DRAFTING ORDERS FOR DISTRICT COURT BENCH TRIALS

Judge Martha A. Geer
N.C. Court of Appeals
June 2011

The District Court differs significantly from any other court in the State in that the trial judge usually is sitting as both judge and jury. While a District Court judge frequently is assessing credibility, determining what weight to give the evidence, and deciding the facts, the superior court rarely does so, and the appellate courts never do so. Unlike a jury, however, the District Court judge cannot simply state the decision or outcome, but must instead set out the facts that the judge has found and the legal conclusions drawn from those facts. The focus of any appeal of that decision will be on the sufficiency of that written order. Although the drafting of the order to be signed by the trial judge is often treated as an afterthought by lawyers, I believe that the single most significant task at the trial level, when there has been a bench trial, is the drafting -- or should we say "crafting" -- of the order.

There are some District Court judges who draft their own orders in abuse/neglect/dependency or TPR cases, but it is the practice of most of our trial judges to have the prevailing party draft the court's order. Based on my experience at the Court of Appeals, it is apparent that, in many instances, counsel does not give a great deal of thought or effort to preparing the order -- he or she may cut-and-paste from some other order or simply string together facts and tack on some conclusions that are favorable to his or her client. The order reads as if the goal was just to "get 'er done" rather than to present to the trial judge an order that will likely be upheld on appeal. If the order is inadequate or incorrect, however, the case will be remanded almost every time – no matter how strong the evidence in support of the ultimate decision. While errors regarding the admissibility of evidence, procedure, or jury instructions in a jury trial may not result in a remand, non-clerical errors in an order usually cannot be fixed or ignored on appeal. This paper is intended to provide guidance in the preparation of orders likely to end up on appeal.

A. The Oral Rendering of the Trial Court's Decision is Essentially Immaterial

When, as in cases involving DSS, the trial judge is required to make written findings of fact and conclusions of law, it is the written order that is controlling. *See In re Hawkins*, 120 N.C. App. 585, 590, 463 S.E.2d 268, 271-72 (1995). It is immaterial if the trial judge made additional oral findings or conclusions in open court – the appellate courts only review the written order. When a particular finding of fact is mentioned from the bench, but is not then included in the written order, it is the same as if the trial judge never made the finding. In other words, if, on appeal, the appellant contends that the order does not contain adequate findings of fact, the appellee cannot supplement the written order by pointing to oral findings recited by the trial judge in open court in explaining his or her decision. The Court will vacate the order and remand for further findings. Although the new order will undoubtedly contain the omitted findings, the result will be unnecessary delay and a waste of judicial resources.

B. The Findings of Fact: Telling the Whole Story

In drafting an order, it is important to review the case law and statutes to determine what the trial judge must find in that particular case. The legal research should be done before drafting the order – if attorneys wait until the appeal, they will discover that they have omitted some critical finding of fact or conclusion of law. The order must contain a finding of fact on each fact necessary, under the case law or statutes, to support a particular conclusion. Although you need to include the ultimate findings of fact, do not rely upon those exclusively. Include a finding on each specific fact that is important to the determination. It may be helpful to have a checklist of the findings that must be included in each type of order. Although some courts have forms or templates already, they don't always seem to work well -- the form has too little space and does not accommodate the variety of factual scenarios that may occur. With AOC forms, there may be adequate space, but trial judges sometimes just check the boxes and do not use that space to supply the additional facts required by some statutes or case law.

1. Make Each Finding Necessary for the Conclusions of Law

Case law usually establishes the elements necessary to reach a particular conclusion. Make a list of those elements and check them against your order's findings of fact. The Court of Appeals regularly reverses and remands for further findings of fact because the order did not include all the "magic" language. *See, e.g., In re T.D.K.*, 2009 WL 26683, *3 (N.C. App. 2009) (unpublished) ("Although the children were adjudicated neglected on 5 July 2007, the court failed to make a specific finding in its termination order that the children had previously been adjudicated neglected. Further, the termination order does not include a finding that there was a probability of future neglect if the children were returned to either parent. Accordingly, the court failed to make the requisite findings to support its conclusion. We, therefore, hold that the trial court erred by finding that the statutory ground of neglect supported the order to terminate both parents' parental rights."); *see also id.* ("Here, the order contains no findings of fact that either parent lacked the ability to provide alternative child care arrangements. Without such a finding, we cannot uphold the court's order terminating the parents' parental rights based on N.C. Gen.Stat. § 7B-1111(a)(6).").

