

Drafting Orders for Clerks of Superior Court

June 13-14, 2024

Thursday, June 13

- 9:45 a.m. *Check-In*
- 10:00 a.m. **Welcome and Introductions**
Meredith Smith, Albert and Gladys Hall Coates Distinguished Term Associate Professor,
UNC School of Government
- 10:15 a.m. **Standards of Appellate Review Applied to Orders of the Clerk** [.75 hrs CLE]
Meredith Smith
- 11:00 a.m. **Making Findings of Fact and Conclusions of Law** [1.5 hr CLE]
Sara Depasquale, Associate Professor, UNC School of Government
- 12:30 p.m. *Lunch*
- 1:15 p.m. **How to Think About the Rules of Evidence When Drafting an Order** [1 hr CLE]
Timothy Heinle, Teaching Assistant Professor, UNC School of Government
- 2:15 p.m. *Break*
- 2:30 p.m. **Exercise: Draft Your Order, Part 1** [1 hr CLE]
Meredith Smith
- 3:30 p.m. *Break (Snacks)*
- 3:45 p.m. **Exercise: Draft Your Order, Part 2** [.75 hrs CLE]
Meredith Smith
- 4:30 p.m. *Adjourn for the day*

Friday, June 14

9:00 a.m. **Recap**

9:15 a.m. **Exercise Caution: Attorney Drafted Orders and Entry of an Order** [1 hr CLE]
Sara DePasquale, Associate Professor of Public Law and Government, UNC School of Government

10:15 a.m. *Break*

10:30 a.m. **Exercise: Peer Review of Your Drafted Order** [1.5 hr CLE]
Meredith Smith

12:00 p.m. *Lunch*

12:45 p.m. **Judicial Decision Making and Discretion** [1.5 hrs CLE]
Jim Drennan, Adjunct and Former Albert Coates Professor of Public Law and Government,
UNC School of Government

2:15 p.m. *Adjourn for the day*

Total Credit Hours: 9

Biographies

Meredith Smith

Meredith Smith joined the School of Government in 2013. Previously, she was an associate with the law firm of McGuireWoods LLP in Charlotte, where she practiced with the real estate, corporate, and restructuring and insolvency groups on matters related to a wide range of issues including commercial loan modifications, foreclosures, bankruptcy, corporate governance, mergers and acquisitions, commercial leasing, and real estate purchase and sale contracts. Smith earned a B.A. in political science and Spanish, with distinction, from the University of North Carolina at Chapel Hill and a law degree, *cum laude*, from Georgetown University School of Law, where she was a member of the *American Criminal Law Review*.

Areas of expertise: adoption, clerks of superior court, estate administration, foreclosure, guardianship (adult), incompetency

Sara DePasquale

Sara DePasquale specializes in child welfare law in North Carolina. Her specific areas of expertise include juvenile abuse, neglect, dependency; termination of parental rights; adoptions of minors; juvenile emancipation; judicial waiver of parental consent for abortion; legitimation proceedings; and paternity issues. In December 2021, DePasquale was one of the first specialists in child welfare law certified by the North Carolina State Bar. She was named Albert and Gladys Hall Coates Distinguished Term Associate Professor for 2020-2022 and received the Albert and Gladys Hall Coates Teaching Excellence Award in 2023.

DePasquale teaches, advises, and writes for judicial officials, social services attorneys, parent attorneys, and other professionals. Her publications include [*Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina*](#), which is an extensive practice manual; the book [*Fathers and Paternity: Applying the Law in North Carolina Child Welfare Cases*](#) (2016); and other publications, including book chapters and bulletins, published by the School of Government. She is a regular contributor to the School's [*On the Civil Side*](#) blog and developed and maintains the [*Child Welfare Case Compendium*](#). Her primer [*Stages of Abuse, Neglect, and Dependency Cases in North Carolina: From Report to Final Disposition*](#), which is updated as needed, earned the School's Margaret Taylor Writing Award in 2016.

Prior to joining the School of Government in 2013, she practiced for 17 years at Pine Tree Legal Assistance, the statewide civil legal services provider in Maine. She started at Pine Tree as a Skadden Fellow and spent her last nine years there as the directing attorney of the KIDS LEGAL project. She is a member of the North Carolina and Maine state bars. DePasquale received a B.A. with honors in history and sociology from Binghamton University, is a *magna cum laude* graduate of the University at Buffalo School of Law, and also earned a dual degree with an M.S.W. in child welfare/family systems from the University at Buffalo School of Social Work.

Areas of Expertise: abuse neglect and dependency (children), adoption, child welfare, confidentiality (social services), guardianship (children), human trafficking, immunizations (children and adolescents),

judicial waiver of parental consent, legitimation of minors, social services law (child welfare and foster care), termination of parental rights

Timothy Heinle

Timothy Heinle joined the School of Government in 2020 as part of the School's Public Defense Education program. After graduating from New England Law-Boston in 2009, he moved to eastern North Carolina where he spent a decade practicing law, including trial and appellate level work on juvenile abuse, neglect, and dependency cases; termination of parental rights hearings; incompetency and guardianship matters; and child support contempt proceedings. At the School, Heinle is primarily focused on providing education and resources to civil defense attorneys, including parent attorneys and guardian ad litem attorneys in adult incompetency matters.

Areas of expertise: abuse, neglect, and dependency (children); abuse, neglect, and exploitation (adults), delinquency, child support, delinquent juveniles, guardianship (adult), guardianship (children), incompetency, indigent defense education, involuntary commitment law and procedure, juvenile justice, public defense education, social services law (child welfare and foster care), termination of parental rights, undisciplined juveniles

Jim Drennan

Jim Drennan joined the School of Government (then the Institute of Government) in 1974. He teaches and advises on court administration issues, judicial ethics and fairness, criminal sentencing, and judicial leadership. Drennan is also responsible for the School's educational programs for clerks of Superior Court and court administrators. While on leave from 1993 through 1995, he served as director of the North Carolina Administrative Office of the Courts. He is a member of the North Carolina State Bar, the American Bar Association, and the National Association of State Judicial Educators. Drennan earned a BA from Furman University and a JD from Duke University, where he served on the editorial board of the *Duke Law Journal*.

Standards of Appellate Review Applicable to Orders of the Clerk

Meredith Smith
UNC School of Government
June 2024

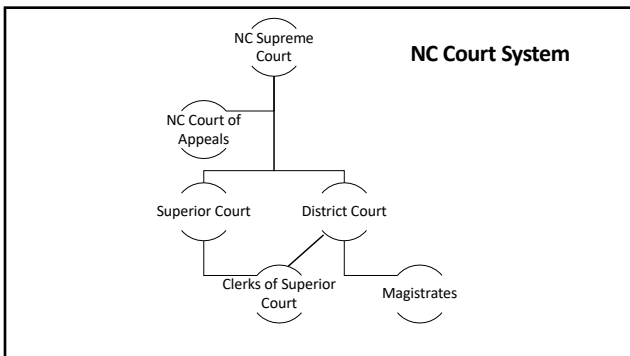
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Appellate Review

Orders of the clerk are final acts of a judicial officer.

If a party wants the order to be **reviewed**, the party must appeal.

2



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Nature of Appeal

When a litigant appeals a case, they argue that the lower court (aka the trial court) made an incorrect decision and, if the court below had done it right, the case would have turned out differently.

Some decisions from the trial court are more difficult to overturn on appeal than others.

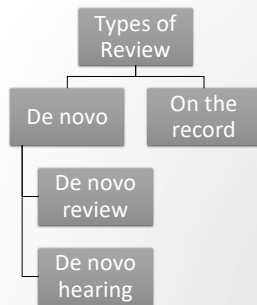


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What is a Standard of Review?

A standard of review determines how much deference an appeals court will give to a decision from the lower court.

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Appellate Review:
De Novo Hearing

- Arises out of G.S. 1-301.2
- Applicable to **special proceedings** heard by the clerk in the "exercise of the judicial powers of that office"

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The Little Engine that Could: Article 27A, G.S. Chapter 1

This entry was contributed by Meredith Smith on April 21, 2017 at 4:22 pm and is filed under Clerks of Superior Court, Judicial Authority.

In my last [post](#), I wrote about the office of the clerk of superior court and the clerk's judicial authority. I provided a basic framework for this authority and noted that the clerk's non-criminal authority falls into three main categories:

1. estates and trusts,
2. civil, and
3. special proceedings.

Some Background on Article 27A of G.S. Chapter 1

I did not come up with these categories on my own. In fact, these are those categories located in §416(a)

Categories: Adoptions, Appeals, Child Welfare Law, Civil Law, Civil Practice, Civil Procedure-General, Clerks of Superior Court

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Special Proceeding

- Initiated by petition and issuance of summons
- Typically initiated before the clerk

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Transfer of Special Proceedings

If an **issue of fact**, an **equitable defense**, or a **request for equitable relief** is raised in a **pleading in a special proceeding** or in a **pleading or written motion in an adoption proceeding**, the clerk shall transfer the proceeding to the **appropriate court**.

G.S. 1-301.2(b)



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Examples: Issue of Fact

In response to the filing of a petition to sell real property, a respondent (and purported owner of the property) files an answer asserting that (1) the decedent did not own the property and (2) the PR is therefore not entitled to bring the property into the estate and sell it to pay the debts of the decedent.

Whether the decedent was the owner of the property is:

- 1. An issue of fact
- 2. An equitable defense
- 3. A request for equitable relief



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Examples: Equitable Defense

In response to the filing of a petition to sell real property, a respondent files an answer asserting that (1) the decedent fraudulently obtained title to the property and (2) the PR is therefore not entitled to bring the property into the estate and sell it to pay the debts of the decedent.

The allegation of fraud is:

- 1. An issue of fact
- 2. An equitable defense
- 3. A request for equitable relief



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Example: Request for Equitable Relief

In response to the filing of a petition to sell real property, a respondent files an answer requesting that the court impose a constructive trust on a portion of the proceeds from the sale of the property for the benefit of the respondent because the decedent obtained title to the property using assets of the respondent.



A request to impose a constructive trust is:

1. An issue of fact
2. An equitable defense
3. A request for equitable relief

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Duty of Judge on Transfer from the Clerk

Judge may hear and determine all matters in controversy in the special proceeding, unless...

it appears to the judge that justice would be more efficiently administered by the judge's disposing of only the matter leading to the transfer and **remanding the special proceeding to the clerk.**

G.S. 1-301.2(c).

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Clerk's Order

If a special proceeding is **not transferred** or is **remanded** to the clerk after an appeal or transfer, the clerk **shall decide all matters** in controversy to dispose of the proceeding.

G.S. 1-301.2(d).



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Example

Adoption petition is filed.

A party files a motion raising the issue of whether the father's consent to the adoption is required.

The clerk transfers the matter to the district court.



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Example

The district court enters an order determining that the father's consent is not required and **remands** the case to the clerk.

The clerk then proceeds with the adoption, relying on the district court's determination regarding consent.

The clerk enters the final order/decree.



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Appellate Review: Special Proceedings

A party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a **hearing de novo**.

G.S. 1-301.2(e).




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De Novo

Means "anew" or "for the first time."

Black's Law Dictionary



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Hearing De Novo vs. De Novo Review

A hearing de novo is not the same as a de novo review.

See In Matter of Estate of Johnson,
264 N.C. App. 27, 34 (2019).


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De Novo Review

Appellate court reviews the record and the order; do not hold a new hearing and new presentation of evidence.


Appellate court applies a fresh analysis to the decision, without giving deference to the trial court decision.

Questions on appeal under *de novo* review are easier to overturn than under the other deferential standards.



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Hearing De Novo



"A court empowered to **hear a case de novo** is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court."

Caswell Cty. v. Hanks,
120 N.C. App. 489, 491 (1995)


The judge is required to **conduct a hearing de novo** "as if no hearing had been held by the [clerk] and without any presumption in favor of the [clerk's] decision."

In Matter of Estate of Johnson,
264 N.C. App. 27, 35(2019).

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**Appellate Review:
Special Proceedings**

A party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court **for a hearing de novo.**



G.S. 1-301.2(e).

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Examples?

- Adoption
- Partition
- Foreclosure
- Cartway
- Condemnation
- Legitimation
- Name change
- Sale of land to create assets
- Adjudication of incompetency

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Appellate Review:
On the Record

- Arises out of G.S. 1-301.3
- Applicable to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors.
- More deferential standard of review.
- **Exception.** G.S. 1-301.2 applies in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate.

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No Transfer

The clerk shall determine all issues of fact and law.

The clerk **shall enter an order or judgment**, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.

G.S. 1-301.3(b).

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Appellate Review


Upon appeal, the judge of the **superior court shall review** the order or judgment of the clerk for the purpose of determining only the following:

1. Whether the findings of fact are supported by the evidence.
2. Whether the conclusions of law are supported by the findings of facts.
3. Whether the order or judgment is consistent with the conclusions of law and applicable law.

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Examples?

Guardianship – who appointed and type of guardian
 Estate proceedings
 Trust proceedings
 POA proceedings



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Appellate Review

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

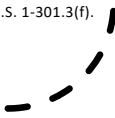
1. Whether the findings of fact are supported by the **evidence**
2. Whether the conclusions of law are supported by the findings of facts.
3. Whether the order or judgment is consistent with the conclusions of law and applicable law.

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Objections

It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion.

