Recitations of evidence are not findings! Fortunately, recitations of evidence are usually easy to identify and avoid.

It is appropriate and sometimes helpful, although normally not necessary, for an order to note the issues in dispute between the parties and the sources of evidence the trial court relied upon in making a particular finding. But if it starts like this, it’s probably not a finding of fact:

- Officer Jones testified that the car was red
- 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 . . .

It's easy to turn these statements into findings of fact; just make clear what you actually determined:

- The car was red.
- The plaintiff presented evidence that showed . . . *and the court finds that*
- There is a dispute about *The court finds that plaintiff has not met his burden of proof on this issue.*
- The parties disagree about *The court finds that*
- Defendants contended that . . . *but the court finds that the evidence does not support defendant's claim.*
- Plaintiff claims that . . . , while defendant claims that *The court finds that the greater weight of the evidence supports plaintiff's claim.*

Sometimes an order that may appear at first glance to include extensive detail in the findings of fact really does not resolve the factual disputes. Quality is more important than quantity for findings of fact, as with many things.

One example is *State v. Cox*, 785 S.E.2d 186, at *1 (N.C. Ct. App. 2016) (unpublished), where the Court of Appeals ultimately remanded to the trial court for additional findings of fact. The defendant claimed that “his statutory and constitutional rights were violated by an unnecessary seven-hour delay between his arrest and appearance before a magistrate” after he ran a red light and hit another car, killing the driver and seriously injuring her son. *Id.* The defendant moved to dismiss, “alleging that he was ‘denied his statutory and constitutional rights to

adequate pre-trial release and has been deprived of his opportunity to be with friends and family, his right to obtain additional chemical analysis, if he so desired, and his right to have an opportunity to obtain evidence on his behalf from friends and family, who would have had an opportunity to observe him and to form opinions as to his condition at a reasonable time after his arrest.’ ” *Id.* at *6.

The trial court orally denied the defendant’s motion before his trial and entered a written order during the trial. *Id.* at *7. The Court explained that the trial court’s order

included numerous findings of fact regarding the delay between [the d]efendant’s arrest and his appearance before a magistrate and regarding [the d]efendant’s access to friends and family during that time period. [But] the trial court addressed only the illegal bond conditions in its conclusions of law. The trial court made no findings or conclusions regarding whether the seven-hour delay between [the d]efendant’s arrest and subsequent appearance before the magistrate was unnecessary or prejudiced [the d]efendant. Nor did the trial court make findings or conclusions regarding whether [the d]efendant’s rights under N.C. Gen. Stat. § 15A–501(5) were violated.

Id. at *15. The Court consequently remanded for additional findings of fact and conclusions of law, stating that:

Resolving [the d]efendant’s appeal on its merits would require this Court to decide issues brought before the trial court but not addressed in the trial court’s order, whether through inadvertence or a misapprehension of the issues to be decided. “[I]t is the trial court that is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.”

It is tempting to speculate that the trial court

considered [the d]efendant's argument that he was entitled to dismissal based upon violations that occurred before he appeared before the magistrate; however, "speculation is not sufficient to affirm the trial court's order." Our Supreme Court has explained:

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. 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. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. 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.

In order for this Court to conduct meaningful appellate review, the trial court must make appropriate findings of fact and conclusions of law.

Id. at *18-19.

- E. Be very careful with a finding that there is "no evidence" of a disputed fact.

Sometimes we encounter findings of fact stating, in one way or another, that there is "no evidence" of a particular disputed fact. Be very careful with a finding of "no evidence," because if there was *any* evidence of that fact—even just a tiny bit—then the finding that there was "no evidence" is not supported by the record. In an appeal of a "no evidence" finding where some evidence of the fact exists, the appellate court has no way of knowing whether the trial judge simply overlooked or forgot the

evidence or whether the trial judge rejected the evidence as not credible. So you can usually save this finding from appellate reversal simply by inserting the word “credible.” (“There is no *credible* evidence of

”) Because the trial court alone determines the weight and credibility of the evidence, this finding shows that even if some evidence of the disputed fact existed in the record, the trial court found that evidence not credible.

