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

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Judge Donna S. Stroud was elected to the North Carolina Court of Appeals in November 2006 and re-elected without opposition in 2014. She is a graduate of Campbell University, summa cum laude, with a BA in Government in 1985, and a graduate of the Campbell University School of Law, with a J.D. magna cum laude in 1988. Judge Stroud was ranked first in her law school class each year of law school and upon graduation and served as the Notes and Comments editor of the Campbell Law Review. She practiced law as an associate and later as a partner with Kirk, Gay, Kirk, Gwynn & Howell in Wendell, Wake County, N.C. from 1988 until 1995; she was then a founding partner of Gay, Stroud & Jackson, LLP, where she continued to practice until her election as a District Court Judge in Wake County in 2004. While in private practice, Judge Stroud was also a certified Superior Court mediator and a District Court arbitrator. Judge Stroud served as a Family Court Judge while on the District Court.

After joining the Court of Appeals in 2007, Judge Stroud began teaching as an Adjunct Professor at Campbell University School of Law in 2008, teaching Judicial Process and Juvenile Law. In May 2014, she graduated from the Duke University School of Law LL.M. program in Judicial Studies as a member of its charter class. Judge Stroud has served as Chair of the Judicial Division of the NC Association of Women Attorneys, as a member of the Governor's Task Force on Mental Health and Substance Use, and as an ex officio member of the Dispute Resolution Committee. She currently serves on the Family Court Advisory Committee, the Appellate Rules Committee, and Women in the Profession Committee of the North Carolina Bar Association.

WHAT THE COURT OF APPEALS WANTS YOU TO KNOW ABOUT DRAFTING ORDERS IN SUPERIOR COURT[1]

I. INTRODUCTION

In law school, we take many substantive classes such as 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. 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 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.

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[1] This manuscript was originally developed for District Court judges. Special thanks are due to Chief Judge Linda McGee, Judge Mark Davis, and Judge Lucy Inman of the North Carolina Court of Appeals for their contributions to revisions to address issues which commonly arise in Superior Court orders.

I have assisted with some training for District Court judges on drafting orders, and when I present this topic to judges, they tell me I need to talk to the attorneys, because the attorneys draft most of their orders. I have 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.[2] The ruling is usually later reduced to writing, in an order or judgment filed in the office of the Clerk of Superior Court; we call this entry of the order.[3] The importance of these documents cannot be overstated. The parties are likely concerned mostly about the practical end result, but the trial court has many other concerns about the content of the order. The order determines the rights of the parties and sometimes dictates the future behavior of the parties. 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.

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[2] 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 (Cum.Supp.1997). "Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737, disc. review denied, 347 N.C. 263, 493 S.E.2d 450 (1997). *Mastin v. Griffith*, 133 N.C. App. 345, 515 S.E.2d 494 (1999).

[3] "Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]" N.C. R. Civ. P. Rule 58.

In Superior Court, many cases are resolved by jury trials, and in those cases, there may be no need for detailed orders to be prepared. But in many motion hearings and in bench trials, orders are necessary, and those orders are frequently the subject of appeals. Considering the importance of court orders, it may seem odd that the vast majority of North Carolina's trial courts have no staff to assist in the preparation of orders. As a general rule, only our business courts have law clerks to assist the judges in order preparation, but the District and Superior Courts also handle thousands of cases each year which require complex and lengthy orders. Besides lack of staff assistance and a heavy workload of cases, the trial judges may have computer technology which is years behind that available to most attorneys in their offices and they have minimal time in the office for order preparation.

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. *See In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) (holding that, in an abuse, neglect, or dependency proceeding, a trial court has a legal duty to enter a timely written order); N.C. Gen. Stat. § 1A–1, Rule 58 (2013) (requiring a judge's signature on judgments). ….
>
> 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.*,768 S.E.2d 573 (2015).

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 also, as trial courts need to be handling the new cases and not revisiting old ones.

Although trial judges frequently rely upon 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 trial courts give more detailed guidance, sometimes the attorneys continue fighting the case even after the judge has rendered a ruling by preparing competing orders for consideration by the judge. A few judicial districts have adopted local rules which provide some guidance and time requirements for order preparation.[4] But most of North Carolina's judicial districts do not have local rules which address 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

[4] As of the preparation of the first version of manuscript 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) have at least one rule addressing order preparation and presentation. Some rules address both Superior Court and District Court while some do 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.