G.S. 1-301.3(f)



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Objections

If on appeal the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge's discretion, shall either

1. remand the matter to the clerk for a subsequent hearing or
2. resolve the matter on the basis of the record.

G.S. 1-301.3(f)

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Exception to the Deferential Standard of Review

- If the record is insufficient, the judge may receive additional evidence on the factual issue in question.
- If the judge retains jurisdiction and either excludes evidence that was considered by the clerk or considers new evidence that was not considered by the clerk, then **the judge shall review issues of fact and law de novo based on the record** from the hearing below, as modified by the court, and any new evidence heard by the court.

G.S. 1-301.3(d)

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Preserving the Record

Option 1: Hit the record button.
G.S. 1-301.3(f). In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device.....

Option 2: Clerk makes a summary.
G.S. 1-301.3(f). If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.

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Preserving the Record DO THIS, SO YOU DON'T HAVE TO DO THIS.

Option 1: Hit the record button.

G.S. 1-301.3(f). In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device.....

Option 2: Clerk makes a summary.

G.S. 1-301.3(f). If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.

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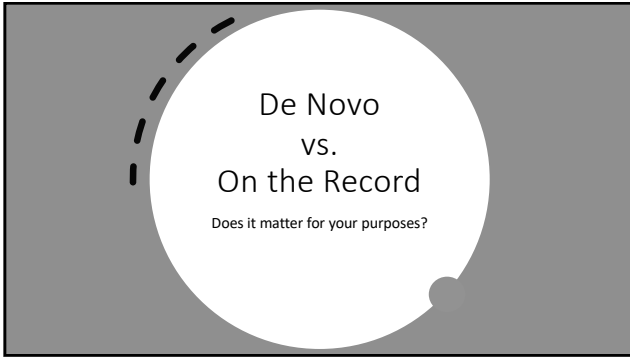
De Novo
vs.
On the Record

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Questions

- Name three types of appellate review.
- The most deferential type of review: _____
- The least deferential type of review: _____
- This type of review requires the appellate court to try the case as if the suit had been filed originally in that court: _____
- For this type of review, the appellate court review the record and the order; it does not hold a new hearing and new presentation of evidence: _____
- For an on the record review, the appellate court reviews the record to determine:
 - Whether the findings of fact are supported by the _____
 - Whether _____ are supported by the findings of fact
 - Whether the _____ is supported by the conclusions of law and applicable law

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ORDER	
<input type="checkbox"/>	The clerk/the jury did not find the respondent to be incompetent by clear, cogent, and convincing evidence and it is ORDERED that the proceeding is dismissed.
<input type="checkbox"/>	No hearing was held due to the death of the respondent and it is ORDERED that the proceeding is dismissed.
<input type="checkbox"/>	It is adjudged that the respondent is incompetent.
<input type="checkbox"/>	It is ORDERED that a guardian be appointed by this court.
<input type="checkbox"/>	For good cause shown, it is ORDERED that the proceeding for the appointment and qualification of a guardian is transferred to _____ County.
<i>(NOTE TO CLERK: All original documents from the incompetency file in this matter are to be sent to the county where this case is transferred.)</i>	
<input type="checkbox"/>	The Court recommends that the respondent be allowed to retain his or her driving privileges.
<input type="checkbox"/>	Pursuant to G.S. 35A-112(d), the Court makes the following findings regarding the nature and extent of the ward's incompetence: <i>(NOTE TO CLERK: If ordering a limited guardianship, separate findings should be recorded on form ACC-E-406 pursuant to G.S. 35A-1212, -1215.)</i>

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STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION File 22-E-523
IN THE MATTER OF THE GUARDIANSHIP OF SARAH SMITH, Ward.))) ORDER
THIS MATTER coming before the undersigned Judge on the Ward's appeal of the Order on Motion to Modify Guardianship entered by the Clerk of Court on January 18, 2023, the Court makes the following findings of fact:	
IT APPEARING TO THE COURT that a motion to modify the existing guardianship and requesting partial restoration of the Ward's capacity as related to financial matters (the "Motion") was filed by the Ward in December of 2022, and a hearing was conducted on the Motion on January 10, 2023.	

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Why?

- Provides a basis for review by the appellate court (most cases superior court)
- Gives parties a better understanding of your decision
- Encourages you to make a careful review of the evidence
- Helps ensure you address all relevant issues

Questions: Standards of Appellate Review

1. Name three types of appellate review.

- _____
- _____
- _____

2. The most deferential type of review:

3. The least deferential type of review:

4. This type of review requires the appellate court to try the case as if the suit had been filed originally in that court:

5. For this type of review, the appellate court review the record and the order; it does not hold a new hearing and new presentation of evidence:

6. For an on the record review, the appellate court reviews the record to determine:

- Whether the findings of fact are supported by the _____, and
- Whether _____ are supported by the findings of fact, and
- Whether the _____ is supported by the conclusions of law and applicable law.

Show Me the Statute: The Office and Judicial Authority of the Clerk of Superior Court

I often get asked what I do here at the School of Government. My work focuses on the areas of law where clerks of superior court exercise judicial authority. This response often elicits confusion – especially for people who work outside the NC court system. The next question is inevitably – clerks are judges? Well, the short answer is yes. In addition to carrying out the more traditional roles of a courthouse clerk, such as record-keeper, administrator, comptroller, and supervisor, the clerks of superior court of North Carolina also serve as judicial officials. This is unique to North Carolina. I am not aware of any other state where clerks carry out such a significant, if any, judicial role. So just who is the clerk of superior court and what are the areas of the clerk's judicial authority? I thought I'd use this post to go over some of the highlights.

1. A Constitutional Office, an Elected Official.

The office of the clerk of superior court is created by the North Carolina Constitution. See [NC Const. art. IV, Sec. 9\(3\)](#). The NC Constitution provides that there shall be one clerk in each of North Carolina's 100 counties who are elected for a four year term. *Id.* This person is often commonly referred to as the "elected clerk" or the "high clerk."

2. A Staff of Assistant and Deputy Clerks.

Each elected clerk has a staff of assistant and deputy clerks and a head bookkeeper, who is paid as an assistant clerk but may be a deputy or an assistant clerk. [G.S. 7A-102](#). While a clerk's office may have no fewer than five staff positions plus the elected clerk, there is no statutory maximum. [G.S. 7A-102\(a\)](#). As a result some counties may have six people in the clerk's office, while other larger counties may have over 200 depending on a [workload formula](#) managed by the NC Administrative Office of the Courts.

Assistants and deputies support the clerk in carrying out the duties of the office and serve at the pleasure of the clerk. *Id.* According to [recent data](#) from the NC Administrative Office of the Courts, there are over 2,500 assistant and deputy clerks in NC. Elected, assistant, and deputy clerks comprise approximately 40% of the total judicial branch personnel.

The elected clerk is responsible for the acts of his or her assistants and deputies. [G.S. 7A-102\(b\)](#). An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the elected clerk. [G.S. 7A-102\(b\)](#). By contrast, a deputy clerk is only authorized to perform ministerial acts which the clerk may be authorized and empowered to do. *Id.* Therefore, when talking about the judicial authority of the clerk, it includes not only the elected clerk, but assistant clerks as well.

3. The Nature of the Clerk's Judicial Authority.

Under the NC Constitution, the clerk's authority is limited. The clerk has only such jurisdiction and powers as given by the General Assembly. [NC Const. art. IV, Sec. 12\(3\)](#). By way of contrast, the superior court has original general jurisdiction through the State and has authority over all controversies brought before it except where the General Assembly has expressly removed such authority. *Id.* So, in effect the two authorities are the inverse of one another – the clerk is of limited jurisdiction and only has authority prescribed by statute and the superior court is of general jurisdiction and has authority except where excluded by statute. As a result, clerks are often appropriately cautious and avoid exercising authority in the absence of a statute authorizing them to do so. A party appearing before the clerk may hear the clerk say “show me the statute” in response to a request for relief or some other judicial action by the clerk.

In recent years, the NC Supreme Court has emphasized the clerk's limited jurisdictional authority and stated that the clerk has no common law (law from judicial precedent rather than statutes) or equitable (procuring a just outcome based on reasonableness and fairness) jurisdiction. See [In re Foreclosure of Vogler Realty, Inc.](#), 365 NC 389, 395 (2012). Further, the clerk cannot perform functions involving the exercise of judicial discretion in the absence of statutory authority. *Id.* Where the legislature intends for the clerk to possess discretionary authority, it specifically provides for it with language such as “may” or “in the discretion of.” *Id.*

Although the clerk is of limited jurisdiction, the clerk's authority is not limited in the same way in each of the proceedings that come before the clerk. This makes adherence and reference to the statutes even more critical as the clerk presides over different types of proceedings with different limits on the clerk's authority.

Under the General Statutes, a clerk's non-criminal authority breaks down into three main areas: (i) estates and trusts, (ii) special proceedings, and (iii) civil actions. The clerk has some limited authority in criminal matters. For example, the clerk may conduct first appearances when the judge is not available and issue arrest and search warrants. [G.S. 15A-601](#); [G.S. 7A-180\(5\)](#). However, the clerk's criminal jurisdiction is beyond the scope of this post (and my area of work).

a. Estates and Trusts

The legislature gives the clerk the broadest authority in the first category – estates and trusts. The clerk is the *ex officio* judge of probate and has original, exclusive jurisdiction over the probate of wills, the administration of decedents' estates, and certain trust and estate proceedings. [G.S. 7A-241](#); [G.S. 28A-2-4\(a\)](#); [G.S. 36C-2-203](#). (But see [G.S. 28A-2-4\(c\)](#) and [G.S. 36C-2-203\(f\)](#) limiting the clerk's jurisdiction.) The clerk also has original jurisdiction over minor and adult guardianship proceedings. [G.S. 35A-1203\(a\)](#) (providing that the clerk shall retain jurisdiction following appointment of a guardian). In these matters before the clerk, the clerk has the authority to

determine all issues of fact and law. [G.S. 1-301.3\(b\)](#).

b. Special Proceedings

With regard to special proceedings, the clerk's authority is somewhat more circumscribed depending on the type of special proceeding before the clerk. The clerk has original jurisdiction over a number of special proceedings, meaning they are initiated before the clerk. This includes, among others, name changes, legitimation, adoptions, sale of land to create assets, sale, mortgage, exchange, or lease of a ward's property, and cartway proceedings. (For a non-exhaustive list, see the [NC Clerk of Superior Court Manual](#), pg. 100.8-100.10.)

If an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court. [G.S. 1-301.2\(b\)](#). For example, the transfer would be to district court if raised in an adoption proceeding and to superior court if raised in a private condemnation proceeding. If a special proceeding is not transferred or is remanded to the clerk after a transfer, the clerk decides all matters in controversy to dispose of the proceeding. [G.S. 1-301.2\(d\)](#).

Note, there are certain special proceedings that are excluded from the special proceeding transfer requirement. They include incompetency and restoration proceedings and proceedings to determine whether a guardian may consent to sterilization of a ward under G.S. Chapter 35A, foreclosure proceedings under G.S. Chapter 45, and whether to order an actual or sale in lieu of partition under G.S. Chapter 46. [G.S. 1.301.2\(g\) and \(h\)](#). These matters are initiated before the clerk and the clerk decides all issues of fact and law; transfer is not available to superior court. *Id.*

c. Civil Actions

The third category where the clerk has judicial authority are in civil actions. The clerk's authority in civil matters is often concurrent with that of the superior or district court. The bulk of the clerk's authority in this area is related to pre- and post- judgment proceedings related to civil actions, such as attachments, claim and delivery, and proceedings supplemental to executions. The clerk also has the authority to rule on certain motions such as extensions of time and substitution of parties and, under limited circumstances, to enter consent, default, and confessions of judgment. In any civil action where the clerk has the authority to exercise jurisdiction, if both the judge and the clerk are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially. [G.S. 1.-301.1\(d\)](#).

This post doesn't begin to touch on the full scope and nature of the clerk's judicial authority and other important areas shaping that authority such as the rules of evidence (spoiler #1: they generally [apply](#) but are sometimes relaxed), the rules of civil procedure (spoiler #2: they apply in [some proceedings](#) before the clerk but [not others](#)), and contempt (spoiler #3: the clerk has

On the Civil Side

A UNC School of Government Blog

<https://civil.sog.unc.edu>

contempt authority as I've discussed [here](#) and [here](#) – and such authority may be changing based on a recent bill filed in the NC House, [H236](#)). Stay tuned for more on hearings before the clerk in the months to come. Feel free to leave any thoughts below.

The Little Engine that Could: Article 27A, G.S. Chapter 1

In my [last post](#), I wrote about the office of the clerk of superior court and the clerk's judicial authority. I provided a basic framework for this authority and noted that the clerk's non-criminal authority falls into three main categories:

1. estates and trusts,
2. civil, and
3. special proceedings.

Some Background on Article 27A of G.S. Chapter 1

I did not come up with these categories on my own. In fact, there are three statutes located in Article 27A of G.S. Chapter 1 that clearly define these as the primary categories of the clerk's judicial authority. They are [G.S. 1-301.1](#) (civil actions), [G.S. 1-301.2](#) (special proceedings), and [G.S. 1-301.3](#) (estates and trusts).