In *In re C.W.*, the Court of Appeals addressed a finding that “the record is void of any interaction” between a father whose parental rights were terminated and his sons, despite evidence that the father had consistently written to the sons. 182 N.C. App. 214, 223, 641 S.E.2d 725, 731 (2007). The Court held:

[T]here is *no* evidence to support the trial court’s finding that “[t]he record is void of any interaction between [respondent] and his sons via letters, telephone or visits during their placement at the Masonic Home” or that respondent “has not legitimated the Juveniles pursuant to N.C.S. Section 49–10 or by marriage to the mother of the Juveniles.” To the contrary, undisputed evidence shows respondent was very consistent in writing the children and DSS concedes in its brief that, although C.W. was born out of wedlock, respondent married the children’s mother shortly thereafter. J.W. was born during the marriage.

Id. at 224, 641 S.E.2d at 732.

In *McRae v. Toastmaster*, the North Carolina Supreme Court addressed a “no evidence” finding by the Industrial Commission, where the Commission found that there was “no evidence” that the plaintiff-employee had sought medical care during a particular time period or that she was unable to perform her job. 358 N.C. 488, 498, 597 S.E.2d 695, 702 (2004). In reality, there was evidence she had seen the doctor

because she was having difficulty performing her job and the doctor had issued work restrictions. *Id.* at 498–99, 597 S.E.2d at 702. The Court explained:

[T]he Commission determined, under finding of fact number nine, that “the 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.”

In our view, the problem with the [Industrial Commission] majority’s finding of fact number nine is two-fold: First, the evidence itself, as reflected by the Commission’s opinion and award, suggests that plaintiff was indeed experiencing difficulties with her labeling duties. 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 . . . the physician issued further restrictions on her duties. Thus, if anything, the evidence relied on by the Commission’s majority indicates that plaintiff was having continuing problems in the wake of, and as a result of, her injuries.

Id.

F. Don’t put findings of fact in an order that should not have findings of fact.

More is not always better, especially in court orders—and most especially if that order grants summary judgment, judgment on the pleadings, or a Rule 12(b)(6) dismissal. If you grant summary judgment, you have determined that there is no genuine issue of material fact and that the moving party is entitled to judgment in his favor.⁶ The same is true for orders granting a motion to dismiss under Rule

⁶ See N.C. Gen. Stat. § 1A-1, Rule 56(c). (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

12(b)(6) or judgment on the pleadings under Rule 12(c).⁷ If there is no genuine issue of material fact, there is no reason for any findings of fact. Under Rule 12(b)(6), the court must consider the allegations of the motion or pleading as true. If those allegations fail to state a claim, the motion to dismiss should be allowed and there is no need for findings of fact. If the allegations taken as true do state a claim, the motion to dismiss should simply be denied.

Findings of fact resolve *disputes* in the evidence, as discussed above.⁸ If there is no dispute, there is usually no need for findings. Sometimes, where the trial court has made findings of fact in an order that does not need findings of fact, one of the parties may even use those findings to argue that there was a genuine issue of material fact, so the order must be reversed.

In some summary judgment orders, it may be helpful for appellate review if the order identifies the material facts not disputed and the legal basis for the trial court's ruling. This is especially true if several different legal arguments were raised and the legal basis upon which the trial court rules is important to the case. But be careful how you word the "findings" section of a summary judgment order, so the

the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.").

⁷ Whether an order on a motion to dismiss requires findings depends on the motion's legal basis. Findings of fact are appropriate or even necessary in orders addressing some motions to dismiss, such as a motion to dismiss under Rule 12(b)(1) or (2) where the parties have presented conflicting affidavits or other evidence. See *Parker v. Town of Erwin*, 243 N.C. App. 84, 776 S.E.2d 710 (2015). An order addressing a motion to dismiss under Rule 41(b) for failure to prosecute also requires findings of fact. See *Jones v. Cath. Charities of the Diocese of Raleigh, Inc.*, 296 N.C. App. 405, 909 S.E.2d 512 (2024).

⁸ As with most rules, there is an exception: Under North Carolina General Statute § 50-10(d), summary judgment absolute divorce judgments typically do have findings of fact. But these "findings" are really statements of the undisputed facts in the verified complaint.

order does not end up highlighting the very thing it says does not exist: a genuine issue of material fact.

The Court of Appeals encountered this problem in *War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 694 S.E.2d 497 (2010). There, the Court opined:

Preliminarily we comment on the trial court's entry of an order containing detailed findings of fact and conclusions of law in a case decided upon a summary judgment motion. . . . The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is not appropriate when granting a motion for summary judgment, where the basis of the judgment is "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." . . . 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. In the instant case, there was no statement that any of the findings were of "uncontested facts."

Id. at 551, 694 S.E.2d at 500 (internal citations omitted); *see also Insurance Agency v. Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 164-65 (1975) ("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.").

