WHAT JUDGES WANT YOU TO KNOW ABOUT DRAFTING ORDERS

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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.

I have assisted with some training for District Court judges on drafting orders, and when I present this topic to judges, they tell me that I need to talk to the attorneys, because the attorneys draft most of their orders. I have presented this program to attorneys before, and they tell me that 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 refer to this as rendition of the order.[1] The ruling is usually later reduced to writing, in an order or judgment which is filed in the office of the Clerk of Superior Court; we refer to this as entry of the order.[2] The importance of these documents cannot be overstated. The parties in the case 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 to that case and sometimes dictates the future behavior of the parties. The order serves 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.

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. In addition to 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:

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[1] 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).

[2] "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." Rules Civ.Proc., G.S. § 1A-1, Rule 58

> 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.[3] 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 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.

If you're the attorney for the prevailing party, you may think that you should draft an order that your client will like, especially if the trial court hasn't given much specific guidance as to findings of fact or conclusions of law. If you're the attorney for the losing party, you may think that you should try to make the order as favorable as possible for your client, to the extent that you can. And if you're representing the losing party and the prevailing party is pro se, the judge may direct you to draft the order anyway. Whatever the attorney drafting the order may think of it, pleasing a client is not the judge's goal. In the end, the order is the judge's work product, not the attorney's.

A good order needs to 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.

[3] As of the preparation of this 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.

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.

I will suggest some ways in which you can help the Judge (and your clients) by preparing orders which accomplish all of these goals. This process begins with preparation before and during the hearing.

II. DURING THE TRIAL:

The first things you can do to help the trial court prepare a better order happen during or even before the trial or hearing.

a. Know the required findings of fact and conclusions of law which will need to be in the order and provide the law to the judge.

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. Do the research and at the hearing, give the judge this information. Start with any applicable statutes and case law. Another good source for clear statements of exactly what the court needs to determine are the pattern jury instructions (even if you're not dealing with a jury) and the Bench Books produced by the UNC SOG. There are Bench Books for both the Superior Court, available online at http://benchbook.sog.unc.edu/, and the District Court. The District court's Benchbook is not available online but you can purchase a copy on disk from the SOG at

http://www.sog.unc.edu/pubs/dcjbenchbookv1.html. The Benchbooks don't cover every single issue you will encounter, but they are often a good starting point and will direct you to the applicable statutes and cases.

b. Prepare summaries of evidence, spreadsheets, timelines, etc. (with references to exhibit numbers and witness testimony) as appropriate to your case.

Often, especially in a more complex case, the judge will take the case under advisement. The judge likely has many cases under advisement and she has little time to work on them. She may have boxes of exhibits and briefs to review. When your trial judge gets around to working on deciding the case, a few weeks after the trial, summaries can be extremely useful. You don't want the judge to rule against you on an issue simply because she couldn't find a particular bit of evidence in her notes or in the boxes of exhibits. Instead of waiting until the closing argument to give the trial court summaries of important evidence, offer the summaries as the evidence is presented so that the judge has the opportunity to note her own thoughts on the summaries and to recall which parts of the evidence she found most useful or credible.

c. In complex or long cases, offer to prepare proposed findings of fact (or just do it). And do the math too!

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. Even if your judge does not

make this request, it's a great idea. I would guess that most judges would be pleased to get proposed findings of fact.

In cases which involve mathematical calculations, the attorney should "do the math" and provide the calculations to the judge, with reference to the exact exhibits or testimony from which the numbers are derived. The judge will make the final call on which numbers to use and how to use them, but assistance from counsel may help the trial court make the evidentiary basis for the numbers clear in the final order and to 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. 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 your proposed findings of fact, include references to the particular exhibits or testimony which support your 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 your proposed findings of fact, you may also include pro-

posed conclusions of law based upon the findings, matched up to the relevant law. Don't assume that the judge knows exactly what findings and conclusions are required.

III. AFTER THE TRIAL

After the trial or hearing, until you have a signed and filed the final order, there is still work to be done, whether you are the attorney assigned to prepare a draft or if you are reviewing the proposed order prepared by opposing counsel.

a. Prepare the draft in a timely manner and share with all parties properly.

Justice delayed is justice denied. Sometimes the delay comes from the trial court's delay in ruling, but sometimes it comes from delay in order preparation by the attorney. When a judge directs you to prepare an order, even if the judge or Local Rules don't set an official deadline for you to submit the order draft, set a deadline for yourself and treat it just as seriously as you would any court deadline. Some local rules do set deadlines and failure to comply can result in sanctions. Depending upon the complexity of the case, thirty days is probably as long as you should allow yourself. Sooner is better.