It is easy to forget these statutes, as they sit separate and apart from the substantive chapters throughout the General Statutes that govern proceedings before the clerk, but for three small statutes, they pack a lot of punch. I would suggest that knowing these statutes is critical for any clerk or assistant clerk who presides over hearings and for any party or practitioner appearing in a judicial proceeding before the clerk. They give context and guidance to proceedings before the clerk and establish the scope of the clerk's jurisdiction and the procedure related to transfer and appeal of the clerk's orders.

Article 27A of G.S. Chapter 1 was adopted by the General Assembly in 1999 as [S.L. 1999-216](#) to replace the existing Article 27. The now repealed and replaced Article 27 was originally enacted after the Civil War and did not contemplate the unified court system adopted in the 1950s and 1960s in NC. See [North Carolina Legislation 1999, Chapter 6, UNC Institute of Government](#). The old Article 27 established some procedure and guidance for appeals and transfers of special proceedings, but also had conflicting and oftentimes confusing language. *Id.* With regard to estate matters, there was a complete lack of guidance in statute and case law was not followed consistently across the state. *Id.*

The purpose of the new Article 27A was "to bring some order to the handling of these cases and to provide easily accessible, clear guidance to clerks, judges, attorneys, and litigants who appear before a clerk of court in a civil action, special proceeding, or estate matter." *Id.* Thus, the General Assembly established in statute the three categories of actions before the clerk.

So what exactly do the three statutes under Article 27A of G.S. Chapter 1 say?

Transfer and Appeal of Estate and Trust Matters before the Clerk (G.S. 1-301.3)

The statute under Article 27A applicable to estates and trusts is G.S. 1-301.3. It applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. It does not apply to a special proceedings arising in a matter relating to the administration of an estate. G.S. 1-301.2, discussed below, applies to those special proceedings before the clerk.

Fortunately, my colleague, Ann Anderson, has written quite a bit about this statute. Her 2012 bulletin, [Estate Proceedings in North Carolina](#), provides guidance on the application of G.S. 1-301.3 on pages 15 through 18. I would recommend reading through this section and paying particular attention to the special evidentiary exception discussed on page 18 that applies to estate matters before the clerk and on appeal to superior court. G.S. 1-301.3(d).

Appeal of the Clerk's Order in Civil Actions (G.S. 1-301.1)

G.S. 1-301.1 applies to orders or judgments entered by the clerk of superior court in civil actions in which the clerk exercises the judicial powers of that office. G.S. 1-301.1(a). If another provision of the General Statutes conflicts with the procedure set forth in G.S. 1-301.1, that specific provision controls. *Id.* See also [Mosler v. Druid Hills Land Co., Inc.](#), 199 NC App. 293. (2009).

I discussed the clerk's civil judicial powers and the clerk's concurrent authority with the judge in certain civil actions in my [earlier post](#). As I noted, if both the judge and the clerk are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially. G.S. 1-301.1(d).

If a party elects to proceed before the clerk and the clerk enters an order in a civil action, an aggrieved party may file an appeal within 10 days from entry of the clerk's order. G.S. 1-301.1(b). The appeal is to the "appropriate court" for a trial de novo. *Id.* See also [Progressive Lighting, Inc. v. Historic Designs, Inc.](#), 156 NC App. 695 (2003). For example, if in a claim and delivery action the clerk enters an order and the underlying civil action is in district court, the appeal of the clerk's order in the claim and delivery proceeding is to district court. See [NC Clerk of Superior Court Procedures Manual](#), pg. 35.7-35.8.

On the de novo appeal, the judge may hear and determine all matters in controversy in the civil action, including the issue that served as the basis for the appeal, unless:

1. The matter is one that involves an action that can be taken only by a clerk. Under these circumstances, the judge must dispose of only the matter appealed and remand the action to the clerk. The judge may also order the clerk to take the action that can only be taken by the clerk. G.S. 1-301.1(c).
2. Justice would be more efficiently administered by the judge's disposing of only the matter appealed. Under these circumstances, the judge must dispose of the matter appealed and

remand the action to the clerk. *Id.*

Transfer and Appeal of Special Proceedings before the Clerk (G.S. 1-301.2)

The third statute under Article 27A of G.S. Chapter 1 is G.S. 1-301.2 and pertains to transfer and appeal of “special proceedings” heard by the clerk in the exercise of the judicial powers of that office. G.S. 1-301.2(a). A special proceeding is defined in G.S Chapter 1 and is defined in the negative – essentially, by what it is not. Under [G.S. 1-1](#), remedies in the courts are divided into two categories: (1) actions, and (2) special proceedings.

An “action” under G.S. 1-2 is what we typically think of when we think of a proceeding in a court. It is a proceeding by which one party prosecutes another party to enforce or protect a right, redress or prevent a wrong, or punish or prevent a public offense. [G.S. 1-2](#). There are two types of actions: civil and criminal. [G.S. 1-4](#). “Every other remedy is a special proceeding.” [G.S. 1-3](#).

This definition of special proceeding leaves open a broad array of proceedings that could and do fall into this category. As evidenced by decisions of the NC Supreme Court as early as the 1870s, courts over time have struggled with a bright-line definition of “special proceeding.” See, e.g., *Tate v. Powe*, 64 N.C. 644 (1870). One practical way to think of a special proceeding is a proceeding that is initiated by petition for the purpose of obtaining “court approval to confer new status or to authorize the taking of some kind of action.” North Carolina Legislation 1999, Chapter 6, UNC Institute of Government. They are often uncontested. *Id.* Frequently, the legislature short circuits the discussion of “is it or isn’t it an SP” and expressly designates a proceeding as a special proceeding or references to G.S. 1-301.2 in the underlying statute creating the proceeding.

Special proceedings create an interesting challenge in application. The *specific* procedures for each special proceeding are prescribed in the relevant governing statute creating the proceeding, such as Chapter 48 for adoptions, Chapter 46 for partitions, Chapter 101 for name changes, and Chapter 40A for private condemnations. The *general* procedure governing special proceedings is set forth in [Article 33 of G.S. Chapter 1](#) and fills in the gaps where the specific statute is silent. This includes a provision which states that the Rules of Civil Procedure set forth in G.S. Chapter 1A are applicable to special proceedings except as otherwise provided. [G.S. 1-393](#). Furthermore, G.S. 1-301.2 attempts to corral special proceedings into one statute when it comes to transfer and appeal of these actions. However, the statute expressly provides that to the extent it conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls. G.S. 1-301.2(a).

I generally described the provisions related to transfer of special proceedings under G.S. 1-301.2 in my [previous post](#). With regard to appeal of orders of the clerk entered in special proceedings, an aggrieved party may appeal a final order of the clerk to the appropriate court for a hearing de novo. G.S. 1-301.2(e). Note, although not a final order of the court, the clerk’s order determining the issue of actual partition or sale in lieu of partition is appealable under G.S. 1-301.2(h). The notice

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of appeal must be in writing and filed within 10 days of entry of the clerk's order. *Id.* The statute notes one specific exception for this 10-day rule related to a clerk's order confirming a partition under [G.S. 46.28.1\(f\)](#). The clerk's order remains in effect pending appeal until replaced by the judge on appeal. *Id.* The order may be stayed by the judge or the clerk if the appellant posts a bond as set by the judge or the clerk issuing the stay. *Id.*

Appeals and Transfers from the Clerk of Superior Court

Ann M. Anderson

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Introduction

In addition to their other duties, North Carolina's clerks of superior court have wide-ranging judicial responsibility.¹ Clerks have authority to hear and determine an array of matters spanning substantive areas as diverse as partitions of land, appointment of guardians for adult incompetents, and real estate foreclosures, to name only a few. The matters a clerk hears essentially fall into three categories: civil actions, special proceedings, and—broadly-stated—estates. Clerks enter many types of orders in civil actions, often in ancillary proceedings aimed at providing litigants pre- and post-trial remedies. Clerks also preside over hearings in dozens of types of actions that are statutorily designated as “special proceedings,” examples of which are listed in this bulletin. In addition, clerks are North Carolina's *ex officio* judges of probate. In that role, they have jurisdiction to determine matters related to decedents' estates, trusts, estates of minors, and estates of persons who have been adjudicated incompetent.

The General Statutes provide that the trial division—the superior courts and, to a much more limited extent, the district courts—have appellate jurisdiction over most appealable orders entered by clerks.² The procedures and review standards governing appeals from the clerk vary according to which of the three types of orders is being appealed. The differences are largely related to whether a clerk has exclusive or non-exclusive jurisdiction over the proceeding at issue. This bulletin discusses the different appeal standards applied by trial courts to clerks' orders, and it notes some special rules and exceptions. This bulletin also discusses when special

¹ This judicial authority is held by the one-hundred elected county clerks of court. The assistant clerks of superior court are also statutorily-authorized to conduct hearings and perform related judicial functions, and “any act of an assistant clerk is entitled to the same faith and credit as that of the clerk.” G.S. 7A-102(b). Deputy clerks, on the other hand, are not authorized to act as hearing officers. *Id.* Especially in larger counties with a higher case volume, elected clerks often must delegate hearing authority to assistant clerks, many of whom, over time, become specialized in handling specific types of hearings, particularly foreclosures, incompetency, and guardianship.

² G.S. 7A-251 provides,

(a) In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

(b) In all matters properly cognizable in the district court division which are heard originally before the clerk of superior court, appeals lie to the judge of district court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes.

proceedings may be transferred to a trial court judge rather than being first determined by the clerk – an important question of jurisdiction.

General Statutes 1-301.1 through 1-301.3 give the basic framework for appeal of a clerk’s order or judgment to the trial court. These statutes were enacted in 1999 at the recommendation of the General Statutes Commission to give clear procedural guidance to clerks, judges, practitioners, and litigants, while largely maintaining the essential substance of existing law.³ In addition, many of the statutes governing particular types of hearings contain further (and more specific) appeal requirements, and this bulletin makes note of some of the more common and high-volume examples. Anyone looking for guidance in an appeal from the clerk of a particular type of matter should look closely at both Chapter 1 of the General Statutes and the relevant substantive chapters governing the type of proceeding at issue.

Civil Actions

Appeals from a clerk’s order or judgment in a civil action are governed by G.S. 1-301.1.⁴ The statute specifies that a party aggrieved by an order or judgment entered by the clerk “may appeal to the appropriate court for a trial or hearing de novo.” If the civil action is filed in district court, the appeal must be filed with the district court, and if the civil action is a superior court action, the appeal must be filed with the superior court. Section 1-301.1 does not affect the concurrent jurisdiction of the clerk and judge: “If both the clerk and the judge are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially.” G.S. 1-301.1(d). Some examples of orders entered by a clerk in a civil action that are appealable to the trial court are:

Orders in proceedings supplemental to execution of judgments. G.S. 1-352 through 1-368.⁵

Orders of attachment and garnishment. G.S. 1-440.1 through 1-440.46.

Orders in claim and delivery. G.S. 1-472 through 1-474.1.

Civil contempt orders. G.S. 7A-103(7); 5A-21 through 5A-24.⁶

³ Prior to enactment of these provisions as part of S.L. 1999-216, the law was a collection of sometimes inconsistent post-Civil War statutes and decades-old cases. For a more detailed discussion of the history of these laws and the legislative process, see North Carolina Legislation 1999, Chapter 6, UNC Institute of Government.

⁴ If a specific provision of the General Statutes conflicts with G.S. 1-301.1, however, the specific provision controls. G.S. 1-301.1(a).

⁵ See *Farmers Nat’l Bank v. Burns*, 107 N.C. 465, 465, 12 S.E. 252, 252 (1890) (holding that there was an immediate right of appeal to the trial court judge from a clerk’s order supplemental to execution).

⁶ G.S. 5A-24 provides that, a “person found in civil contempt may appeal in the manner provided for appeals in civil actions.”

Criminal contempt orders by the clerk are also appealed de novo, but they must be appealed to the superior court, even where the underlying action is a district court action. Appeal from criminal contempt orders is governed by G.S. 5A-17, which provides that “appeal from a finding of [criminal] contempt by a judicial officer inferior to a superior court judge is by hearing de novo before a superior court judge.” See also *Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 418 (1996)

Notice of Appeal

Notice of appeal must be made in writing and filed with the clerk. The notice must be filed within ten (10) days of entry of the order or judgment. G.S. 1-301.1(b).⁷ “Entry” of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk’s office. G.S. 1A-1; Rule 58.⁸ After the appeal is filed, the clerk’s order or judgment remains in effect until it is modified or replaced by an order or judgment of the judge. G.S. 1-301.1(b). The judge on appeal or the clerk may issue a stay of the clerk’s order or judgment if the appellant posts an appropriate bond set by the judge or clerk issuing the stay. *Id.*

Standard of Review

A judge hears an appeal from the clerk in a civil action *de novo*. In a hearing “de novo,” the trial court hears the evidence in its entirety (“anew”), and gives no deference to the findings and conclusions of the clerk. In reviewing a clerk’s order in a civil action, the judge may hear and determine not only the matter appealed, but also all the matters in controversy in the action, unless: (1) the matter is one that involves an action only a clerk can take; or (2) justice would be more efficiently administered if the judge disposed only of the matter appealed. G.S. 1-301.1(c). If (1) or (2) applies, and the judge determines only the matter appealed, the judge must then remand the action to the clerk. *Id.* If (1) applies, the judge may order the clerk to take the relevant action that is only within the clerk’s authority. *Id.*

Special Proceedings

Appeal of a clerk’s order or judgment in a special proceeding is governed by G.S. 1-301.2. The various special proceedings are also governed by specific substantive statutes, and if one of these specific provisions conflicts with G.S. 1-301.2, “the specific provision controls.” G.S. 1-301.2(a). In addition, general procedures for special proceedings are set out in G.S. 1-393 to 408.1, and these provisions control where the specific statutes are silent. The North Carolina Rules of Civil Procedure are applicable to special proceedings unless the specific governing statutes provide otherwise or the Rules conflict with G.S. 1-393 to 1-408.1. G.S. 1-393; G.S. § 1A-1, Rule 1.