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. 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.

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 which will need to be in the order.

It may seem obvious that the attorneys and the trial judge should know the law relevant to the order, but sometimes it seems that this first step was not addressed. Depending on the issue presented by the case, either a statute or case law may set forth very specific requirements of findings of fact and conclusions of law

which the trial court must address. If the attorneys have not provided the applicable law, have them do the research. If you still have questions, do your own research. The Superior Court Bench Books 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 addition, many publications from the School of Government are available online, including CJE presentations from prior Superior Court Conferences. Another good source for clear statements of required findings and conclusions is the pattern jury instructions, even if you're doing a bench trial.

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 get around to working on deciding the case, a few weeks after the trial, summaries can be extremely useful. You don't want your order to be reversed on appeal just because you couldn't find a particular bit of evidence in your notes or in

the boxes of exhibits. Instead of waiting until the closing argument to ask for summaries of important evidence, have the attorneys prepare summaries or spreadsheets as the evidence is presented so you have the opportunity to note your own thoughts on the summaries and to 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 that by the end of the trial, he has these 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 to use in his order.

In cases which involve mathematical calculations, have the attorneys "do the math" and provide the calculations, with reference 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 cannot 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 has the opportunity to ask the attor-

neys 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 and 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. 145 N.C. App. at 480, 550 S.E. 2d at 538.

In the proposed findings of fact, have the attorneys include references to the particular exhibits or testimony which support the proposed findings of fact. 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 proposed conclusions of law based upon the findings, matched up to the relevant law.

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 you are directing an attorney to draft an order, make sure to give the attorneys sufficient

detail about your ruling so the attorney drafting it will know what you want and all of 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 facts in most dispute 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."[5] 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 a written order entered later rarely are exactly the same. A discrepancy between the order as orally rendered and the order as written and entered is not necessarily a reason for 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

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

controlling order. But serious discrepancies between the rendered order and the executed order can raise an issue, if it appears that the trial court did not actually make the findings or conclusions required.

In re BSO, a case dealing with termination of parental rights, presents an example of this sort of discrepancy. The Court of Appeals first noted that Rule 52 of the North Carolina Rules of Civil Procedure requires that:

> In 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. *In re T.P.*, 197 N.C. App. 723, 729, 678 S.E.2d 781, 786 (2009) (emphasis added).

After trial on termination of parental rights as to the mother and two fathers of the children, 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:

> Here, toward the end of the termination hearing on 16 March 2012, 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.

(Emphasis added). 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[.]" *Id*. at 88, 627 S.E.2d at 515. 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." *Id*. at 89, 627 S.E.2d at 515. 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., ___ N.C. App. ___, 740 S.E.2d 483, 486 (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 preparation of an order, whether you prepare the order or you direct an attorney to prepare it.

Justice delayed is justice denied. Sometimes the delay comes from the trial court's delay in ruling, and sometimes it comes from delay in order preparation by the attorney. Whether or not the Local Rules set a deadline for attorneys to submit an order draft or for the judge to prepare an order, set a deadline for any attorney you direct to prepare an order. If you are preparing the order, set a deadline for yourself. Depending upon the complexity of the case, thirty days is probably as long as you should allow yourself or an attorney. Sooner is better. The time between

completion of the hearing or trial and entry of the order or judgment sometimes presents potential ethical pitfalls for attorneys and judges. Issues related to order preparation lead to two of the most frequent complaints to Judicial Standards Commission about trial judges:

1. *Delay in entry of order*

Delay increases risk of problems for the judge under Canon 3, Code of Judicial Conduct:

> (5) A judge should dispose promptly of the business of the court.

The Local Rules of some judicial districts also address delays in ruling by judges. 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 order entry 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) of the Rules of Professional Conduct 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[.]