G. Be careful with the shortcut of judicial notice.

Like any shortcut, judicial notice can save lots of work and can be useful, but it can also be abused. Judges sometimes try to use judicial notice to support a finding

that really can't be supported by the actual evidence presented in a case. If you want to use this shortcut, make sure to use it properly.

Rule 201 of the North Carolina Rules of Evidence (N.C. Gen. Stat. § 8C-1, Rule 201) states when judicial notice of adjudicative facts can be taken:

(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.

(c) When discretionary.—A court may take judicial notice, whether requested or not.

(d) When mandatory.—A court shall take judicial notice if requested by a party and supplied with the necessary information.

(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.

(f) Time of taking notice.—Judicial notice may be taken at any stage of the proceeding.

In *TD Bank, N.A. v. Mirabella*, 219 N.C. App. 505, 506, 725 S.E.2d 29, 30 (2012), a foreclosure case, the promissory note was payable to Carolina First Bank as the lender. Plaintiff TD Bank instituted the foreclosure action and the defendant alleged that TD Bank failed to show it was the “owner and holder of the promissory note upon which it has sued.” *Id.* The complaint and other documents submitted to

the trial court failed to show that TD Bank was the note holder. *Id.* at 508, 725 S.E.2d at 31. On appeal, TD Bank asked the Court to take judicial notice of the fact that TD Bank and Carolina First Bank had merged and thus it stood in the place of Carolina First Bank as holder. *Id.* at 509, 725 S.E.2d at 32. The Court of Appeals held that it could not take judicial notice of this fact under the circumstances:

Plaintiff contends that this “Court can and should take judicial notice of the merger in this appeal, regardless of the record below” and directs this Court’s attention to various documents regarding the alleged merger, including documents which appear to have been filed with the Secretary of State of South Carolina. These documents were only provided in the appendix of plaintiff’s brief.

....

Plaintiff argues that this Court should take judicial notice of the merger under either the first or second prong of subsection (b). Plaintiff first contends that the merger is “generally known within the territorial jurisdiction of the trial court.” We first note that judicial notice of facts “generally known within the territorial jurisdiction” of the court are normally “subjects and facts of common and general knowledge.” Some examples of the sorts of facts which have been judicially noticed in North Carolina are that “[i]t is common knowledge that light bulbs burn out unexpectedly and frequently,” and that “gasoline either alone or mixed with kerosene constitutes a flammable commodity and a highly explosive agent.” Although we recognize that it may be appropriate for an appellate court to take judicial notice of a bank merger in some situations, we do not believe that the alleged merger of TD Bank and First Carolina Bank falls within the realm of “common and general knowledge.” Although plaintiff’s brief compares the notoriety of its merger to that of Wachovia and Wells Fargo, which at least one federal court has judicially noticed, it appears that these banks are not quite so well-known as Wells Fargo and Wachovia as this panel has never heard of TD Bank or First Carolina Bank, much less of their merger, and thus we cannot say that this purported South Carolina merger is “generally known within the territorial jurisdiction of the trial court.”

Plaintiff next contends that the merger should be judicially noticed because it is a fact “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Although in certain situations copies of documents certified by the Secretary of State, even a state other than North Carolina, may be “sources whose accuracy cannot reasonably be questioned,” we do not deem plaintiff’s merger documents to be so here. Due to the manner in which plaintiff presented us with its merger documents, we conclude that defendant has reasonably questioned these documents in its reply brief.

Id. at 509-10, 725 S.E.2d at 32-33 (internal citations and brackets omitted).

In addition, the types of facts that may be judicially noticed are “not subject to reasonable dispute.” In *Khaja v. Husna*, the Court of Appeals addressed judicial notice of Department of Labor statistics of the average earnings of electrical engineers, which the trial court used as part of the evidence to support its determination of the wife’s earning capacity. 243 N.C. App. 330, 352-353, 777 S.E.2d 781, 794, *appeal dismissed*, 780 S.E.2d 757 (2015). But the wife’s earning capacity and applicability of the statistics to wife were both very much “subject to reasonable dispute”:

As part of husband’s evidence regarding wife’s earning capacity, his attorney asked the trial court “to take judicial notice of the Department of Labor Statistics with regard to salaries for electrical engineers.” Wife’s counsel objected, noting that “this is the sort of thing that if they wanted to call in a vocational expert to talk about what she’s capable of earning, then I wouldn’t have any objection to it.” After further discussion, husband’s counsel noted that “what I’m asking you to take judicial notice of is what the average salary is for someone with her qualifications.” The trial court then took judicial “notice of what she can earn.”