(criminal contempt orders of the clerk are properly appealed to the superior court, not Court of Appeals); *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985) (superior court is proper appeal forum from criminal contempt in district court actions). The “beyond a reasonable doubt” standard applies in the appeal hearing. *State v. Ford*, 164 N.C. App. 566, 570–71, 596 S.E.2d 846, 849–50 (2004).⁷ See *Wilson v. Watson*, 136 N.C. App. 500, 503, 524 S.E.2d 812, 814 (2000) (holding that, where party failed to bring an appeal of clerk’s order within 10 days, doctrine of res judicata prevented party from bringing same issue before superior court in separate action).

⁸ Notwithstanding the service requirement of Rule 58, clerk’s orders in matters covered by G.S. 1-301.1 do not have to be served on the other party or parties unless otherwise required by law. G.S. 1-301.1(b).

A special proceeding is a matter set before the clerk in which the clerk has jurisdiction to hear and determine an issue not heard by a judge except by transfer or appeal.⁹ There are many types of special proceedings heard by the clerk, and most are related to real property, estates and guardianship, foreclosure, and certain family law matters. Superior court judges hear appeals of special proceedings, except in very few matters—most notably adoptions, which are appealed to the district court.¹⁰ Examples of special proceedings, by general category, include:

Real Property Matters

Cartway proceedings. G.S. 136-68 to 136-70.
Condemnation by private condemners. G.S. 40A-19 to 40A-34.
Establishing and monitoring drainage districts. G.S. 156-64 to 156-78.1.
Partition. G.S. 46-1 to 46-34.
Proceeding to establish boundaries when deed and registry destroyed. G.S. 98-3.
Torrens Act proceedings for land registration. G.S. Chapter 43.
Sale, lease, and mortgage of property in case of remainders. G.S. 41-11.
Sale, lease, and mortgage of property where class membership may increase by members not yet in being. G.S. 41-11.1.
Settlement of boundaries. G.S. 38-1 to 38.4.

Estate-Related Matters¹¹

Assignment of a year's allowance of more than \$10,000. G.S. 30-27 through 30-33.
Proceeding against unknown heirs of decedent before distribution. G.S. 28A-22-3.
Proceeding for relief of surety on bond of personal representative. G.S. 28A-8-5.
Sale of land to create assets. G.S. 28A-17-1.
Spouse's right to elect life estate. G.S. 29-30.
Proceeding to take possession of decedent's real property. G.S. 28A-13-3.

Guardianship-Related Matters¹²

Adult incompetency determinations. G.S. 35A-1101 to 35A-1115.
Proceeding by foreign guardian to remove ward's property from state. G.S. 35A-1281.

⁹ All remedies in the courts of justice of North Carolina are either civil actions or special proceedings. G.S. 1-1. An "action" is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. G.S. 1-2. Every other remedy is a special proceeding. G.S. 1-3.

¹⁰ G.S. 48-2-607(b) ("A party to an adoption proceeding may appeal a final decree of adoption entered by a clerk of superior court to district court by giving notice of appeal as provided in G.S. 1-301.2.")

¹¹ Although these matters are related to estates, they are special matters that have been statutorily-designated as special proceedings, and therefore are procedurally distinct from estate proceedings, which are governed by G.S. 1-301.3, discussed later in this bulletin.

¹² Note that appointment and removal of guardians, modification of guardianships, and similar orders of the clerk in guardianships are considered estate matters governed by G.S. 1-301.3. *See infra* p. _.

Proceeding to obtain advancement from estate of incompetent person. G.S. 35A-1321.

Sale, mortgage, exchange, or lease of a ward's property. G.S. 35A-1301.

Proceeding by abandoned incompetent spouse to sell his or her separate real property. G.S. 35A-1306.

Proceeding by spouse of incompetent person for sale of real property. G.S. 35A-1307.

Proceeding to sell entirety property when one or both spouses is incompetent. G.S. 35A-1310.

Proceeding to permit sterilization of mentally ill or mentally retarded ward. G.S. 35-1245.

Foreclosure

Foreclosure under power of sale. G.S. 45-21.16.¹³

Proceeding to determine ownership of surplus proceeds. G.S. 45-21.31 through 45-21.32.

Renunciation of trusteeship by personal representative of deceased mortgagor. G.S. 45-6.

Legitimation and Proof of Birth

Proceeding by putative father to legitimate child. G.S. 49-10.

Proceeding to legitimate child when mother married to someone other than child's father. G.S. 49-12.1.

Proceeding to establish facts of birth. G.S. 130A-106.

Adoptions. G.S. 48-1-100 through 48-10-105 (appealed to district court).

Name Changes. G.S. 101-2.

Motor Vehicle Liens. G.S. 44A-2 through -6.1 and G.S. 20-77(d).

Appeal

A party aggrieved by an order or judgment of a clerk that “finally disposes” of a special proceeding may appeal to the appropriate court for a hearing *de novo*. G.S. 1-301.2(e).¹⁴ (As noted above, the “appropriate court” is typically superior court.) The appeal must be made in writing and filed with the clerk. *Id.* The notice of appeal must be filed with the clerk within ten (10) days of entry of the order or judgment. *Id.*; *see also* G.S. 45-21.16(d1)(ten-day notice in foreclosures). As in civil actions, an order or judgment in a special proceeding is “entered” when it reduced to writing, signed by the clerk, and filed in the clerk's office. G.S. 1A-1, Rule 58.

¹³ Foreclosures under power of sale are treated as special proceedings for purposes of filing and record keeping. G.S. 45-21.16(g) (“Any notice, order or other papers required by this Article to be filed in the office of the clerk of court shall be filed in the same manner as a special proceeding.”).

¹⁴ In partition actions, however, the clerk's order determining whether to order the actual partition or sale in lieu of partition does not “finally dispose” of the matter, but it is still appealable *de novo* to the superior court pursuant to G.S. 1-301.2(e). G.S. 1-301.2(f).

There is an important exception to the 10-day appeal requirement in the case of partitions of real property: In partition actions, the order of the clerk confirming the partition sale becomes final and effective 15 days after entry of the order of confirmation or when the clerk denies a petition for revocation, whichever occurs later. A party may appeal an order confirming the partition of sale of real property within 10 days of the order becoming final and effective.

G.S. 46-28.1(f); G.S. 1-301.2(e) (providing that the ten-day appeal requirement applies “except as provided in G.S. 46-28.1(f)).

Upon appeal, the clerk’s order remains in effect until it is modified or replaced by an order or judgment of a judge. G.S. 1-301.2(e). The judge or clerk may issue a stay of the clerk’s order or judgment “upon the appellant’s posting of an appropriate bond set by the judge or clerk issuing the stay.” *Id.*

Transfer

In special proceedings before the clerk, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading,¹⁵ “the clerk shall transfer the proceeding to the appropriate court.” If the issue is not raised in a pleading, but instead is raised in the course of the hearing, the clerk proceeds to hear the issue, and it is appealable *de novo* with the rest of the matter. If a special proceeding is not transferred, “the clerk shall decide all matters in controversy to dispose of the proceeding.” G.S. 1-301.2(d). Once transferred to the trial court, a special proceeding is subject to General Statutes and rules that apply to actions initially filed in that court. G.S. 1-301.2(b). Upon transfer of an issue from the clerk to the trial court, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge’s disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.

G.S. 1-301.2(c). If a special proceeding is remanded to the clerk after transfer, “the clerk shall decide all matters in controversy to dispose of the proceeding. G.S. 1-301.2(d). If an issue in a special proceeding has previously been transferred to and determined by the trial court, that issue “shall not be relitigated in a hearing *de novo* under [G.S. 1-301.2].” G.S. 1-301.2(e).

There are three major exceptions to the transfer requirement of G.S. 1-301.2:

1. Incompetency Proceedings. Petitions for adjudication of incompetency; petitions for restoration of competency; and proceedings to determine whether a guardian may consent to sterilization of a mentally ill or mentally retarded ward under G.S. Chapter 35A, “shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised.” G.S. 1-301.2(g)(1). Adjudications of an individual’s capacity, by their nature, require the clerk to consider numerous questions of fact. The procedure for these hearings is set forth in G.S. 35A-1101 through 35A-1115. Appeals from these orders are also governed by G.S. Chapter 35A “to the extent that Chapter conflicts with G.S. 1-301.2.” G.S. 1-301.2(g)(1).

¹⁵Or, in the case of adoptions, when it is raised either in a pleading or a written motion.

Section 35A-1115 provides: “Appeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals.” G.S. 35A-1115.¹⁶

2. Foreclosures. Foreclosures under power of sale, which are governed by G.S. Chapter 45, Article 2A, “shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised.” G.S. 1-301.2(g)(2). A clerk’s hearing in a foreclosure under power of sale is a tightly-circumscribed proceeding in which the clerk’s task is to make findings as to five legal questions and, based on these findings, to order or deny a foreclosure sale. G.S. 45-21.16(d). An appeal of the clerk’s order is to the superior court *de novo*, and the superior court judge’s task is identical to the clerk’s. G.S. 45-21.16(d1).¹⁷ Neither the clerk in the original hearing nor the judge on appeal has jurisdiction to consider additional factual or equitable issues. Other equitable or legal issues may *only* be raised by bringing a *separate* civil action in superior court pursuant to G.S. 45-21.34 before the rights of the parties to the sale are fixed. *See Mosler v. Druid Hills Land Co., Inc.*, 199 N.C. App. 293, 297, 681 S.E.2d 456, 459 (2009) (holding that superior court did not have jurisdiction to consider the equitable issue of merger of title in an appeal of a clerk’s foreclosure order); *see also Goad v. Chase Home Finance, LLC*, 704 S.E.2d 1, 4–6 (2010) (discussing when the right to bring an action under G.S. 45-21.34 becomes fixed).¹⁸

3. Partitions. The question of whether to order the actual partition or a sale in lieu of partition of the real property at issue “shall not be transferred and shall be determined by the clerk.” G.S. 1-301.2(h). The clerk’s order on this issue, although interlocutory, is immediately appealable to the superior court, which has the identical task as the clerk. *Id.*¹⁹ The final order in a partition matter is the clerk’s confirmation of the partition sale, which is appealable *de novo* to the superior court ten days after the order becomes final and effective. G.S. 46-28.1(f).

Estates, Trusts, and Guardianships

As *ex officio* judges of probate, the clerks of superior court have original, exclusive jurisdiction over “the administration, settlement, and distribution of estates of decedents.” G.S. 28A-2-1.²⁰

¹⁶ For a discussion of who may be considered an “aggrieved party” for purposes of the appeal of an incompetency determination, see *In the Matter of Winstead*, 189 N.C. App. 145, 657 S.E.2d 411 (2008).

¹⁷ Appeals from orders of sale in foreclosure proceedings are governed by G.S. Chapter 45 to the extent that Chapter conflicts with G.S. 1-301.2. G.S. 1-301.2(g)(2).

¹⁸ Once properly brought in the superior court, the equitable action under G.S. 45-21.34, in the superior court’s discretion, may be consolidated with an appeal from the clerk of the order of sale. *See Driftwood Manor Investors v. City Fed. Sav. & Loan*, 63 N.C. App. 459, 462, 305 S.E.2d 204, 206 (1983).

¹⁹ In its *de novo* review of a clerk’s partition order, the superior court must, like the clerk, make findings of fact and conclusions of law as to each of the required elements of the partition. *Lyons-Hart v. Hart*, 695 S.E.2d 818, 822–23 (N.C. App. 2010) (reversing superior court order of partition by sale where it failed to make adequate findings of fact of the fair market value of the property).

²⁰ G.S. 7A-241 also provides that, “[e]xclusive original jurisdiction for the probate of wills and the administration of decedents’ estates is vested in the superior court division, and is exercised by the

Accordingly, appeal of a clerk’s order or judgment in an estate matter is “on the record”, rather than *de novo*, and it is governed by G.S. 1-301.3. This statute applies not only to decedent’s estates, but also to matters “arising in the administration of testamentary trusts and of estates of...incompetents, and minors.” G.S. 1-301.3(a). Clerks’ orders in a guardianship proceeding, including the appointment of a guardian, are considered estates proceedings, and thus are also covered by G.S. 1-301.3. If the matter in question is a special proceeding relating to the administration of an estate or guardianship, examples of which are listed in the prior section, G.S. 1-301.2 (the *de novo* standard) applies.²¹

Because of the nature of the clerk’s jurisdiction, “in matters covered by [G.S. 1-301.3], the clerk shall determine all issues of fact and law.” G.S. 1-301.3(b). There is no provision in G.S. 1-301.3 for transfer of an estate or guardianship matter to a trial court judge.²² Upon making a determination in the matter, the clerk “shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.” *Id.*²³

Appeal

Appeal of an estate or trust matter is to the superior court. Parties “aggrieved by an order or judgment of the clerk”, and wishing to appeal, must file a written notice of the appeal with the clerk. The notice must be filed within ten (10) days of the entry of the order or judgment. G.S. 1-301.3(c). As in civil actions and special proceedings, “entry” of an order or judgment occurs when it is reduced to writing, signed by the clerk, and filed in the clerk’s office. N.C. R. Civ. P. 58. In the written notice of appeal, the aggrieved party “shall specify the basis for the appeal.” G.S. 1-301.3(c).