If the trial court assigned opposing counsel to prepare the order and you are waiting for a draft, but too much time is going by with no progress on the order, you can and should take steps to move the process along. First, if the local rules address this situation, you should use any methods directed by the rules. If not, start with a friendly reminder letter or email to opposing counsel. But if this does not work and the delay is continuing, depending upon your client's situation and the issues involved, you may consider communicating with the trial court about the need to have the order entered, sharing all communications contemporaneously with opposing parties or counsel. You

may also set the matter on the trial calendar for a status conference or for entry of the order.

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 as follows:

> 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 get the draft completed 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) E*x parte* communications about the order.

> Canon 3, Code of Judicial Conduct:
>
> (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 advice of a disinterested expert on the law applicable to a proceeding before the judge.

If you are waiting for a judge to rule on a case which has been taken under advisement, you may be tempted to ask the judge about it when you see him during another case or in passing at the courthouse. Don't. That's an *ex parte* communication and is in violation of Canon 3, Section 4. If you need to ask the judge about the ruling or about wording for an order you are preparing, let opposing counsel or parties know and arrange a time to do this when everyone can be present. Any written communications with the judge, whether by letter or email, must always be contemporaneously

shared with all counsel or parties. If all else fails, set the case on the judge's court calendar for a conference regarding the order.

b. Remember that you are an Officer of the Court.

The order you are preparing is not your order, even if your client won. It is the order of the Court and you are representing to the judge that what you have drafted accurately reflects his ruling. Trial judges are very busy and have to read and sign many documents each day. They are human and cannot remember each and every detail about hundreds of cases. They rely on you as an officer of the Court to draft the order accurately and to share the draft and any communications regarding the order with all parties. If you betray a trial judge's trust by twisting the facts to favor your client, a bit beyond what the judge really found, or failing to be entirely open in your dealings with the opposing parties or counsel, he will remember it and may not trust you again, at the very least.

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."[4]

Sometimes an order does not make it clear exactly what was decided and what was not. When you are drafting an order, start at the beginning, which is to state exactly what is being decided. The order should summarize the procedural posture of the

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

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. Make sure you know what the judge wants in the order.

What if the judge told you to draft the order but you're not entirely sure what the ruling is on certain issues? Ideally, the judge would make sure to give you sufficient detail that you will not have any difficulty drafting the order. But if you need more guidance, you can and should ask. You must avoid *ex parte* communications, as discussed above, but you can send a letter or an email to the judge or you can schedule a conference with the judge, along with opposing counsel or parties, to ask your questions. The sooner you do this, the better, as the judge's memory of the case will be clearer. If you wait six months to begin drafting the order, only to find that you have major questions about the ruling, it may be far more difficult to get your questions answered.

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 controlling order and the written order is almost never exactly the same as the oral rendition. 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 which are 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).

c. 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 all of 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 which are unfortunately necessary in some cases..

> First, we note that it appears that defendant has miscalculated the percentages of the marital estate awarded to each party. The trial court found the net marital estate to be $886,234.00, which is not challenged by defendant. 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 as to 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 was required 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 set 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 some 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." As to 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.

d. Recitations of evidence are not findings of fact.

We see this all too often at the Court of Appeals. Findings of fact must resolve disputes in the evidence 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:

Mrs. Jones testified that *her car is worth $2000.00.*

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 the trial court actually determined:

Mrs. Jones's car is worth $2000.

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 *Carpenter v. Carpenter*, __ N.C. App. __, 737 S.E.2d 783 (2013), a custody case in which the mother and father were both seeking custody of the child and each made allegations that the other abused alcohol. The findings recited evidence of various incidents of alcohol use or abuse by each party or family members, but never resolved the actual issue which was relevant to the best interests of the child:

> None of these findings resolve the real issue, which upon the pleadings and evidence in this case was whether plaintiff abuses alcohol to an extent that it may have an adverse effect upon George[, the minor child]. Findings 35 and 40 are recitations of testimony by various witnesses about their observations of plaintiff and are not really findings of fact. Findings 29 and 57 recognize the existence of dispute between the parties as to the extent of plaintiff's drinking. Finding 34 does not address the parties at all and fails to explain why plaintiff's mother's problems with alcohol abuse may be relevant to the issue of custody of George. Findings 43 and 58 show that plaintiff at some point in time has gone hunting, fishing and four-wheeling with his friends and has consumed

alcohol during these activities.