This is not a matter of the appellate courts being hypertechnical. If a trial court has not specifically found the facts necessary to establish a particular ground, then the findings of fact cannot support the conclusion of law that the ground exists. *See In re T.M.H.*, 186 N.C. App. 451, 455, 652 S.E.2d 1, 3 ("One of the required elements that petitioner must demonstrate to establish each of these grounds is that respondent's conduct was 'willful.' The order before us contains no findings of willfulness. In the absence of a finding of willfulness, the trial court's order does not establish grounds for termination."), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

There are other findings of fact that must be included apart from the elements of a cause of action, a criminal offense, or a "ground" under the Juvenile Code. For example, there must be the necessary findings of fact regarding jurisdiction. Make sure that they are right – do not just add boilerplate language through cutting and pasting from another order without making sure they are correct for this particular case. *See In re M.G.*, 187 N.C. App. 536, 542-43, 653 S.E.2d 581, 585 (2007) (holding that trial court incorrectly found North Carolina to be children's home state

because children had lived in North Carolina for six months before commencement of proceedings when undisputed evidence established that children had only been in state three or four months), *rev'd on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

When you are introducing the findings of fact, make sure you recite the correct standard of proof. If the standard of proof is not in the order, and the trial judge did not mention the standard of proof in the hearing, the order will be reversed. There is no reason to take the risk that the standard of proof was not recited when the decision was rendered in open court. *See In re A.O.S.*, 2009 WL 1525301, *2 (N.C. App. 2009) (unpublished) ("In the present case, the trial court did not state the clear and convincing standard of proof in the written adjudication order, nor did it orally state the standard of proof during the hearing. Accordingly, the trial court's order terminating respondent father's parental rights is vacated and remanded for a statement of the standard of proof applied in the trial court's adjudication order. Because we vacate the trial court's order, we need not address respondent-father's remaining arguments."); *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) ("N.C. Gen. Stat. § 7B-807 requires the trial court to affirmatively state that the allegations in the petition have been proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-807 (2003). Failure by the trial court to state the standard of proof applied is reversible error.").

2. <u>If It's Not in the Order, It Didn't Happen</u>

If the order, as signed by the trial judge, does not contain findings regarding certain evidence, it is as if that evidence was never presented. In other words, if an appellant argues that the conclusions of law are not supported by the findings of fact, an appellee cannot supplement those findings by pointing to evidence, not addressed in the order, as providing further support for the conclusions of law. *See In re C.R.*, 2009 WL 2751064, *3 (N.C. App. 2009) (unpublished) ("The trial court made no findings of fact that would support a conclusion that C.R. was a neglected juvenile at the time of the termination proceeding, and the trial court made no finding of fact that there is a probability of repetition of neglect if C.R. were returned to respondent's custody and care. Although there may be evidence in the record to support such a finding, this Court does not make findings of fact. It is the duty of the trial court to make findings of fact and we are limited to reviewing whether those findings are supported by competent evidence."); *In re T.P.*, 197 N.C. App. 723, 787, 678 S.E.2d 781, 787 (2009) ("We have little doubt after studying the record that there existed evidence from which the trial court could have made findings and conclusions to support its orders for termination of parental rights. Unfortunately, the skeletal orders in the record are inadequate to allow for meaningful appellate review."); *In re B.G.*, 197 N.C. App. 570, 552, 677 S.E.2d 549, 552 (2009) ("Although there may be evidence in the record to support a finding that Respondent acted inconsistently with his custodial rights, it is not the duty of this Court to issue findings of fact.").

The bottom line is: If the order does not find a particular fact, then that fact does not exist for purposes of the appeal. *See In re J.S.L.*, 177 N.C. App. 151, 162, 628 S.E.2d 387, 394 (2006) ("While the guardian *ad litem* cites to various other evidence of domestic violence, the court made no findings of fact regarding that evidence and it cannot be considered.").