Unless statutes or case law provides otherwise, a superior court judge or the clerk may issue a stay of the order or judgment upon the appellant’s posting an appropriate

superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law.”

²¹ As noted above, a determination of whether an adult is incompetent pursuant to Chapter 35A is also treated as a special proceeding and is heard on appeal *de novo* by the superior court. G.S. 35A-1115; G.S. 1-301.2.

²² It should be noted, however, that certain trust matters *are* transferrable pursuant to Chapter 36C, which governs express trusts. A number of proceedings trust proceedings are in the clerk’s original, *exclusive* jurisdiction—such as appointment and removal of a trustee—and these matters may not be transferred to the trial court. G.S. 36C-2-203(a). There are a few other, broad categories over which the clerk has original but *non-exclusive* jurisdiction. G.S. § 36C-2-203(9). Upon motion of a party, these hearings, such as proceedings to ascertain beneficiaries, “shall” be transferred to the Superior Court. *Id.*

²³ A “finding of fact” is a determination reached after “logical reasoning from the evidentiary facts.” *Sheffer v. Rardin*, 704 S.E.2d 32, 35 (N.C. App. 2010) (citing *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657–58 (1982)). Findings of fact are not recitations of the evidence or summaries of the record. The clerk must reach factual conclusions from the evidence in the record, resolving the material disputes in the form of judicial “findings.” A conclusion of law is the application of the findings of fact to the controlling law. *Id.* In making written findings, the clerk is not required to include every “evidentiary fact” in the case. The order need only include those “ultimate” or “controlling” findings of fact necessary to make the relevant conclusions of law. *Quick*, 305 N.C. at 452, 290 S.E.2d at 658; *Woodward v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).

bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority. G.S. 1-301.3(c).

Unlike in civil actions and special proceedings, the superior court in an estate or trust matter does not review the clerk's decision *de novo*. Instead, the court reviews the matter under the more deferential "on the record" standard. Specifically,

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

G.S. 1-301.3(d). The superior court judge has no authority to modify or substitute the clerk's findings of fact. *In the Matter of Estate of Severt*, 194 N.C. App. 508, 513–14, 669 S.E.2d 886, 889–891 (2008). In *Severt*, the clerk had jurisdiction over administration of an estate valued at over \$100 million. In the course of the estate's administration, the clerk heard a complex set of issues related, among other things, to the deceased's domicile, and he entered an order with twelve findings of fact and ten conclusions of law. Upon appeal, the superior court judge reversed the clerk's order and entered an order making his own findings of fact, some of which "re-characterized the findings made by the clerk." *Id.* at 512, 669 S.E.2d 889. The Court of Appeals vacated the superior court order, stating

There is no language in the superior court's order that tells this Court whether or not the clerk's findings of fact were supported by the evidence. Even if the superior court made such a determination, our statutes make no provision for the trial court to make such a modification to the clerk's findings of fact. Here, the superior court seems to have ignored completely those findings of fact made by the clerk...and substituted its own in their place. In doing so, the trial court exceeded its statutorily proscribed standard of review.

Id. at 513, 669 S.E.2d at 889.

Because the superior court's review is limited to an examination of the clerk's written findings and conclusions (and their support in the record), it is clear that the clerk must provide the requisite written order for the judge to review. The clerk may not merely recite his or her decision orally at the conclusion of the hearing or enter an order containing only the clerk's final decree or disposition. G.S. 1-301.3(b), (d). In the absence of an order, the superior court should remand the matter to the clerk for the proper findings and conclusions.

In "specifying the basis for the appeal" pursuant to G.S. 1-301.3(c), the aggrieved party must point to specific findings and conclusions of the clerk. The superior court is not required to review and assess every finding and conclusion included in the clerk's order. The superior court "only reviews those findings of fact which the appellant has properly challenged by specific exceptions." *In Re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 853 (2006). It

is not sufficient for a party to merely make a general objection to the clerk's findings and conclusions. *Id.* In *Whitaker*, the clerk held a hearing on a motion by a co-executor of an estate that had been very contentious up to that point. The co-executor sought reimbursement for expenses and attorney fees she had allegedly incurred during the complicated administration. The clerk granted in part and denied in part the motion in an order consisting of sixty-six findings of fact and several conclusions of law. The co-executor appealed to the superior court, stating in her notice of appeal that "the findings of fact are not supported by evidence, the conclusions of law are not supported by findings of fact, and the order is inconsistent with the conclusions of law, prior court orders and applicable law." The superior court noted that this assignment of error was merely a general objection and thus inadequate to properly state an appeal. The judge nevertheless reviewed the findings and conclusions and entered an order affirming them. The Court of Appeals agreed with the superior court judge that the statement of error was inadequate:

In the present case, petitioner's appeal to the superior court did not refer specifically to any of the clerk's 66 findings of fact. Th[e] statement constitutes only a broadside attack on the findings of fact and thus the trial court did not err by concluding that petitioner had only made a 'general objection.'

Id. The Court of Appeals reiterated the rule that an appeal from a clerk's order must make a specific challenge or it will be "ineffective." The panel then affirmed the superior court without conducting its own review of the clerk's findings of fact and conclusions of law. *Id.*

Record of the Clerk's Hearing

To determine "whether the findings are supported by the evidence," the superior court judge must have reasonable access to the evidentiary record before the clerk. The statute therefore provides that,

In the discretion of the clerk or upon request of a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device....If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk.

G.S. 1-301.3(f). As a practical matter, whenever a clerk hears a contested estate or trust matter that is reasonably likely to be appealed, a clerk is well served to record the proceeding. Recording will eliminate the difficulty inherent in relying on notes and memory to re-create a record, particularly when significant time has passed since the hearing was conducted. Where the parties use the services of a court reporter, a "transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge." *Id.*

Special Evidentiary Exception

Although contested proceedings before the clerk tend to be less formal than proceedings before the trial courts, the North Carolina Rules of Evidence nevertheless generally apply.²⁴ Rule 103 states that parties may not raise an issue on appeal if they do not properly object to it in the underlying proceeding: “[E]rror may not be predicated upon a ruling which admits or excludes evidence unless a . . . timely objection or motion to strike appears of record.” N.C. R. Evid. 103. When G.S. 1-301.3 was enacted, however, an exception to Rule 103 was carved out for estate and trust proceedings. In actions covered by this section, including all estates and trust matters, “[i]t is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion.” G.S. 1-301.3(d). If the judge finds prejudicial error in the clerk’s admission or exclusion of evidence, [T]he judge, in the judge’s discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the evidentiary issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence.

Id.

Conclusion

Clerks of superior court preside over hearings in a wide range of subject areas, and their orders in these matters are typically appealed to the trial court level—most often superior court. Because the extent of the clerks’ jurisdiction over these matters varies, however, the standards of appeal and transfer vary as well. For orders in civil actions and “final” orders in special proceedings, the trial courts hear appeals de novo. Also, in special proceedings, the clerk must often transfer certain questions of fact and equity to the trial courts if these questions are properly raised by the parties. Major exceptions exist in incompetency, foreclosures, and partitions. In estates, trusts, and many guardianship matters, appeals to the superior court are heard according to the “on the record” standard, which gives considerable deference to the findings and conclusions of the clerk. In these matters, special evidence standards apply in hearings before the clerk, and there is typically no transfer to superior court of factual and equitable issues.

Knowing that differing appeal and transfer requirements apply to clerks’ proceedings can help litigants prepare more effectively for these proceedings; can aid clerks in gauging the type of record to maintain; and can help trial court judges apply the appropriate review standard. Litigants and their counsel should always consult both the procedural statutes applicable to appeals and transfers from the clerk as well as the substantive statutes governing the type of proceeding at issue.

²⁴ “Except as otherwise provided . . . by statute, these rules apply to all actions and proceedings in the courts of this State.” N.C. R. Evid. 1101.

Article 27A.

Appeals and Transfers From the Clerk.

§ 1-301.1. Appeal of clerk's decision in civil actions.

(a) **Applicability.** - This section applies to orders or judgments entered by the clerk of superior court in civil actions in which the clerk exercises the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.

(b) **Appeal of Clerk's Order or Judgment.** - A party aggrieved by an order or judgment entered by the clerk may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a trial or hearing de novo. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. Notice of appeal shall be filed with the clerk in writing. Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay.

(c) **Duty of Judge on Appeal.** - Upon appeal, the judge may hear and determine all matters in controversy in the civil action, unless it appears to the judge that any of the following apply:

- (1) The matter is one that involves an action that can be taken only by a clerk.
- (2) Justice would be more efficiently administered by the judge's disposing of only the matter appealed.

When either subdivision (1) or subdivision (2) of this subsection applies, the judge shall dispose of the matter appealed and remand the action to the clerk. When subdivision (1) of this subsection applies, the judge may order the clerk to take the action.

(d) **Judge's Concurrent Authority Not Affected.** - If both the judge and the clerk are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially. (Rev. s. 529; C.S., s. 558; 1971, c. 381, s. 12; 1999-216, s. 1.)

§ 1-301.2. Transfer or appeal of special proceedings; exceptions.

(a) **Applicability.** - This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.

(b) **Transfer.** - Except as provided in subsections (g) and (h) of this section, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court. In court, the proceeding is subject to the provisions in the General Statutes and to the rules that apply to actions initially filed in that court.

(c) **Duty of Judge on Transfer.** - Whenever a special proceeding is transferred to a court pursuant to subsection (b) of this section, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge's disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.

(d) Clerk to Decide All Issues. - If a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer, the clerk shall decide all matters in controversy to dispose of the proceeding.

(e) Appeal of Clerk's Decisions. - A party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo. Under G.S. 46A-85(a), however, a party may appeal an order confirming the partition sale of real property within 10 days of the order becoming final. Notice of appeal shall be in writing and shall be filed with the clerk. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay. Any matter previously transferred and determined by the court shall not be relitigated in a hearing de novo under this subsection.

(f) Service. - Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.

(g) Exception for Incompetency and Foreclosure Proceedings and Proceedings to Permit Sterilization for Medical Necessity. -

(1) Proceedings for adjudication of incompetency or restoration of competency under Chapter 35A of the General Statutes, or proceedings to determine whether a guardian may consent to the sterilization of a ward with a mental illness or intellectual disability under G.S. 35A-1245, shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised. Appeals from orders entered in these proceedings are governed by Chapter 35A of the General Statutes to the extent that the provisions of that Chapter conflict with this section.

(2) Foreclosure proceedings under Article 2A of Chapter 45 of the General Statutes shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised. Equitable issues may be raised only as provided in G.S. 45-21.34. Appeals from orders entered in these proceedings are governed by Article 2A of Chapter 45 of the General Statutes to the extent that the provisions of that Article conflict with this section.

(h) Exception for Partition Proceedings. - Notwithstanding the provisions of subsection (b) of this section, the issue whether to order the actual partition or the sale in lieu of partition of real property that is the subject of a partition proceeding shall not be transferred and shall be determined by the clerk. The clerk's order determining this issue, though not a final order, may be appealed pursuant to subsection (e) of this section. (C.C.P., c. 115; Code, s. 256; 1903, c. 566; Rev., ss. 588, 717; C.S., ss. 634, 758; 1971, c. 381, s. 12; 1995, c. 88, s. 2; 1999-216, s. 1; 2003-13, s. 2; 2009-362, s. 5; 2018-47, s. 1(a); 2020-23, s. 4.)

§ 1-301.3. Appeal of trust and estate matters determined by clerk.

(a) Applicability. - This section applies to matters arising in the administration of trusts and of estates of decedents, incompetents, and minors. G.S. 1-301.2 applies in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate.

(b) Clerk to Decide Estate Matters. - In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.

(c) **Appeal to Superior Court.** - A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of service of the order on that party. If a timely motion is made by any party for relief under Rule 52(b) or 59 of the Rules of Civil Procedure, the 10-day period for taking appeal is tolled as to all parties. Upon entry of an order disposing of the motion, the 10-day period then runs as to each party from its service upon that party. The notice of appeal shall contain a short and plain statement of the basis for the appeal. Unless otherwise provided by law, a judge of the superior court or the clerk may issue a stay of the order or judgment upon the appellant's posting an appropriate bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.