According to wife’s brief, her “earning capacity was

highly disputed,” and the trial court made an unchallenged finding of fact regarding her prior earnings. The trial court found in finding of fact 13 that wife was employed by Cree Inc. at the time of the marriage and earned \$58,685.00 annually. In 2008, she earned \$63,783.00, and in 2009, \$89,242.53. In 2010, wife’s income from Cree Inc. and Nitek was \$57,328.00. Wife also began pursuing her PhD and Nitek was paying her tuition, which was “substantial” and unreported on her income tax returns. In 2011, wife was paid \$24,023 by Nitek, and in 2012, she was paid “about \$25,000.00” and sold stock “in excess” of \$17,000.00. In August of 2012, wife quit her job. Furthermore, the trial court found, and wife does not dispute, that she “is an accomplished electrical engineer who hold several patents” and “has been published more than 20 times;” her area of expertise is “semi-conductor and other electrical components.” The trial court then found wife’s earning capacity to be \$99,540.00 annually, based upon the “national average salary” for an electrical engineer with wife's qualifications.

Given the evidence at trial, and the trial court’s own recitation of wife’s varying salaries through the years, wife’s earning capacity actually was and is “open to reasonable debate.”^[9] Even if the labor statistics alone are undisputed, their applicability to wife is still open to question. Wife may contend, and apparently does, that she does not have the capacity to earn as much as the average electrical engineer with her qualifications or perhaps her capacity to earn is even greater than average, considering her patents and publications. Either way, her earning capacity is not the type of undisputed fact of which the trial court could take judicial notice under Rule 201.

Id. at 354, 777 S.E.2d at 794–95 (internal citations and brackets omitted).

H. Orders must be based on the record and not on the judge’s memory.

Occasionally, we see findings based on a judge’s memory or lack thereof.

Perhaps we may call findings based on the judge’s memory “Déjà vu findings,” based

⁹ “Any subject, however, that is open to reasonable debate is not appropriate for judicial notice.” *Greer v. Greer*, 175 N.C. App. 464, 472, 624 S.E.2d 423, 428 (2006).

upon the determination that “I already heard (and decided) this case!” But the judge’s memory is not evidence. It’s not in the record on appeal, and we can’t review it.

In *Hensey v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541 (2009), the same district court judge who heard the defendant’s criminal trial for assault on a female later heard the domestic violence hearing between the same couple. The judge made findings in the domestic violence protective order based upon his recollection of the criminal trial:

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. 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.

Id. at 67-68, 685 S.E.2d at 549.

The trial court's *lack of memory* was the problem in *Coppley v. Coppley*, 128 N.C. App. 658, 496 S.E.2d 611, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998). In *Coppley*, the order on appeal included a finding about a unrecorded hearing for entry of a consent order regarding the judge's memory of that hearing that "[t]he undersigned does not recall the defendant being emotionally distraught or mentally or physically impaired when she appeared before him for entry of the consent order on May 3, 1995." *Id.* at 666, 496 S.E.2d at 617. But the order also noted that "Judge Honeycutt indicated he had *no independent recollection of the parties appearing before him* for the entry of the Consent Order and further indicated that should he have the same, he would consider recusal at that time." *Id.* at 665, 496 S.E.2d at 617-18. (emphasis added.) The Court of Appeals concluded that:

[o]ne who has no independent recollection of the parties appearing before him cannot then make a finding as to the mental or physical condition of one of the parties on that occasion. As this finding of fact is clearly in conflict with the evidence before us on appeal, it fails.

Id. at 666, 496 S.E.2d at 618.

If the trial court is relying upon any prior proceedings to make findings of fact, some documentation of those proceedings, as relevant to the particular issue, must be included in the evidence. For example, in *Hensey*, 201 N.C. App. at 56, 685 S.E.2d at 541, if there had been a transcript of the prior criminal trial, the transcript or portions of that testimony might have been presented as evidence at the DVPO hearing. Then the trial court could make its findings based upon that evidence, and

the Court of Appeals could review the case to determine if the evidence supported the findings of fact.

In addition, the trial court cannot rely on memory of evidence or information from other unrelated cases. For example, as a judge, you may learn many things about various areas of expertise and expert witnesses from different cases. It may be tempting to rely on your memory of some evidence you saw in another case to rule on an issue regarding an expert witness in a case where the parties have not presented the particular bit of evidence you need. The evidence you remember may be entirely relevant and exactly what is needed. But if that evidence has not been presented in the case before you, you cannot rely upon it in making your ruling. Again, the judge's memory is not part of the record on appeal, so we cannot rely on it when reviewing your ruling on appeal—and it is likely to be reversed.