> The findings merely recognize the existent of a dispute and some evidence which may bear upon that dispute without resolving it. There are no findings that either party actually does abuse alcohol or that either party's drinking has adversely affected George, although the findings tend to indicate that the plaintiff drinks more than defendant and that his drinking has caused at least one adverse consequence, the wreck of a 4–wheeler in 2010. As the trial court ordered that neither party consume alcohol in George's presence, the trial court may have had some concern about the potential effect upon George, but the findings fail to resolve the issue. 737 S.E.2d at 788.

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. If the trial court is granting summary judgment, this means that the court has found that there is no genuine issue of material fact and that the moving party is entitled to judgment in his favor.[5] 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. If there is no dispute, there is no need for findings. Sometimes, because the trial court has made findings of fact, it becomes evident that there is a genuine issue of material fact, so the order must be reversed for that reason.

In some cases, it may be helpful for appellate review if the order identifies the material facts which are 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"

[5] 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."

section of a summary judgment order is worded, so that 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*552 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. <u>Be careful with shortcut of judicial notice.</u>

(1) Judicial Notice of Facts

Like any shortcut, judicial notice can save lots of work and can be useful, but it can also be abused. Attorneys 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 that 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 presented.

> 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 *510 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.

(2) Judicial Notice of prior proceedings

Although taking judicial notice of prior proceedings in a case would not seem to fit neatly under Rule 201, it is a well-established practice. "[T]his Court repeatedly has held that a trial court may take judicial notice of earlier proceedings in the same case. Moreover, the trial court "'is presumed to have disregarded any incompetent evidence.'". *In re W.L.M.*, 181 N.C.App. 518, 640 S.E.2d 439 (2007). This form of judicial notice is frequently used in types of cases which have several hearings over a longer period of time, such as domestic cases and juvenile cases. But this type of judicial notice must be used carefully and cannot be used as a substitute for making the findings of fact and conclusions of law which are necessary for the particular issues being addressed by the order. *Crocker v. Crocker,* 190 N.C.App. 165, 660 S.E.2d 212 (2008) presented an example of a misuse of the "judicial notice" shortcut which led instead to a very long detour with two trips to the Court of Appeals.

Crocker is an alimony case which first came to the Court of Appeals in 2008 on the wife's appeal, in which she contended that that the trial court's findings of fact could not support the trial court's conclusion that the husband was "actually substantially dependent" upon her and thus entitled to alimony. In *Crocker I*, the Court of Appeals reversed and remanded the order for post-separation support and alimony for additional

findings of fact because the order had simply incorporated various prior orders by reference instead of making clear findings on the issue to be decided.

> [W]ife argues that the trial court erred in entering its order of permanent alimony where it failed to make required findings of fact pursuant to N.C.G.S. § 50-16.3A. The court purported to make extensive findings of fact by taking judicial notice of the postseparation support order, the consent judgment regarding equitable distribution, the child custody and support order, and various wage affidavits and amended alimony affidavits and incorporating by reference the facts in these documents. As we previously noted, when determining an alimony award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors." *Skamarak*, 81 N.C.App. at 128, 343 S.E.2d at 561. The general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony. Therefore, these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C.G.S. § 50-16.3A. 190 N.C.App. at 167, 660 S.E.2d at 214.

On remand, the trial court held a non-evidentiary hearing and then entered amended orders for post-separation support and alimony which "repeated many of the findings of fact" from the original orders but "added numerous new findings of fact" and again ordered wife to pay post-separation support and alimony. Wife appealed again from the new orders, and in *Crocker v. Crocker*, 206 N.C.App. 596, 698 S.E.2d 768 (2010) (unpublished) the Court of Appeals reversed and remanded again for additional findings as to a few issues, but as to many of the findings challenged found that the trial court's new findings of fact were proper since they were clearly "its own independent findings of fact" which were based upon competent evidence. In the second alimony order, the trial court had incorporated its post-separation support order on remand into the alimony order, but did not use that as a "substitute for any findings required in con-

nection with an award of alimony." Thus, incorporation by reference or judicial notice of prior orders is permissible but cannot be used as a substitute for required findings.

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 re-

> view 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), as noted above, 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 evi-

dence and the Court of Appeals would be able to review the case to determine if the evidence supported the findings of fact.

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 which was 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 which is 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.

The *Whitworth* case presents a good example of how delay in order entry can cause problems and when *nunc pro tunc* should not be used.