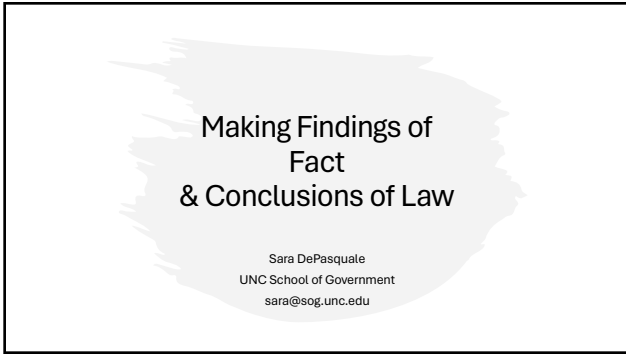
(d) **Duty of Judge on Appeal.** - Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

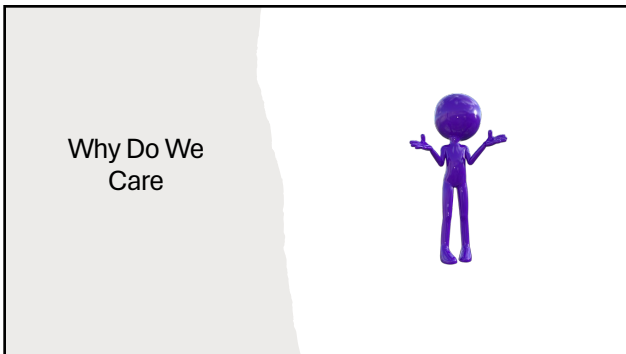
It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion. If the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the factual issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence. If the judge retains jurisdiction and either excludes evidence that was considered by the clerk or considers new evidence that was not considered by the clerk, then the judge shall review issues of fact and law de novo based on the record from the hearing below, as modified by the court, and any new evidence heard by the court.

(e) **Remand After Disposition of Issue on Appeal.** - The judge, upon determining the matter appealed from the clerk, shall remand the case to the clerk for such further action as is necessary to administer the estate.

(f) **Recording of Estate Matters.** - In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device. A transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge. If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk. (1999-216, s. 1; 2011-344, s. 1; 2021-53, s. 3.5.)



1



2



3

Rule 52. Findings by the court

Findings –

(1) 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.

4

G.S. 1-301.2(d)

(d) Clerk to Decide All Issues. – If a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer, the clerk shall decide all matters in controversy to dispose of the proceeding.

G.S. 1-301.3(b)

(b) Clerk to Decide Estate Matters. – In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.

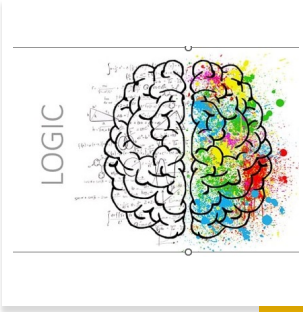
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Appellate
Review



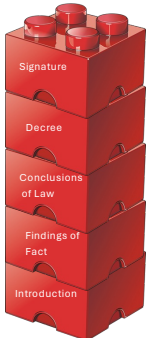
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Explains your decision



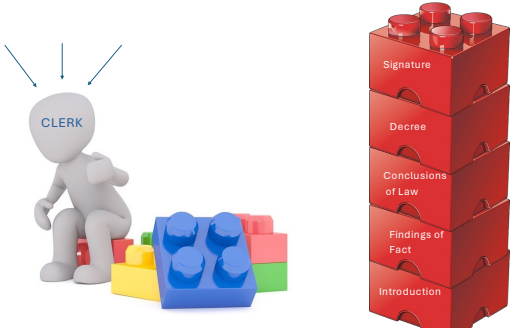
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Building Blocks of an Order



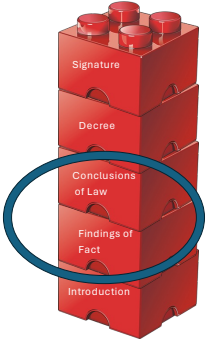
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CLERK



9

Our Focus




Signature
Decree
Conclusions of Law
Findings of Fact
Introduction

10

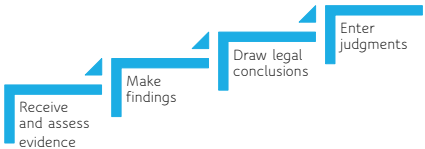
Know the law

- Order must cover what is required
 - Know what the issues are
- Starts before or during the trial
- Address the issues as you go



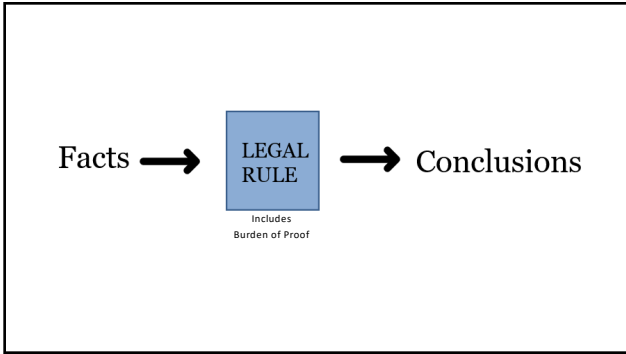
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The Steps

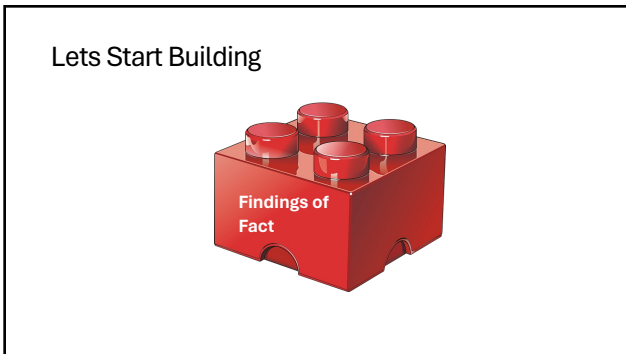


Receive and assess evidence
Make findings
Draw legal conclusions
Enter judgments

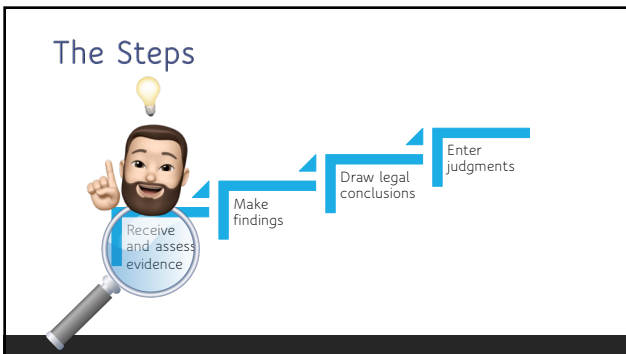
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13



14



15

Competent Evidence

You determine


- Relevance and Admissibility
- Witness credibility
- Weight of the value of the different evidence presented
- Make reasonable inferences



16

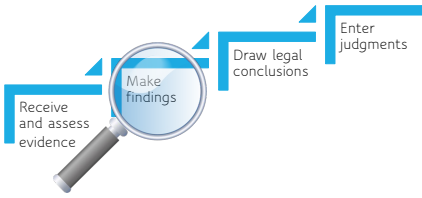
Competent evidence does not include

- statements by counsel
- court's knowledge from earlier proceedings



17

The Steps



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graph LR; A[Receive and assess evidence] --> B[Make findings]; B --> C[Draw legal conclusions]; C --> D[Enter judgments];
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18

2 Types of Facts
In re G.C., 384 N.C. 62 (2023)

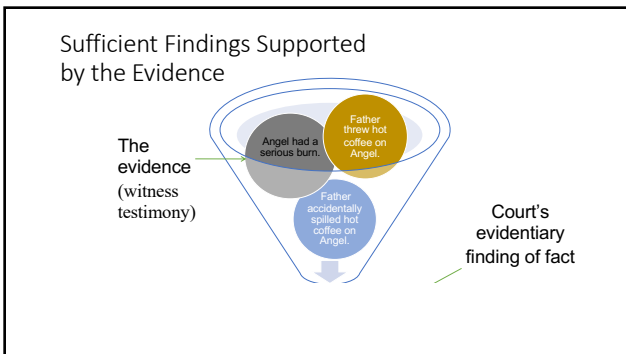
Evidentiary

- Subsidiary facts required to prove ultimate facts
- Things in space and time that can be objectively ascertained by 1 or more of the 5 senses, *In re M.N.C., 176 N.C. App. 114 (2006)*

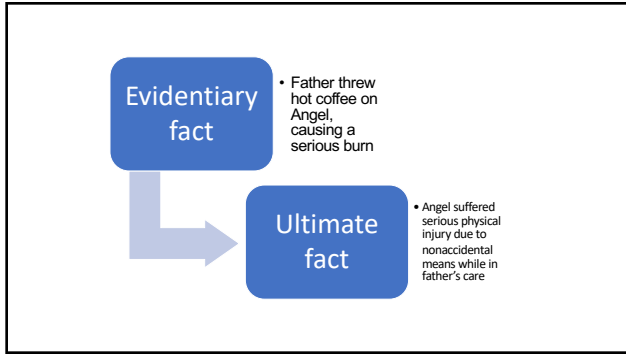
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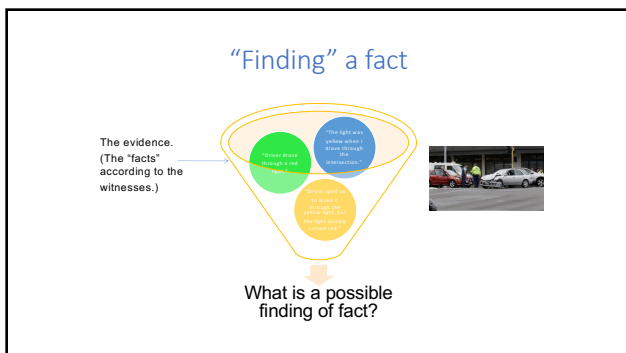
How did that work?

§ 7B-101. Definitions.
 As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused juveniles. – Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:

a. inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;


23



24

Testimony

- Recitation of testimony
"Doctor testified that Bobby had two broken bones."
- Finding based on testimony
"Bobby had two broken bones."



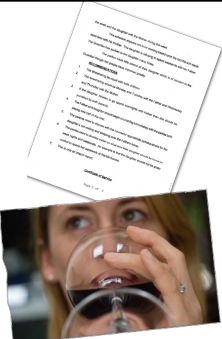
25

Report

- Report or Document by Itself
"The GAL report is incorporated..."

vs.

- "after reviewing the GAL report, the court finds the mother arrived at the supervised visitation center impaired from alcohol."




26

Do Not Give A Description

- Description of Evidence
"DSS introduced a case plan setting out steps respondents agreed to take."

vs.

- "On [date] respondents and DSS agreed on a case plan that provided for"



27

Other Issues with Findings

Should not be equivocal

NOT: "It appears that Mrs. Parker suffers from depression."

YES: "Mrs. Parker suffers from depression."

28

Lack of Specificity

"Father has a serious drinking problem."


vs.

"Father regularly gets drunk on weekends. When he is drunk, he is easily angered and sometimes violent toward his wife and children. The children try to avoid him. On weeknights he regularly drinks at least a 6-pack of beer. . ."

29

Can you think of other descriptors you shouldn't use?

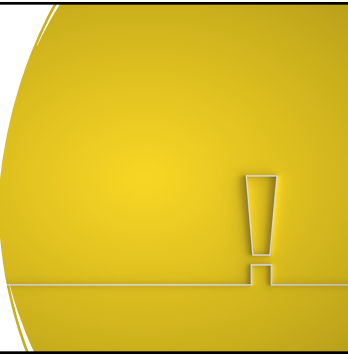
- Plaintiff presented evidence that showed
- The parties disagree about
- Defendant contends
- Plaintiff claims



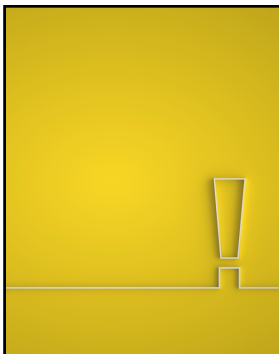
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Does the statutory language have to be used?

- NO
- Substance of statute must be addressed



31




Can an order cut and paste from a pleading?

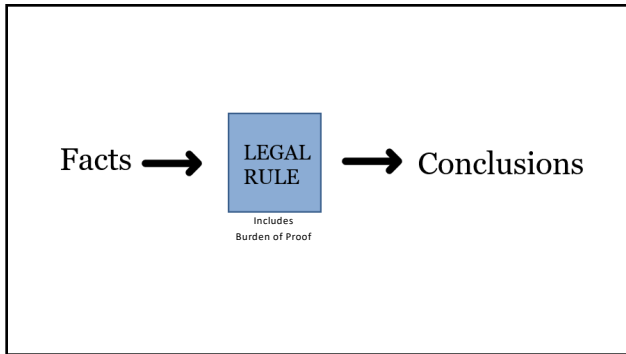
- Yes, not per se reversible error
- But, must demonstrate court used process of logical reasoning to make ultimate facts based on evidentiary facts
- Make sure based on evidence admitted

32

Lets Keep Building



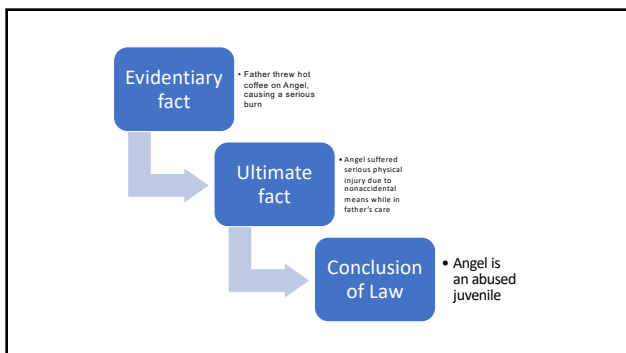
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34



35



36

How did that work?