I. Evidentiary Facts, Ultimate Facts, and Conclusions of Law: How do I know which is which?

In most orders with findings of fact, the section entitled “findings of fact” may include different types of findings or even conclusions of law. Although the distinction between findings and conclusions may not be immediately obvious, for purposes of appeal, the distinctions are important. The appellate standard of review is different for findings of fact than for conclusions of law. Appellate courts review the findings only to determine if they are supported by the evidence. *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022). Appellate courts review conclusions of law *de novo*. *Id.*

In the realm of findings of fact, there are two types of findings: ultimate facts and evidentiary facts. The most important findings are the findings of ultimate fact.

So what's the difference? The Supreme Court of North Carolina clarified the distinctions between evidentiary facts, ultimate facts, and conclusions of law:

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.

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.

In re G.C., 384 N.C. 62, 66, n.3, 884 S.E.2d 658, 661 (2023) (citation and ellipses omitted).

Findings of evidentiary facts are typically findings describing the basic who, what, when, and where of a case. These findings are based directly on the testimony or other evidence (but these findings should not be simply recitations of that evidence, as noted above). Findings of ultimate fact are "the final resulting effect which is

reached by processes of logical reasoning from the evidentiary facts.” *Id.* So the findings of ultimate fact draw on the evidentiary facts; they are findings “supported by other evidentiary facts” reached by natural reasoning. *Id.* Ultimate findings are based on logical reasoning and not the law and they are “the final facts on which the rights of the parties are to be legally determined.” *Id.* A conclusion of law is based upon these ultimate facts with the “application of fixed rules of law.” *Id.* As noted by *G.C.*, even appellate opinions have not always correctly described this distinction between ultimate facts and conclusions of law. *See id.*

But for purposes of drafting an order, why is it important for the court to distinguish between “ultimate” or “evidentiary” findings? The court must insure that the order includes the evidentiary and ultimate facts necessary to support the conclusions of law in the particular case. Since ultimate facts are “the final facts on which the rights of the parties are to be legally determined,” the ultimate facts are crucial. *Id.* The order need not include evidentiary findings about every bit of evidence in a case. But the evidentiary findings should be sufficient to support the ultimate facts, and the ultimate facts are necessary because they are the “final facts upon which the rights of the parties are to be determined.” *Id.*

Here’s an examples from *In re G.C.*, 384 N.C. at 66, n.3, 884 S.E.2d at 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.

And should the court be concerned about labeling a finding of fact or conclusion of law wrong? For purposes of appellate review, no. The appellate court will review each part of the order based on its correct classification. Even if the order includes a conclusion of law within the section entitled “Findings of Fact,” the appellate court will treat it as a conclusion of law, not a finding of fact. *In re H.P.*, 278 N.C. App. 195, 862 S.E.2d 858, 868 (2021).

J. Use *Nunc Pro Tunc* entry only when legally proper.

Sometimes, it seems that attorneys and judges like to include the term “*nunc pro tunc*” on any order not entered on the same day that the judge announced the ruling to the parties. Perhaps they think it’s the thing to do: After all, it’s Latin! It sounds official! It even sounds really smart! Why not?

Not every order entered after rendition is a *nunc pro tunc* order. A *nunc pro tunc* order may be entered *if*:

1. The 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 order’s late entry.

The main thing to remember is that the words “*nunc pro tunc*” do not magically change the past. In *Whitworth v. Whitworth*, 222 N.C. App. 771, 731 S.E.2d 707 (2012), the Court of Appeals explained:

“*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.” . . .

Id. at 777, 731 S.E.2d at 712; *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”); *Hill v. Hill*, 105 N.C. App. 334, 340, 413 S.E.2d 570, 575 (1992) (holding that “like any other court order, an alimony order cannot be ordered (*nunc pro tunc*) to take effect on a date prior to the date actually entered, unless it was decreed or signed and not entered due to mistake and provided that no prejudice has arisen”), *rev’d on other grounds*, 335 N.C. 140, 435 S.E.2d 766 (1993).