3. The Reality About "Ultimate Findings of Fact"

The focus in the case law on "ultimate findings of fact" frequently means that orders simply parrot the language of the statute or case law. The order, however, needs to state the specific facts that support the ultimate determination that the legal standard has been met. For example, set out the facts that support a conclusion of neglect. When there has been a failure to make reasonable progress, set out the requirements of the parent's plan, the specifics of any pertinent court orders, and then the facts that show the parent did not make progress on the requirements. *See In re T.P.*, 197 N.C. App. at 730, 678 S.E.2d at 786-87 (2009) ("In the instant case, the trial court entered three essentially identical orders for termination of Respondent's parental rights of K.P., M.P., and T.P. The orders consist mainly of quotations from the statutory grounds for termination of parental rights and conclusory recitation of the statutory standard for termination. However, the trial court failed to set out the specific facts that require termination of this Respondent's parental rights. For example, the orders state that Petitioner made reasonable efforts to reunite Respondent and the children, that Respondent failed to comply with the Court's reunification efforts, and that the Respondent willfully left her children in foster care for more than twelve months without making adequate progress in addressing the conditions that had led to their removal from her home. However, the orders do not state whether reunification efforts were undertaken, the manner by which Respondent failed to comply with Petitioner's and the trial court's efforts, the conditions that led to the removal of the children from Respondent's home, or in what respect Respondent failed to make progress addressing these conditions. The termination orders refer several times to Respondent's substance abuse problems, but provide no details about her drug use or any rehabilitation that was offered or attempted. The orders do not include facts about Petitioner's case plan, Respondent's family or work history, her visitation with the children, or her housing situation.").

If you are basing a TPR on a failure to pay the reasonable share of the cost of care, then you need a finding of fact as to the ability to pay. The order cannot simply say that the parent did not pay. There also need to be facts establishing that the parent had the ability to pay something. *See In re D.J.*, 2007 WL 1599129, *5 (N.C. App. 2007) (unpublished) ("There is no determination by the trial court that mother had the ability to pay a reasonable portion of her children's care, or what this amount may have been. Furthermore, the trial court did not specifically address whether she was employed at any time between 8 November 2005 and 8 May 2006, the relevant period for this statutory ground to terminate. Finally, we observe that the trial court did not conclude that mother 'willfully' failed to pay for the care of the children, G.S. § 7B-1111(a)(3). We conclude the findings lack the specificity required to support a conclusion that mother failed to pay a reasonable portion of the children's care.").

Copying a complaint's or petition's allegations, as orders sometimes do, is dangerous. First, allegations sound like allegations rather than findings of fact. Second, a pleading's allegations tend not to be as specific as an order should be. Finally, and most importantly, it is rare that the evidence presented at trial matches up with what an attorney anticipates being able to prove at the time of a complaint or petition – sometimes, the evidence is better; sometimes, the evidence is not as good as hoped; and sometimes, the evidence is just different.

In crafting the findings of fact, you need to set out all the facts necessary to justify the conclusions. Tell a story – show the reader of the order that the child was neglected or that the parents failed to make reasonable progress. In an equitable distribution case, provide the factual reasoning that leads to the particular division. To make an effective closing argument, you do not just recite the ultimate findings of fact, you lay out all of the little facts that lead up to and make inevitable that ultimate finding of fact. The same is true for orders.

If a statute requires that certain factors be considered, then the order should include sufficient findings to demonstrate that the trial court has considered the pertinent factors. *See In re J.V.*, 198 N.C. App. at 119, 679 S.E.2d at 849 ("[S]ince the trial court's findings of fact simply do not address the issues posited in N.C. Gen. Stat. § 7B-907(b), we conclude that the permanency planning order should be vacated and that this matter should be remanded to the trial court for the entry of a new permanency planning order containing adequate findings of fact and conclusions of law."); *In re L.L.*, 172 N.C. App. 689, 705, 616 S.E.2d 392, 402 (2005) (remanding in part because of trial court's failure to make findings of fact on factors set out in N.C. Gen. Stat. § 7B-906(c)). In termination of parental rights cases, the order must "clearly reveal that the trial court considered" the mandatory "best interest" factors set out in N.C. Gen. Stat. § 7B-1110(a) (2007); *Embler v. Embler*, 159 N.C. App. 186, 190, 582 S.E.2d 628, 631 (2003) ("Without sufficient findings as to the § 50-20(c) distributional factors, we cannot determine whether the trial court appropriately applied the law in ordering the unequal distribution of the marital estate.").