§ 7B-101. Definitions.

As used in this Subchapter, unless the context clearly requires otherwise, the following words have the listed meaning:

- (1) **Abused juveniles**. Any juvenile less than 18 years of age (i) who is found to be a victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:
 - a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

37

Give Examples of Conclusion of Law

38

Chapel Hill-Carrboro Schools v. Chavioux, 116 N.C. App. 131 (1994).

"A bare conclusion such as the one in this case does not meet the requirements of Rule 52(a)(1). "...We cannot determine what the judge's factual and legal grounds for his judgment were and, thus, may not review it on appeal."

The trial judge's order reads as follows:

THIS MATTER COMING ON FOR HEARING and having been heard by the undersigned Judge, sitting without a jury, at the December 3, 1992, Civil Session of the District Court and

This matter appearing on the regular printed calendar, copies of which were mailed to both parties as Notice of the hearing, and

The plaintiff was represented by counsel, the defendant was not present for trial but the defendant's spouse was present Pro Se, and

Upon call of the case for trial the defendant's spouse requested a continuance, which was denied.

Having reviewed the pleadings and having heard the evidence the Court concludes that the plaintiff should recover nothing of the defendant.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff recover nothing of the defendant.

This 11th day of December, 1992.

39

Rule 52

Rule 52. Findings by the court
 Findings –
 (1) 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.

40

“Separately”

Use headings

- Findings of Fact
- Conclusions of Law
- Order/Decree

} If mislabeled, will be treated appropriately

41

It Matters for Appellate Review

Findings of fact


- Are they supported by competent evidence / burden of proof

Conclusion of law

- De novo review; do findings support conclusion

42


Pop Quiz!



vevo

CLIPBA


43



Which clip has the facts?

- CLIP A
- **CLIP B**

44




Which clip has the legal rule?

- **CLIP A**
- CLIP B

45







Which clip has the conclusion of law?





46

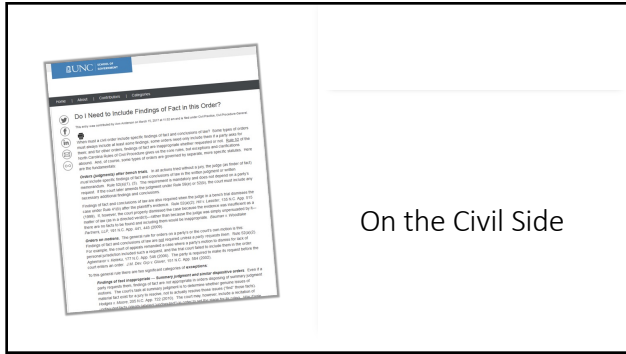
In Your Order, Answer Everything

-  Find all the facts necessary to dispose of all the legal issues
-  Make conclusions as to all the legal issues
-  Not a checklist, it's a process!
-  Be precise and clear

47

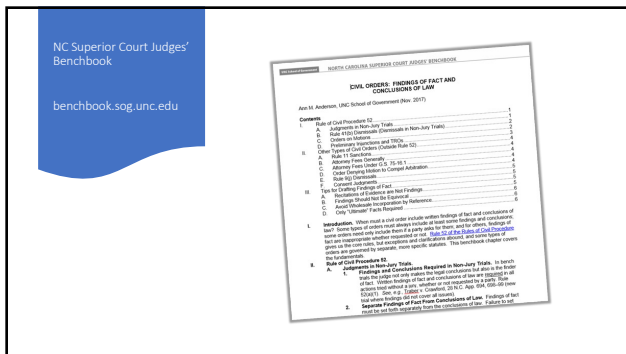
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50



51

Estates

A 20-year-old man, Frank, dies without a will. Both of his parents are alive, and he has no siblings, spouse, or children. A proceeding to determine heirs is filed by Frank's father. The father asserts that Frank's mother is not entitled to take as an heir because Frank's mother abandoned him.

Although Frank was initially raised by both of his parents, his mother left his father for another man. When his parents divorced, Frank was 8 years old. Frank's parents were awarded joint legal custody, and his father was awarded physical custody with his mother having three weekends a month visitation, two weeks in the summer, and alternating school vacations and holidays. Frank's mother exercised her visitation rights but never participated in decision-making for him. When Frank was 10, mother married the man she left his father for and a year later she had a child. Once she had her child with her new husband, Frank's mother stopped executing her visitation and stopped paying child support. Frank's mother did call him every year on his birthday and sent a small gift every Christmas. A year before Frank died, Frank reached out to mother and they started to repair their relationship, emailing and talking regularly as well as seeing each other monthly. Frank was able to form a relationship with not only his mother but his half-sibling as well.

§ 28A-2-4. Subject matter jurisdiction of the clerk of superior court in estate proceedings.

(a) The clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive. Estate proceedings include, but are not limited to, the following:.....

(4) Proceedings to ascertain heirs or devisees, to approve settlement agreements pursuant to G.S. 28A-2-10, to determine questions of construction of wills, to determine priority among creditors, to determine whether a person is in possession of property belonging to an estate, to order the recovery of property of the estate in possession of third parties, and to determine the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party or the clerk of superior court may file a notice of transfer of a proceeding pursuant to this subdivision to the Superior Court Division of the General Court of Justice as provided in G.S. 28A-2-6(h). In the absence of a transfer to superior court, Article 26 of Chapter 1 of the General Statutes shall apply to an estate proceeding pending before the clerk of superior court to the extent consistent with this Article.

§ 29-15. Shares of others than surviving spouse.

Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

- (1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G.S. 29-16; or
- (2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G.S. 29-16; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share; or
- (4) If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G.S. 29-16; or

§ 31A-2. Acts barring rights of parents.

Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except -

- (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
- (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child

What evidentiary findings of fact of fact can you make?

What ultimate findings of fact can you make?

What is the conclusion of law?

Incompetency

A petition for incompetency is filed by a parent for their 35-year-old child, John. John has been in and out of psychiatric facilities for the last ten years, including three IVCs. John has been diagnosed with bipolar disorder but refuses to regularly take medication as prescribed. As a result, John is often homeless as he is unable to pay his rent. When his parents find out, they let John stay with them. John receives SSI but his “friends” show up at the beginning of the month, and John spends all his money in the first week hanging out with his “friends,” buying them food, alcohol, and cigarettes. When John is depressed, he does not shower, change clothes, or leave the house. He does not talk with his parents but sleeps and/or watches tv. When John is manic, he does not sleep for days. He does not make any sense when he talks and can become aggressive. John has no power of attorney or health care directive in place, in part, due to the fact that no one is willing to serve as John’s agent.

§ 35A-1101. Definitions.

The following definitions apply in this Subchapter: ...

(7) Incompetent adult. - An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. An adult or emancipated minor does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property.

§ 35A-1112. Hearing on petition; adjudication order.

(a) The hearing on the petition shall be at the date, time, and place set forth in the final notice of hearing and shall be open to the public unless the respondent or his counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other than those directly involved in or testifying at the hearing.

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. If the petitioner is a State or local human service agency or a health care provider, evidence may be presented without the need for legal counsel.

(b1) At the hearing on the petition, on the clerk's own motion, the clerk may appoint an interim guardian pursuant to G.S. 35A-1114(d) and (e) if the clerk determines such an appointment to be in the best interests of the respondent.

(c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk or a jury, does not find the respondent to be incompetent.

(d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent. The clerk may include in the order findings on the nature and extent of the ward's incompetence.

What evidentiary findings of fact of fact can you make?

What ultimate findings of fact can you make?

What is the conclusion of law?

Legitimation

A putative father files a legitimation proceeding involving his alleged 4-year-old daughter, Mary, who was born out of wedlock. Mary's mother has never been married. Mary's father testifies under oath that he had a monogamous romantic relationship with her mother starting 6 years ago. They moved in together when Mary's mother was pregnant. They have never taken any action to establish paternity. They continue to live together. Mary's father introduces genetic marker testing that indicates the probability that he is the father is 99.96 percent. Her mother does not testify.

§ 49-10. Legitimation. The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child....

What evidentiary findings of fact of fact can you make?

What ultimate findings of fact can you make?

What is the conclusion of law?

Thinking About Evidence
Paper for notetaking

Possible Kinds of Evidence

Evidentiary Values and Common Traits of Good/Bad Evidence

Assessing Credibility

Determining Relevance

Weighing Evidence

Your Role with Evidence (and available options/strategies)

Protected Patient Records: Standards for Court-Ordered Disclosure

HIPAA, GS §§ 122C, 130A

- Information is relevant to the matter before the court.
- Information is necessary to adjudicate issues in the case.

Privileges, GS § 8-53 thru -53.13

- Information is necessary to the proper administration of justice.

Substance Use Disorder, 42 CFR 2

- Lack of available or effective alternative ways to obtain.
- Public interest and need for the disclosure > the potential injury to the (i) patient's privacy interests, (ii) physician-patient privilege, and (iii) treatment services.

Hearings Cheat Sheet

Incompetency Hearing Tips!

- ❖ GAL can testify as to best interest recommendations and respondent's express wishes. G.S. 35A-1107.
- ❖ Petitioner has the burden of proof by clear, cogent, and convincing evidence. G.S. 35A-1112(d).
- ❖ If bifurcated, Clerk can receive evidence necessary to determine nature and extent of guardianship, who should serve, and ward's estate. G.S. 35A-1212(a).
- ❖ Clerk must close hearing to anyone not directly involved or testifying, if requested by respondent or their counsel or GAL. G.S. 35A-1112.

General Evidentiary and Procedural Keys	Authority
Rules of Evidence apply.	Rule 1101
Clerk controls mode and order of presentation of evidence.	Rule 611
Testimony must be under oath/affirmation.	Rule 603
Clerk can call and/or interrogate witnesses.	Rule 614
Witness should identify and explain the relevance of an exhibit to lay a proper foundation for its admission.	Rules 401, 901
Privileged physician-patient communications admissible if <ul style="list-style-type: none"> • waived (explicitly or implicitly) by respondent/GAL, <u>or</u> • upon finding that admission is necessary for proper administration of justice. 	G.S. 8-53
Experts, when qualified, can give opinion on capacity.	Rule 704
A lay witness can opine on capacity if rationally based on witness' perception <u>and</u> if Clerk finds the opinion will be helpful in determining capacity.	Rule 701

Putting it Into Practice: Drafting an Order

Meredith Smith
UNC School of Government
June 2024

1

Components of an Order

- CAPTION
- INTRODUCTORY PARAGRAPH
- FINDINGS OF FACT
- CONCLUSIONS OF LAW
- ORDER/DECREE

2

Caption

}	STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE
	COUNTY OF MECKLENBURG		SUPERIOR COURT DIVISION BEFORE THE CLERK File 22-E-523
	IN THE MATTER OF THE GUARDIANSHIP OF SARAH SMITH, Ward.)))	ORDER

THIS MATTER coming before the undersigned Judge on the Ward's appeal of the Order on Motion to Modify Guardianship entered by the Clerk of Court on January 18, 2023, the Court makes the following findings of fact:

IT APPEARING TO THE COURT that a motion to modify the existing guardianship and requesting partial restoration of the Ward's capacity as related to financial matters (the "Motion") was filed by the Ward in December of 2022, and a hearing was conducted on the Motion on January 10, 2023.

3

Who is a party?

In re Estate of John Williams



4

Who is a party?

Estate:

In re Estate of John Williams

Estate Proceeding:

Nancy Williams, Petitioner

vs.

Sue Williams, Respondent



5

Who is a party?

Who was issued a summons and serviced with notice as a respondent?

- Named in the petition as a R
- Ordered joined by the court as a R

- G.S. 28A-2-6(a) (estate proceeding)
- G.S. 36C-2-205(a) (trust proceeding)
- G.S. 32C-1-116(c) (POA proceeding)
- G.S. 1-394 (special proceedings)



6

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 BEFORE THE CLERK
 22 E 3284
 COUNTY OF UNREAL


 IN RE ESTATE OF JOHN WILLIAMS
 NANCY WILLIAMS, as Personal
 Representative of the Estate of John Williams Petitioner **ORDER**

 VS.
 SUE WILLIAMS, as beneficiary of the Estate
 of John Williams Respondent

7

Drafting Orders: Who is a party?



1. Know who is a party vs. who just appeared at the hearing and reflect that in your order – either in the caption or the introductory paragraph or both.



8

Minors and Incompetent Adults as Parties

Minors and incompetent* adults may be the real party in interest but are incompetent as a matter of law and require someone acting on their behalf in the proceeding.

*Includes someone adjudicated incompetent under 35A or who is an incompetent person under Rule 17 of the N.C. Rules of Civil Procedure for purposes of the proceeding before you.

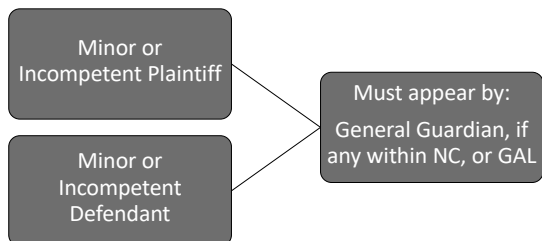
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Types of Representation

G.S. 1A-1, Rule 17	Estates, Trusts, POA
<ul style="list-style-type: none"> • Minors and Incompetent adults • Sue or Defend • Substitution Role 	<ul style="list-style-type: none"> • GAL not required when minor or incompetent person "represented" • CSC may appoint GAL under Rule 17 in certain circumstances

10

G.S. 1A-1, Rule 17



11

Even if the Person has a General Guardian...