K. Be careful with cutting and pasting.

I learned to type on a manual typewriter, and I remember well the joy of retyping a page over and over to correct one error. I am thankful that we now have computers and I never have to do that again. But our ability to cut and paste can

lead to some problems too. Be careful when cutting and pasting text from other documents, such as the complaint or other pleadings. As long as the evidence supports the allegations that were cut and pasted from a pleading, the order should not be reversed; however, the order should clearly demonstrate that the trial court considered the evidence and that the findings are based on that evidence.

The Court of Appeals addressed one frequent “cut and paste” argument in *In re J.W.*, 241 N.C. App. 44, 772 S.E.2d 249 (2015):

Respondent’s lead argument is one we see with increasing frequency in this Court: that the trial court’s fact findings are infirm because they are “cut-and-pasted” directly from the juvenile petition. This argument stems from language in a series of this Court’s decisions holding that fact findings “must be more than a recitation of allegations.”

As explained below, we 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.” 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.

Id. (internal citation omitted).

Cutting and pasting also requires careful editing and proofreading. Another potential problem with cutting and pasting is leaving in parts of a document you meant to take out, creating an order that is internally contradictory. In *In re A.B.*, the trial court initially decided that there were grounds for terminating the mother’s parental rights, but that termination would not be in the children’s best interest. 239

N.C. App. 157, 768 S.E.2d 573, 575 (2015). Counsel had begun drafting an order based upon this rendition, but another hearing was held before that order was entered. *Id.* The trial court ultimately determined that termination would be in the children's best interests. *Id.* In editing the order's first draft—which had found that termination was NOT in the children's best interests—counsel failed to delete some of the language on this conclusion, as well as some of the relevant findings of fact. *Id.* at 167, 768 S.E.2d at 576-78. The order on appeal was thus internally contradictory:

It is not unusual for an order terminating parental rights to include both favorable and unfavorable findings of fact regarding a parent's efforts to be reunited with a child, and the trial court then weighs all the findings of fact and makes a conclusion of law based upon the findings to which it gives the most weight and importance. 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.

Petitioner seeks to explain this illogical conclusion of law in its brief as follows:

The petitioner drafted in error Matter of Law # 3 "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." . . . The trial court ordered the petitioner to draft the termination order and amend the prior order prepared by [respondent's] trial counsel. The petitioner failed to edit the Matter of Law # 3 to read as ordered by the trial court.

While we appreciate the candor of petitioner's counsel in attempting to take responsibility for this clearly improper conclusion of law, this argument cannot remedy the problem. First, the order is the responsibility of the trial court, no matter who physically prepares the draft of the order. Second, counsel's representations regarding the preparation of the order are not matters of record, because a brief is not a source of evidence which this Court can consider. We also understand that the initial drafts of most court orders in cases in which the parties are represented by counsel are drafted by counsel for a party. Unfortunately, in North Carolina, the majority of District Court judges have little or no support staff to assist with order preparation, so the judges have no choice but to rely upon counsel to assist in order preparation. Considering the lack of adequate staff to address the increasing number of cases heard by our District Courts, some mistakes are inevitable.

Id. at 166-67, 768 S.E.2d at 578–79 (emphasis in original) (citation, quotation marks, ellipses, and brackets omitted).

L. Forms are great BUT you must read them and fill them out completely.

With our computer technology comes ever-increasing access to forms for orders. And we also have many AOC forms available online at <http://www.nccourts.org/forms/formsearch.asp>.¹⁰ On these forms, usually the trial court simply must “check the boxes” for many findings of fact and conclusions of law and fill in blanks with more details as appropriate for the case. When the judge fails to check a box that the record clearly shows he intended to check, the Court of Appeals can normally remand the case for correction of the clerical error. On remand, the

¹⁰ But paper forms are now going away. In 2025—over ten years after this manuscript began—Enterprise Justice e-filing goes live in all 100 counties as of October 13, 2025. The checkboxes on forms are now checkboxes on computer screens.

trial judge will simply check the proper box or correct an obvious mistake, so the court record will “speak the truth.” In *State v. Edmonds*, 236 N.C. App. 588, 763 S.E.2d 552 (2014), the Court of Appeals remanded to the trial court for correction of these types of clerical errors on the defendant’s record level and amount of attorney’s fees owed—where it was clear from the record and the State conceded that the judgment had clerical errors:

Here, the trial court committed a clerical error. *See State v. Taylor*, 156 N.C. App. 172, 177, 576 S.E.2d 114, 117–18 (2003) (defining clerical error as “an error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination”). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” Accordingly, we remand for the correction of the clerical errors described above in the Judgment and Commitment form (correcting [the] defendant’s Prior Record Level from II to IV and correcting the amount of attorney’s fees owed from \$13,004.45 to \$6,841.50).