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

> (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, 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 ad-

> vice 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 for the attorney and Canon 3(A)(4) of the Code of Judicial Conduct for the judge. If the attorneys need to discuss the ruling or wording for an order, arrange a time to do this when everyone can be present. Any written communications between the judge and any party or attorney, whether by letter, email, text message, or any other type of communication, must always be contemporaneously shared with all counsel or parties.[6]

IV. CONTENTS OF THE ORDER

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

Or as Maria sang in *The Sound of Music*, "let's start at the very beginning; a very good place to start."[7] This is more likely to be a problem in complex cases in which many motions have been filed or with many claims. When the case is on appeal, sometimes it is very difficult for the appellate court to determine exactly what was decided and what was not. For example, a party may have abandoned a claim or

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[6] *See* Formal Ethics Opinion, Ex Parte Submission of Proposed Order to Judge (adopted Jan. 16, 1998); *see also* Psst. Hey Judge…, Suzanne Lever, NC State Bar Journal 17, 2, June 2012 provided at https://www.ncbar.gov/media/121093/journal-17-2.pdf.

[7] *Do-Re-Mi (Maria And The Children)* was written by R. Rodgers, O. Hammerstein II.

motion, but when the order is on appeal, the record does not clearly reflect what happened, and on appeal we may think there are still outstanding claims or motions which would make the order interlocutory. Start at the beginning and state what is being decided. The order should summarize the procedural posture of the case. As appropriate for the issues in the case, 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 were heard and which were not?
- Are there prior orders which affect this order or which the trial court has considered?
- Are there other related cases?
- Are there any pending motions or claims remaining?
- Were any other claims or motions abandoned or dismissed?
- 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 it may still be affirmed if appealed, it is more likely to lead to confusion of the parties affected and to make appellate review of the order difficult. If the order is organized properly, just like any other written document, it is more likely to address the issues it should and it is easier for everyone to understand.

The order should make the logical process behind the trial court's rulings 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 addressed a disorganized equitable distribution order which was nonetheless affirmed in *Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 ((2012). At the outset, the court addressed the confusion over the actual percentages of the marital estate awarded to each spouse and addressed an example of failure to do the mathematical calculations 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. *See Best*, ___ N.C.App. at ___, 715 S.E.2d at 598. 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. *Peltzer*, 222 N.C. App. at 788, 732 S.E.2d at 360-61.

The court then addressed the defendant's arguments on 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). *Peltzer*, 222 N.C. App. at 789, 732 S.E.2d at 361.

The Court went on to note the specific findings scattered throughout the very long equitable distribution order which addressed each of the factors which the trial court had to consider under the controlling statute and accordingly rejected the appellant's contention that the findings of fact failed to support the order's conclusions of law. But in this case, as in many, the relevant statute itself sets out an appropriate organizational framework for findings of fact and conclusions of law. If the order uses that organizational framework, it is less likely to omit an important finding and the order is more likely to be upheld on appeal.

In appeal of another disorganized equitable distribution order, in *Hill v. Hill*, __ N.C. App. __, 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." On the trial court's order, the Court noted that:

> 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. 748 S.E. 2d at 356.

C. 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 and not just list the evidence. Recitations of evidence are not findings! Recitations of evidence are usually pretty 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 it 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 which 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 (N.C. Ct. App. 2016) (unpublished), where the Court of Appeals 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. The defendant filed a "motion 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.'" The trial court orally denied the defendant's motion prior to his trial and entered a written order during the trial. The order included "numerous findings of fact regarding the delay between Defendant's arrest and his appearance before a magistrate and regarding Defendant'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 Defendant's arrest and subsequent appearance before the magistrate was unnecessary or prejudiced Defendant. Nor did the trial court make findings or conclusions regarding whether Defendant's rights under N.C. Gen. Stat. § 15A–501(5) were violated." The court remanded for additional findings of fact and conclusions of law, stating that:

> Resolving Defendant'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." *State v. Salinas*, 366 N.C. 119, 124, 729 S .E.2d 63, 67 (2012) (internal quotation marks and citations omitted).
>
> It is tempting to speculate that the trial court considered Defendant'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." *New Hanover Child Support Enf't v. Rains*, 193 N.C. App. 208, 210, 666 S.E.2d 800, 802 (2008). 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.
>
> *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). In order for this Court to conduct meaningful appellate review, the trial court must make appropriate findings of fact and conclusions of law.