In addition, even when the appellate courts review a decision on a particular issue only for abuse of discretion, that review cannot occur if the order does not set out the trial judge's reasoning for making the decision it made. The most common reason that a discretionary decision is sent back to the trial court is a failure to explain the basis for the decision. *See Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (holding that, even under an abuse of discretion standard, "[t]he trial court must ... make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law"); *see also In re A.S.*, 190 N.C. App. 679, 694, 661 S.E.2d 313, 322-23 (2008) ("The language appears to be boilerplate that, without further clarification, does not necessarily apply to the specific circumstances of this case. Accordingly, on remand, the trial court must clarify its disposition; must specify which statements in the reports it is finding as a fact; and must make findings of fact specifically relating to Adam that support its disposition."); *In re J.S.*, 165 N.C. App. 509, 513, 598 S.E.2d 658, 661 (2004) ("Since the trial court's findings are not sufficiently specific to allow this Court to review its decision and determine whether the judgment was correct, and since the findings also fail to comply with the statutory requirements, we remand this matter to the district court to make appropriate findings of fact.").

4. Recitation of Testimony is not a Finding of Fact

Frequently, orders simply recite what witnesses said in the course of their testimony. For example, the order may state: "Dr. Smith evaluated the mother and found her to be depressed and needing regular mental health treatment." This finding of fact simply finds that Dr. Smith made that statement. It is not a finding of fact that the mother is depressed or that the mother needs any treatment. The order must state, in addition: "The mother is depressed and needs regular mental

health treatment."

It may be helpful to include a recitation of the evidence supporting the trial judge's ultimate finding of fact, but those evidentiary findings are not sufficient in and of themselves. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 449 n.7, 342 S.E.2d 798, 800 n.7 (1986); *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). While the appellate court might deem such findings to be assertions of fact, as in *Peoples*, the court also might not. Why take the chance? If the order describes a social workers' testimony regarding a parent's unwillingness to work with DSS, the order must then go on to say that the trial judge finds that the parent was unwilling to cooperate with DSS.

This principle does not, however, mean that a finding of fact reciting testimony is not helpful. It may make for a more persuasive order, so long as the description of the testimony is followed by a finding of fact, finding what the testimony stated.

5. No Findings of Fact through Incorporation by Reference

A related issue comes up when an order incorporates a report by reference "as its findings of fact." In abuse, neglect, and dependency proceedings, this Court has held that because a trial court "may not delegate its fact finding duty[,]" a court "should not broadly incorporate . . . written reports from outside sources as its findings of fact." *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (emphasis added). This Court has explained that "although the trial court may properly incorporate various reports into its order, it may not use these as a substitute for its own independent review." *In re M.R.D.C.*, 166 N.C. App. 693, 698, 603 S.E.2d 890, 893 (2004), *disc. review denied*, 359 N.C. 321, 611 S.E.2d 413 (2005).

In other words, a trial court may incorporate a report by reference if the intent of the finding is simply to memorialize the evidence – instead of summarizing the report, the finding incorporates the report. An evidentiary finding of fact of that nature is acceptable. *See Crocker v. Crocker*, __ N.C. App. __, 698 S.E.2d 768 (2010) (unpublished) (when trial court incorporated prior post-separation support order by reference, holding that "[t]his was an evidentiary finding of fact and not an ultimate finding of fact necessary for determination of the request for alimony"). The order cannot, however, then say that the trial court finds all the facts recited in the report. Instead, the trial court must itself make the necessary findings of fact. *See In re A.S.*, 190 N.C. App. 679, 693-694, 661 S.E.2d 313, 322 (2008) ("In this case, the trial court did not err when, while summarizing the evidence considered by the court, it incorporated the DSS and GAL reports by reference rather than specifically describing the content of those reports. The court was, however, required to make its own findings of fact based on those reports and any testimonial evidence presented. The trial court's bare finding that 'the statements set forth' in the reports 'are true' does not tell this Court upon which assertions in those reports the trial court was relying."); *In re C.M.*, 183 N.C. App. 207, 212-13, 644 S.E.2d 588, 593-94 (2007) (holding that the trial court did not improperly incorporate the social worker's report, the GAL's report, and psychological evaluations when it set them out and then made subsequent independent findings).