Id. at 601, 763 S.E.2d at 560 (citation and quotation marks omitted).

But some errors, omissions, or conflicts in form orders cannot be considered on appeal as simple clerical errors. *In re B.E.*, 186 N.C. App. 656, 652 S.E.2d 344 (2007) presents an example of a conflict between the pre-printed provisions of a form order and the findings added to the form by the trial court. The juvenile, B.E., was adjudicated as delinquent, and North Carolina General Statute Section 7B-2409 provides that “[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt.” *Id.* at 660, 652 S.E.2d at 347. Additionally, the trial court is required to affirmatively state this if it finds that “the allegations in

the petition have been proved as provided in [Section] 7B-2409.” *Id.* This Court noted that the adjudication order

contains the following relevant finding:

The following facts have been proven beyond a reasonable doubt:

1. That on or about July 15, 2005 the juvenile, B.E.[.] did unlawfully and willfully commit indecent liberties between children against the victim, a child who was at least three (3) years younger than the juvenile, being an offense in violation of [North Carolina General Statute Section] 14-202.2, by clear, cogent & convincing evidence.

The underlined portion of the above finding is the pre-printed wording of a standard form Juvenile Adjudication Order (Delinquent), AOC–J–460, New 7/99. The remainder of the finding was typed into a blank on the form.

Id. at 659, 652 S.E.2d at 346 (brackets omitted). One of the State’s arguments for affirmance of the order was that

the words “clear, cogent and convincing evidence,” which were included on the adjudication order after the correct standard of “beyond a reasonable doubt” was a “pure administrative error,” which should be ignored by this Court as mere surplusage.

But based upon ambiguous statements in the record by the trial court, the Court rejected “the State’s contention that the ambiguity in the adjudication order is a ‘pure administrative error.’” The Court noted that

there was substantial conflicting evidence regarding the allegations against juvenile. It is apparent from the trial judge’s comments during the hearing and his taking the case under advisement to consider it more carefully that he could have had some “reasonable doubt” regarding juvenile’s guilt.

Finally, we find an elementary principle of contract interpretation instructive in this case. “When a contract is partly written or typewritten and partly printed any conflict between the printed portion and the [type] written portion will be resolved in favor of the latter.” *National Heater Co., Inc. v. Corrigan Co. Mech. Con., Inc.*, 482 F.2d 87, 89 (8th Cir.1973). The words on the order which indicate that the State has failed to satisfy the required standard of proof, would be, according to the elementary principles of contract law, controlling as to the document.

The trial court must unequivocally state the standard of proof in its order pursuant to N.C. Gen. Stat. § 7B-2411 (2005). Because the adjudication order contains an ambiguity which this Court cannot resolve, we conclude that the trial court erred.

Id. at 661-62, 652 S.E.2d at 347.

This case highlights the importance of reading the form order carefully and making sure it is filled in correctly.

We see problems with checking the correct boxes on forms frequently in Satellite Based Monitoring cases and probation violation cases. We understand why these errors are so common. These forms have tiny print, many options, and several conditions for when a particular box should be checked or not. The statutes on which the forms are based are complicated and have been amended frequently in recent years. Often, the trial judge announces the ruling and a clerk checks the boxes on the forms, and something is lost in translation. Be especially careful in these cases. One good practice is to have the attorneys review the form order after you or the clerk have filled it out. They can make sure all the required blocks are marked and the required blanks filled in. If counsel can call the judge’s attention to this type of error immediately upon completion of the hearing, it can easily be corrected, perhaps

avoiding a lengthy appeal which ends in a remand for the trial judge to make a minor correction which could have been made in mere moments at the hearing.

M. Don't use attorney stationery for orders.

This practice seems to have become less common in recent years but still happens occasionally. The order is the court's order, not the attorney's order, and use of the attorney's stationery may give parties the wrong impression. The Court of Appeals pointed this out:

We note that Judge Webb's 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.

Habitat for Human. of Moore Cnty., Inc. v. Bd. of Comm'rs of the Town of Pinebluff, 187 N.C. App. 764, 770, 653 S.E.2d 886, 889 (2007).

V. COMMON PROBLEMS IN SPECIFIC TYPES OF ORDERS

A. Interlocutory orders and Rule 54(b) Certification.

An interlocutory order is any order which does not resolve all the issues for all parties to a case. Normally, interlocutory orders cannot be appealed. But sometimes, interlocutory appeals are appropriate and proper. Interlocutory orders present special challenges for both the trial judge and the appellate court.