D. <u>Be very careful with a finding that there is "no evidence" of any disputed fact.</u>

Sometimes we encounter findings of fact which say, in one way or another, 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 there was "no evidence" is not supported by the record. In an appeal

of a "no evidence" finding where there is some evidence of the fact, the appellate court has no way of knowing if the trial judge simply overlooked or forgot there was evidence of the fact or if 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 .....") Since the trial court alone determines the weight and credibility of the evidence, this finding shows that even if there was some evidence of the disputed fact in the record, the trial court found that evidence not to be credible.

In *McRae v. Toastmaster*, the North Carolina Supreme Court addressed a "no evidence" finding by the Industrial Commission, where the Commission found 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, but actually there was evidence she had seen the doctor because she was having difficulty performing her job and the doctor had issued work restrictions:

> From this evidence, the 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, on 10 May 1999, 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.

McRae v. Toastmaster, Inc., 358 N.C. 488, 498–99, 597 S.E.2d 695, 702 (2004).

E. 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 is an order granting summary judgment, judgment on the pleadings, or a Rule 12(b)(6) dismissal. If you are granting summary judgment, this means you have determined there is no genuine issue of material fact and that the moving party is entitled to judgment in his favor.[8] The same is true for orders granting a motion to dismiss under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c). If there is no genuine issue of material fact, there is no reason for any findings of fact. Findings of fact resolve *disputes* in the evidence, as discussed above.[9] If there is no dispute, there is no need for findings. Sometimes, because the trial court has made findings of fact, it becomes evident there is a genuine issue of material fact, so the order must be reversed.

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[8] *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 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."

[9] As with most rules, there is an exception: under N.C. Gen. Stat. § 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.

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, especially if there are several different legal arguments raised and the legal basis upon which the trial court rules is important to the case. But be careful how the "findings" section of a summary judgment order is worded, so the order does not end up highlighting the very thing it says does not exist: a genuine issue of material fact.

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

> 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. *See* N.C. Gen. Stat. § 1A–1, Rule 56 (2009). 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." N.C. Gen.Stat. § 1A–1, Rule 56(c); *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."). 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."

204 N.C.App. at 551, 694 S.E.2d at 500.

F. Be careful with 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 which 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, 725 S.E.2d 29 (2012), a foreclosure case, the promissory note was payable to Carolina First Bank as the lender; plaintiff TD Bank instituted the foreclosure action and defendant alleged that TD Bank failed to show it was the "owner and holder of the promissory note upon which it has sued." The complaint and other documents submitted to the trial court failed to show that TD Bank was the holder of the note. TD Bank asked on appeal for 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. 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[.]" *Id*. 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." *Dowdy v. R.R.*, 237 N.C. 519, 526, 75 S.E.2d 639, 644 (1953). 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[,]" *Reese v. Piedmont, Inc.*, 240 N.C. 391, 397, 82 S.E.2d 365, 369 (1954) and that "gasoline either alone or mixed with kerosene constitutes a flammable commodity and a highly explosive agent." *Stegall v. Oil*

> *Co.*, 260 N.C. 459, 462, 133 S.E.2d 138, 141 (1963). 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." *Dowdy*, 237 N.C. at 526, 75 S.E.2d at 644. 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[.]" N.C. Gen. Stat. § 8C–1, Rule 201.
>
> 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." *Id.* 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. *Id.* 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. 219 N.C. App. at 509-510, 725 S.E.2d at 32-33.

In addition, the type of facts which 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. *See Khaja*, ___ N.C. App. ___, ___, 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 "[t]his 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[.]" *Id.*[10] 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 elec-

[10] "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).

> trical 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. *See id.*

Id. at ___, ___ S.E.2d at 794–95.

G. Orders must be based on the record and not on the judge's memory.

Occasionally we see an instance of 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 up 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 and made findings in the domestic violence protective order based upon his recollection of the prior 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. 201 N.C. App. 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." 128 N.C. App. 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. 128 N.C. App. 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 v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541(2009), 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.

H. 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 n*unc 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 late entry of the order.

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 this:

> "Nunc pro tunc" is defined as "now for then." Black's Law Dictionary 1174 (9th ed.2009). It signifies " 'a thing is now done which should have been done on the specified date.' "…
> Nunc pro tunc orders are allowed only when "a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk ... provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced."…
> *See also Rockingham Cnty. Dep't of Soc. Servs. v. Tate*, 202 N.C. App. 747, 751, 689 S.E.2d 913, 916 (2010) (holding that when no substantive ruling was made at hearing and written order was prepared long after hearing, "[e]ntry of the order nunc pro tunc does not correct the defect" because "[w]hat the court did not do then ... cannot be done now ... simply by use of these words") *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.)