6. Make Sure the Finding of Fact is Supported by Evidence

You must make sure that evidence was actually admitted that supports each finding of fact set out in the order. In a DSS case, the fact that a piece of information may appear somewhere in the juvenile file is not sufficient to include that information in a finding of fact unless the information was admitted at the hearing. The same is true in an alimony case if the trial court learned the information by presiding over a child support hearing.

If the trial judge took judicial notice of material within the juvenile file or of a prior order in the proceeding, then the order should reflect that fact. While it may be sufficient for the trial judge to state in the hearing that he or she is taking judicial notice, it is cleaner to set that determination out in the order. Be aware that judicial notice does not, however, make everything in the file fair game for findings of fact. It depends upon the nature of the hearing and the stage of the hearing.

For a finding of fact in a prior order to be sufficient to support a finding of fact in a subsequent order, the standard of proof must have been the same in both hearings, such as clear, cogent, and convincing evidence. If a lesser standard of proof applied, then it cannot constitute clear, cogent, and convincing evidence for the current order. Orders sometimes recite the "clear, cogent, and convincing" standard even though that standard was not required for that particular type of hearing. Be cautious about assuming that it is appropriate to rely upon such a finding of fact in a hearing actually requiring the higher standard of proof.

In abuse, neglect, and dependency cases and TPR cases, trial courts are not required to hold separate adjudication and disposition hearings. Dramatically different evidence is, however, admissible at the disposition stage as opposed to the adjudication phase. For example, reports of the guardian ad litem or the social worker would be inadmissible hearsay during the adjudicatory hearing, but entirely appropriate at the disposition phase of a hearing. Frequently, when both hearings are held together – either in a combined hearing or one right after the other – the findings of fact for the adjudication will reference "facts" that are contained only in reports admitted solely for purposes of the disposition phase.

If a finding of fact in the adjudication phase is supported only by a report admitted in the disposition stage, that finding of fact is not supported by evidence and, if material, may result in a remand for further proceedings. I suspect that this problem occurs because counsel do not have the benefit of a transcript when drafting the order and may use the reports as an outline for the order without knowing for sure that everything in the report was admitted during testimony at the adjudication phase. Of course, if the report was admitted in the adjudication portion of the hearing or was not objected to or subject to any limitation in a combined hearing, then it can be relied upon.

7. Forms are not Always the Answer

In an effort to ensure that all bases are covered in an order, trial courts are sometimes using form orders. Those orders can create a bigger problem than they solve. Although some courts

limit the use of such forms to review hearings or permanency planning hearings, those orders can, in certain circumstances, be appealed, so the problems with the forms are revealed.

Checking boxes sometimes results in findings of fact that are not supported by the evidence, especially with respect to jurisdiction, when the box is just checked automatically. A form finding of fact almost always must be supplemented with handwritten specifics that can be very confusing and sometimes contradictory. Using a form to address more than one child can result in a nightmare for the appellate courts. The forms also hinder the court's ability to set out all the details necessary for proper appellate review.

B. Conclusions of Law: Just Don't be Careless

Conclusions of law are the easiest part of the order. When they result in reversals, it is usually because of plain carelessness by the drafter of the order.

1. No Breaking New Ground

In TPR cases, not infrequently, the order will rely upon a ground not asserted in the petition – either the initial juvenile petition or the petition/motion to terminate parental rights. It is well established that if the ground is not in the petition, it cannot be relied upon in the order. *See In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50-51 (2009) (holding that where ground was not alleged in termination petition, it could not be used as ground for terminating parental rights); *In re C.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007) ("Because it is undisputed that DSS did not allege abandonment as a ground for termination of parental rights, respondent had no notice that abandonment would be at issue during the termination hearing. Accordingly, the trial court erred by terminating respondent's parental rights based on this ground.").

2. Get the Law Right

It is striking how often the conclusions of law do not properly state the law. For example, N.C. Gen. Stat. § 7B-1111(a)(2) was amended eight years ago to eliminate the need for reasonable progress in "the prior 12 months." *See In re C.L.C.*, 171 N.C. App. 438, 447, 615 S.E.2d 704, 709 (2005) ("The focus is no longer solely on the progress made in the 12 months prior to the petition."), *aff'd per curiam in part, disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Yet, orders repeatedly recite the old law. The conclusions of law must reflect any applicable amendments to the statutes at issue or developments in the case law.