Perhaps the judge or a party believes that an interlocutory appeal would be helpful. Can you just add "certification for appeal" language to your order and send

it on its way? It's not always that easy.

Rule 54(b) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that “when more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim the court may enter a final judgment as to one or more but fewer than all of the claims only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. However, the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.

Branch Banking & Tr. Co. v. Peacock Farm, Inc., 241 N.C. App. 213, 217-18, 772 S.E.2d 495, 499 (2015) (citations, quotation marks, brackets, and ellipses omitted).

Even if the order includes the proper Rule 54(b) certification language, the Court of Appeals must still consider whether the interlocutory appeal is proper; otherwise, we have no jurisdiction to consider it. A Rule 54(b) certification is a factor in allowing the appeal to be considered but make sure that the legal basis for the certification is sufficient. If the order makes the certification, but there is really not a proper legal basis, the Court of Appeals then must dismiss the appeal because the certification was not appropriate. In those cases, the certification simply wastes everyone's time and money and judicial resources. Just remember that Rule 54(b) certification is not magic! For a good summary of the law on Rule 54(b) certification and requirements of the order, the North Carolina Bar Association's Guide to Appealability of Interlocutory Orders, which is prepared by the Appellate Rules

Committee, available online here:
<https://www.ncbar.org/members/communities/committees/appellate-rules/>.

B. Orders on Motions to Suppress

One of the most common problems with orders on motions to suppress is there is *no* order. North Carolina General Statute Section 15A-977(f) provides that “[t]he judge must set forth in the record his findings of fact and conclusions of law.” N.C. Gen. Stat. § 15A-977(f) (2023). True, a trial court can rule on a motion to suppress on the record, and it is not always necessary for a written order to be prepared, but absence of a written order simply invites issues on appeal. The Court of Appeals noted the need for a record of the ruling, whether by announcing it from the bench or by a written order:

When ruling on a motion to suppress, our Supreme Court has recognized the importance of the trial court to establish a record, which allows for meaningful appellate review. It is always the better practice to find all facts upon which the admissibility of the evidence depends. If the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence, the court is not required to enter a written order. If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress. If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows.

State v. Wainwright, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015) (citations, quotation marks, and brackets omitted).

If there is any material conflict in the evidence, the trial judge must make findings of fact to resolve the conflict. You may think there is no conflict in the

evidence, but once a transcript is available and an attorney has time to comb through it looking for a basis for an appeal, conflicts tend to appear, or at least an argument there is a conflict appears. Then we may have to remand the case for the trial court to make findings of fact. If you want to make sure that motion to suppress never comes back to visit you again, the better practice is to enter a written order with sufficient findings of fact.

Delay in entry of the written order also creates common issues on appeals of orders on motions to suppress. Although the trial court rules on the motion to suppress before trial (or at least that's when it *should* be done) or sometimes during trial, the trial may be over and judgment entered before the written order on the motion to suppress is signed and filed. This is where we run into problems with the timing of the notice of appeal since the defendant needs to appeal both the order denying the motion to suppress and the final judgment. *See* N.C. Gen. Stat. § 15A-979. The issues arising from the timing of a notice of appeal given to an order on a motion to suppress before the written order has been entered are beyond the scope of this paper, since they involve procedural issues that go beyond the drafting issues, but the timing of the written order denying the motion to suppress is an issue in some cases. The better practice is to have the written order entered before the trial is over and notice of appeal is given. Direct the attorneys to prepare the order immediately so it can be filed as soon as possible.

Orders on motions to suppress suffer from many of the same drafting problems that appear in other orders, but they seem particularly prone to “recitation of

evidence” findings—which are not findings after all. Make sure to include all the findings needed and the conclusions of law on the legal issues presented. See the Superior Court Benchbook for more details on motions to suppress at <http://benchbook.sog.unc.edu/criminal/motion-suppress-procedure>.

VI. CONCLUSION

Even a well-organized, logical order can be reversed on appeal. Order drafting can’t correct legal errors or deficiencies in the evidence. But in many cases, the problems with an order on appeal arise not from the law or the evidence but from errors or omissions in the drafting of the order. Drafting errors can result in remand for correction of clerical errors – annoying but simple – but they can also result in remand for additional proceedings or a new order, a new trial, or even a reversal. I hope this article helps attorneys and judges avoid those problems in the order itself.