The Rendition:

On 14 August 2007, the trial court heard a motion for Window World, a corporation which was wholly owned by Leon and Marie, husband and wife, to intervene in their equitable distribution case and rendered this ruling:

> The trial judge, after hearing oral argument, announced:
>
> I don't see any way for the company not to be a part of this. It's just simply to pass their opinion as to whether it's going to affect the company or not…
> So Mr. [Smith], if you'll do an Order for me—we'll get on to the Restraining Order today, but if you'll do an Order for you to intervene, I'll allow you to at least take part in what discussions I think you all were already in the middle of when I called you in here. Is that okay?
> MR. [Smith]: Yes, I'll draw that Order.
>
> Mr. [Smith], however, apparently failed to draft this order.
> 731 S.E.2d at 710, 731 S.E. 2d at 773-774.

The Entry:

Three years later… the written order appears.

> In the meantime, on 12 August 2010, an order was filed in this action purportedly nunc pro tunc to 14 August 2007 allowing Window World's motion to intervene. According to Mr. [Smith's] testimony at the hearing below, he drafted the order, handed it up to the trial judge in a regular session of court, and asked her to sign and enter it. Mr. [Smith] acknowledged that prior to submitting the order to the trial judge, he did not provide a copy of it to Marie's or Leon's counsel. Mr. [Smith] also admitted that he did not serve Marie or Leon with a copy of the signed order."
> 731 S.E.2d at 710, 731 S.E. 2d at 775.

The Order, entered three years later, said this:

> The 12 August 2010 intervention order included a finding of fact that "Window World, Inc. is a closely held corporation owned in part by Leon, Marie, and Todd Whitworth." This finding of fact was contrary to findings in the 6 November 2007 consent order. The order also included the following conclusions of law:
>
> > 1. This Court has jurisdiction over the subject matter and the parties to this action.
> > 2. Window World, Inc. as Intervenor has an interest in the property which is the subject matter of this action.
> > 3. The rights, obligations, and interests of Window World, Inc. will be impaired and impeded if it is not allowed to intervene in this action.
> > 4. Since the parties to the underlying action are now adversaries, they cannot adequately represent the interests of Window World, Inc.
> > 5. Window World, Inc. should be allowed to intervene as a matter of right in this matter.
>
> 222 N.C. App. at 775, 731 S.E.2d at 711.

The Court of Appeals reversed the order, because the rendition was not detailed enough to support the later order. When the trial judge announced, or rendered, the oral ruling, he made no oral findings of fact and stated no legal basis for allowing intervention. The trial judge did not say how much Window World would be allowed to participate in the case. The Court of Appeals noted that

> It is apparent that the trial court expected the details of the order granting intervention to be fleshed out in a written or-

> der. This non-specific ruling is not a sufficient rendering to support the entry three years later of a detailed written order nunc pro tunc.
> …
> Further, the record contains no evidence and the trial court made no finding regarding why no written order was signed in 2007. It appears from Mr. [Smith's] testimony that he simply never got around to submitting the order to the trial judge for her signature. 222 N.C. App. at 779, 731 S.E. 2d at 713.

The Whitworth case presented another possible reason that a *nunc pro tunc* order could not be entered, although the court did not address this issue since the order had to be reversed based simply on the lack of detail in the rendition. During that three year delay, the original parties to the equitable distribution case, Leon and Marie, resolved the case by entry of a consent order, which was also consented to on behalf of Window World by their son Todd Whitworth, who was also the president and a director of Window World. Todd Whitworth later died, and both Leon and Marie filed claims in Superior Court and against Todd's estate. Marie also sought to set aside the settlement of the equitable distribution action. Allowing late entry of an order allowing the intervention of Window World, Inc., which was seeking to intervene in the equitable distribution case and set aside the consent order, after the case had been settled and the company's president, also a shareholder, had died would certainly seem to have much potential to prejudice substantial "intervening rights" since it would have the effect of reopening the completed equitable distribution proceeding between the husband and wife and interfering with the final disposition of the son's estate.

i. <u>Be careful with cutting and pasting.</u>

I learned to type on a manual typewriter, and I remember well the joy of retyping a page over and over to correct one error. I am thankful that we now have computers

and I never have to do that again. But our ability to cut and paste can lead to some problems too. Be careful when you are 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 the "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.

j. <u>Forms are great BUT you have to read them and fill them out completely</u>.

Along with our computer technology comes ever-increasing access to forms for orders. We also have many AOC forms available online athttp://www.nccourts.org/forms/formsearch.asp. On these forms, usually the trial court simply has to "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 that 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 as to 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. Even if the trial judge has prepared the order on a pre-printed form, whenever possible, the attorney should check to make sure that all of the required blocks are marked and blanks filled in correctly. If counsel can call the judge's attention to this type of error immediately upon completion of the hearing, the trial court still has the opportunity to correct it, thus 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 Ju-

dicial 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.