3. Citing the Relevant Statute

Please cite the relevant statute. You do not want the Court of Appeals to have to guess, for example, regarding which grounds for termination are the basis for the order. It is not always as clear from the text as you might expect.

C. Decretal Portion of the Order

The decretal portion of the order is the part that really matters. This, of course, is the portion of the order that directs what must be done. Do not just cut and paste it from another order. It must match up with the rest of the order. You also need to make sure that there are findings of fact and conclusions of law to support what is being ordered in the decretal portion. *See In re A.S.*, 190 N.C. App. 679, 693, 661 S.E.2d 313, 322 (2008) (noting that trial court's findings of fact were inconsistent with conclusions of law regarding disposition and that decretal portion made no reference to what plan should be and "remand[ing]for clarification of what the trial court intended" with the direction that "[o]n remand, the trial court should specify not only what it is ordering, but also the specific facts and reasoning upon which that order is based").

Know what may be ordered in the particular type of order that you are drafting. Decisions of the Court of Appeals have suggested that the trial court does not have authority to include certain mandates in the decretal part of an initial adjudication. *See In re D.C.*, 183 N.C. App. 344, 356, 644 S.E.2d 640, 646-47 (2007) (stating that "N.C. Gen. Stat. §§ 7B-507 and 907 do not permit the trial court to enter a permanent plan for a juvenile during disposition" in the initial proceeding to determine whether juvenile is abused, neglected, or dependent). Look at the relief authorized by the controlling statutes.

Research the law to ensure that you have included all of the necessary details regarding any matter that is ordered. For example, the Court of Appeals has established that any order allowing for visitation must provide details regarding that visitation and cannot simply delegate the decisionmaking to DSS. *See In re B.L.*, 2007 WL 2833439, *4-5 (N.C. App. 2007) (unpublished).

D. Miscellaneous (and Should be Unnecessary) Reminders

Make sure that the right judge is identified at the end of the order. Yes, really. I have seen multiple instances of a judge signing an order although he or she did not preside over the hearing. It is caught and corrected, but delays the process. In addition, it hardly enhances the credibility of the judicial system if a judge is seen as not recognizing that he or she was not involved in a particular case.

If counsel for the prevailing party is in private practice and has its firm's name on the bond paper used for court documents, the order submitted to the court may have the firm's name on it. Such paper should not be used for court orders. *See, e.g., Heatzig v. MacLean*, 191 N.C. App. 451, 461, 664 S.E.2d 347, 355 (2008) ("This Court has held that a trial court should not sign orders prepared on stationery bearing the name of the law firm that prepared the order, since it does not convey an appearance of impartiality on the part of the court."); *In re T.M.H.*, 186 N.C. App. 451, 455-56, 652 S.E.2d 1, 3 ("We further note that the termination order was printed, signed, and filed on the ruled stationery of petitioner's trial attorney. It is important that our trial courts not only be impartial, but also have every appearance of impartiality. We strongly discourage judges from signing orders prepared on stationery bearing the name of any law firm."), *disc. review denied*, 362 N.C. 87, 657 S.E.2d 31 (2007).

E. Correction of Orders

Do not assume that you will be able to correct any oversights in an order by filing a motion under Rule 60(a) of the Rules of Civil Procedure. N.C.R. Civ. P. 60(a) ("Clerical mistakes in judgments, orders or other parts of the record and errors arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any part and after such notice, if any, as the judge orders. During the pendency of an appeal such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division."). As the Court of Appeals has emphasized, "courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or to correct substantive errors in their decisions." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006).

A clerical error is one that involves a minor mistake or inadvertence and not judicial reasoning or determination, such as the inadvertent checking of boxes on forms "or minor discrepancies between oral rulings and written orders." *Id.* (holding that changing order from awarding full custody to only physical custody was a substantive change and could not be corrected under Rule 60(a)). A change in an order is substantive when it alters the effect of the original order. *See In re C.N.C.B.*, __ N.C. App. __, __, 678 S.E.2d 240, 242 (2009). Thus, this Court has refused to consider a corrected order that added a finding of fact that was not in the original order – that respondent lacked an appropriate alternative child care arrangement – but was essential to the trial court's final determination. *Id.*