222 N.C. App. at 777, 731 S.E. 2d at 712.

I. Be careful with cutting and pasting.

I learned to type on a manual typewriter, and I remember well the joy of re-typing 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 which were cut and pasted from a pleading, the order should not be reversed, but 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 recently in *In re J.W.,* .__ N.C. App. __, 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." *In re A.B.*,___ N.C. App. ___, ____, 768 S.E.2d 573, 579 (2015). It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose. 772

S.E. 2d at 251.

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 and creating an order that is internally contradictory. In *In re A.B.*, the trial court initially decided there were grounds for terminating the Mother's parental rights, but that termination would not be in the children's best interest. ___ N.C. App. ___, 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 and ultimately the trial court determined that termination would be in the children's best interests. *Id.* In editing the first draft of the order 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 ___, 768 S.E.2d at 576-78. Thus, the order on appeal was 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. *See In re T.H.T.*, 362 N.C. 446, 455, 665 S.E.2d 54, 60 (2008) (holding that, in an abuse, neglect, or dependency proceeding, a trial court has a legal duty to enter a timely written order); N.C. Gen. Stat. § 1A–1, Rule 58 (2013) (requiring a judge's signature on judgments). 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. *See Builders Mut. v. Meeting Street Builders*, ___ N.C. App. ___, ___, 736 S.E.2d 197, 200 (2012) ("[M]atters discussed in a brief but not found in the record will not be considered by this Court."). 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 ___, 768 S.E.2d at 578–79.

J. <u>Forms are great BUT you must read them and fill them out completely</u>.

With our computer technology comes ever-increasing access to forms for orders. We also have many AOC forms available online at http://www.nccourts.org/forms/formsearch.asp. 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 which 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 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*, __ N.C. App. __, 763 S.E.2d 552 (2014), the Court of Appeals remanded for correction of these types of clerical errors on the defendant's record level and amount of attorney 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." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696–97 (2008) (citations and quotations omitted). Accordingly, we remand for the correction of the clerical errors described above in the Judgment and Commitment form (correcting 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). 763 S.E. 2d at 560.

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 N.C. Gen. Stat. § 7B-2409 (2005) provides that "[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt." In addition, the trial court is required to affirmatively state this if it finds that "the allegations in the petition have been proved as provided in G.S. 7B–2409. N.C. Gen. Stat. § 7B–2411 (2005)." 186 N.C. App. at 660, 652 S.E. 2d at 347.

> 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 G.S. 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. (emphasis added.)

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. 186 N.C. App. at 661-662, 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, lots of options, and lots of 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 the last few

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 of 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.

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

> 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. 187 N.C. App. at 770, 653 S.E. 2d at 889.

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 of 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 "[w]hen 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 *218 rules or other statutes." N.C.R. Civ. P. 54(b) (emphasis added). 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." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (internal citations and quotation marks omitted); *see Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (affirming dismissal of interlocutory appeal where trial court's use of certification language under Rule 54(b) was insufficient to establish appellate jurisdiction; "That the trial court declared it to be a final ... judgment does not make it so.").

Branch Banking & Tr. Co. v. Peacock Farm, Inc., 241 N.C. App. 213, 217–18, 772 S.E.2d 495, 499, *aff'd*, 368 N.C. 478, 780 S.E.2d 553 (2015).

Even if the order includes the proper Rule 54(b) certification language, the Court of Appeals must still consider whether the interlocutory appeal is actually 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, see 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/media/758546/ncba-appellate-rules-committee-guide-to-appealability-2017.pdf.

B. Orders on Motions to Suppress

One of the most common problem with orders on motions to suppress is there is *no* order. 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. For example, if there is any conflict in the evidence, the trial judge must make findings of fact to resolve them. 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 must 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.

Delay in entry of the written order also creates common issues on appeals of orders on motions to suppress. Because the trial court rules on the motion to suppress before trial (or at least that's when it *should* be done), 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. The issues arising from 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 go beyond the drafting issues, but the timing of the written order is an issue in many 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 of 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.