A GAL for a minor or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the minor or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

G.S. 1A-1, Rule 17(b)(3)

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Drafting Orders: Example

Order Caption:

In re Estate of Susan Smith

Jane Smith, a minor, by and through her guardian ad litem, Tom Smith,
Petitioner

v.

Jim Jones, an incompetent adult, by and through his general guardian, Frank
Jones, Respondent

13

Estates, Trusts, POAs: Appointment of a GAL



The clerk does not always have to appoint a GAL in a trust, estate, or power of attorney proceeding for a minor or incompetent adult if that person is **otherwise represented**.

14

Estate, Trust, POA Representation



As long as no conflict of interest exists:

1. A **general guardian** or a **guardian of the estate** may represent and bind the estate that the guardian controls.
2. An **agent under a power of attorney** having authority to act with respect to the particular question or dispute may represent and bind the principal.
3. A **trustee** may represent and bind the beneficiaries of the trust unless the question or dispute involves the internal affairs of the trust.

G.S. 36C-3-303; G.S. 36C-3-304.

15

Estate, Trust, POA Representation



As long as no conflict of interest exists:

- 4. A **personal representative** of a decedent's estate may represent and bind persons interested in the estate.
- 5. A **parent** may represent and bind the parent's minor child if a general guardian or guardian of the estate for the child has not been appointed.
 - 1. If a disagreement, the parent who is a beneficiary of the trust is entitled to represent the minor child.
 - 2. If no parent is a beneficiary of the trust, a parent who is a lineal descendant of the settlor is entitled to represent the minor child.
 - 3. If no parent is a lineal descendant of the settlor, a GAL appointed to represent the minor child.
- 6. A person may represent and bind that **person's unborn issue**.
G.S. 36C-3-303; G.S. 36C-3-304.

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Estate, Trust, POA Representation



A minor, an incompetent or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable may be represented and bound by a person with a **substantially identical interest** with respect to the particular question or dispute, if

- 1. the minor, incompetent or unborn individual, or person whose identity or location is unknown and not reasonably ascertainable is not otherwise represented, and
- 2. there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute.

G.S. 36C-3-304.

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Drafting Orders: Example

Order Caption:

In re Estate of Susan Smith

Jane Smith, a minor, by and through her parent as her representative, Tom Smith, Petitioner

v.

Frank Jones, an incompetent adult, by and through his agent under power of attorney as his representative, Sally Jones, Respondent

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Who is a party?

1. Know who is a party vs. who just appeared at the hearing.
2. If they are a party and a minor or incompetent person, ensure that they are appropriately represented in the proceeding.

YOUR ORDER SHOULD REFLECT BOTH CLEARLY.



19

Introductory Paragraph

STATE OF NORTH CAROLINA		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG		FILED 22 E-523
IN THE MATTER OF THE GUARDIANSHIP OF SARAH SMITH, Ward.)))	ORDER

THIS MATTER coming before the undersigned Judge on the Ward's appeal of the Order on Motion to Modify Guardianship entered by the Clerk of Court on January 18, 2023, the Court makes the following findings of fact:

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20

Introductory Paragraph

- Nature of the matter and hearing
- Jurisdiction of the court
- Names of the parties and role
- Appearances at the hearing
- Attorney names and who represent



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Finding of Fact

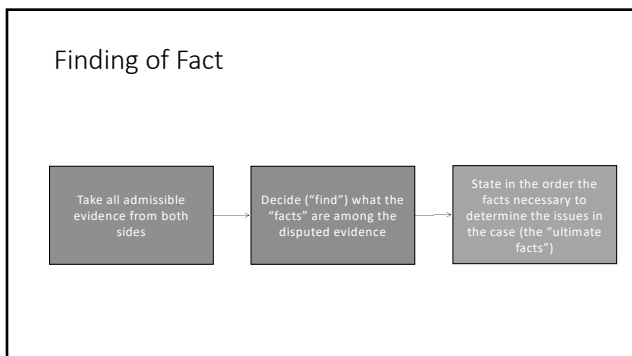
Determining what the facts are from the disputed evidence.

22

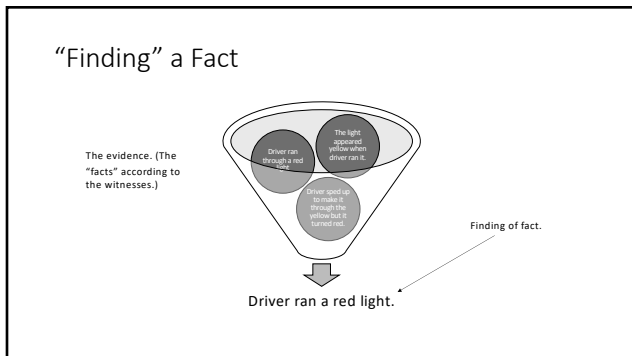
What is a conclusion of law?

Application of the law at issue to the facts you have just found.

23



24



25

"Finding" a Fact

- Findings of fact do not merely recite or recount the evidence.
- They present what you have decided the facts are.

26

"Finding" a Fact

- NO:
"Mr. Davis testified that he did not sign the contract at issue."
- YES:
"Mr. Davis did not sign the contract at issue."

27

“Finding” a Fact

How do I get there?

- Listen to the evidence.
- Assess the credibility of the witnesses.
- Weight the value of the various bits of evidence.
- Make the necessary deductions.
- Have confidence.

28

“Finding” a Fact

- Findings of fact should not sound equivocal or uncertain.
- Avoid leaving the reader with uncertainty about whether you have actually decided what the facts are.

29

“Finding” a Fact

- NO:
“It would seem that Mr. Davis did not sign the contract at issue.”
- YES:
“Mr. Davis did not sign the contract at issue.”

30

How many facts do I include?

- Orders only have to have the controlling facts
- Also called the ultimate facts

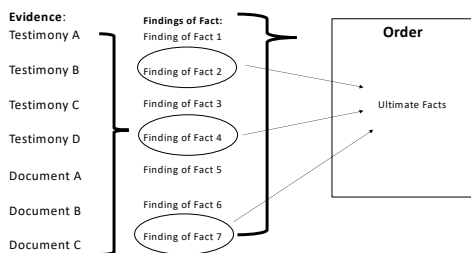
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“Ultimate” Facts

Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense

32

“Ultimate” Facts



33

Drafting Tip

- Remember to find all the facts necessary to dispose of all legal issues
- So...
 - Know what the issues are
 - Check off the issues as you go

34

Considerations

- What law applies?
 - What is my authority to enter an order?
 - Does the law provide the remedy the party seeks?
- What does the petitioner need to prove? Have they proven it?
- What are my (fact) findings?
- How does the law apply to those findings?
- What will I order?

35

Exercise: Draft Your Order

1. Read the prompt (10 minutes).
2. Watch and listen to the testimony (10 minutes).
3. Draft your outline (25 minutes).
4. Break + break out rooms (15 minutes).
5. Draft your order as a group (30-45 minutes – end at 4:30).
6. Email your final order to Meredith (Meredith.smith@sog.unc.edu) and return to the main classroom.

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A Clerk's Guide to Drafting Orders in Contested Estate Matters

The Law

- Clerk's orders in estate, trust, and guardianship matters, when appealed, are reviewed by the superior court "on the record." The judge "shall review the order or judgment of the clerk for the purpose of determining only the following:
 - (1) Whether the **findings of fact** are supported by the evidence.
 - (2) Whether the **conclusions of law** are supported by the findings of facts.
 - (3) Whether the order or judgment is consistent with the conclusions of law and applicable law." G.S. 1-301.3(d).
- In these matters, the clerk "shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment." G.S. 1-301.3(b).

Basic Components of an Order

- Introductory paragraph – type of hearing; date of hearing; who appeared. (Not required, but useful)
- Findings of fact
- Conclusions of law
- Clerk's order or decree

Drafting Findings of Fact

- Not mere summaries of the evidence.

Findings of fact are the clerk's statements of the determinations *he or she has made* about the material evidence. They are not mere recitations of the evidence.

- No: "Mr. Jones testified that the executor failed to inform the heirs of the transaction."
- Yes: "The executor failed to inform the heirs of the transaction."

- Should convey certainty.

Findings of fact should not sound uncertain or leave doubt about whether the clerk has actually made a determination of fact.

- No: "The evidence seems to show that [“it appears that...,” “the court is inclined to find that...”] the trustee did not provide access to the account statements.”
- Yes: “The trustee did not provide access to the account statements.”

- Only ultimate facts are required.

The clerk need not include in the order every dispute of fact that he or she has resolved. The order need only include those findings of fact that bear on the ultimate issues in the case. The clerk may include less significant findings if needed to create a foundation, but this is not required.

Drafting Conclusions of Law

- Conclusions of law are statements applying the applicable law to the court's findings of fact.

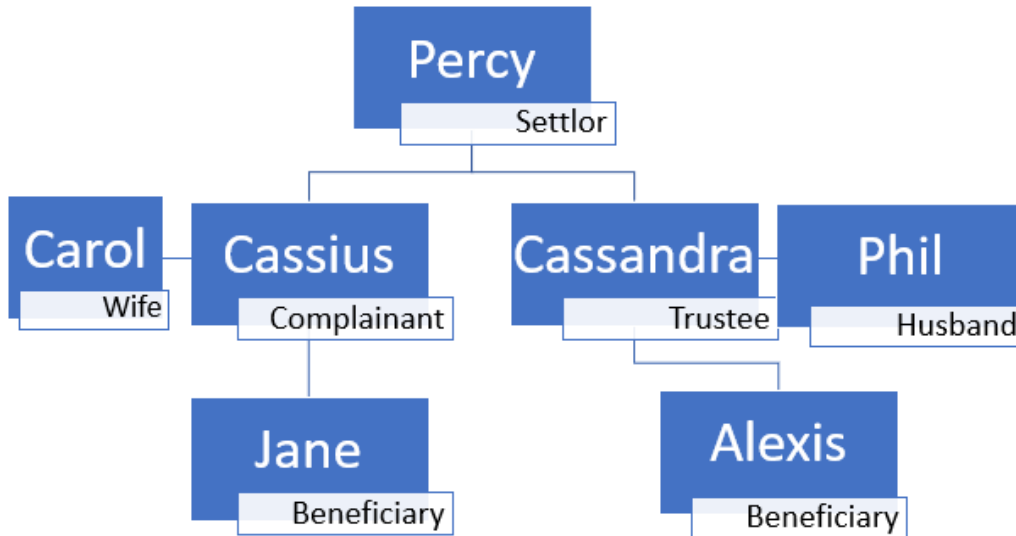
- Example:

Finding of fact: "The trustee failed to provide beneficiary with access to the account statements."

Conclusion of law: "The trustee's failure to provide beneficiary with access to the account statements was a breach of the duty to inform and report under G.S. Chapter 36C."

- An order should contain conclusions of law sufficient to address each legal question before the clerk in the proceeding.
- Each conclusion of law should be supported by sufficient findings of fact.

Drafting Orders Exercise: In re Trust of Percy



Background

Cassandra is the sole trustee of a trust left by her father, Percy, when he died two years ago. The beneficiaries of the trust are Cassandra’s own daughter, Alexis, and Cassandra’s niece, Jane. Both girls are 16 years old (in other words, Percy’s granddaughters). The trust specifies that the trust funds be used for the “support, education, edification, and general welfare” of the girls, distributed “in an equitable manner.”

Jane’s father (Cassandra’s twin brother, Cassius) believes Cassandra is breaching her duty as trustee by withholding trust money from Jane for the purchase of a car. Cassius has brought a proceeding before the clerk on behalf of Jane. He alleges that Cassandra breached her duty of impartiality and duty of loyalty. He is asking the clerk for appropriate relief (set forth in the law section below).

Evidence

Evidence to be considered is a combination of

- **Testimony** (Cassius, Jane, Carol, Cassandra, Phil), and
- **Documents** including the trust instrument and trust account statements

Documents:

Trust Instrument states the following:

- Initial trust property includes \$150,000.00
- Property to be invested in a low risk manner

- Funds are to be used for the “support, education, edification, and general welfare” of Jane and Alexis to be distributed “in an equitable manner”
- On July 1, 2027 (after the girls turn 20), whatever remains of the trust property is to be divided equally and distributed directly to the two beneficiaries

Trust account statements submitted into evidence (containing trust property only) set out the following withdrawals:

- \$8,600 – paid to a Honda dealership for the used vehicle for Alexis
- \$2,500 – paid for 2022 summer camp and educational expenses for Alexis
- \$2,500 – paid for 2022 summer camp and educational expenses for Jane
- \$7,000 – paid for private school tuition for Alexis
- \$387 – paid to H&R Block for tax preparation for the trust

Law

§ 36C-8-802. Duty of loyalty.

- (a) A trustee shall administer the trust solely in the interests of the beneficiaries.

§ 36C-8-803. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

§ 36C-10-1001. Remedies for breach of trust.

- (a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.
- (b) To remedy a breach of trust that has occurred or may occur, the court may:
- (1) Compel the trustee to perform the trustee's duties;
 - (2) Enjoin the trustee from committing a breach of trust;
 - (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
 - (4) Order a trustee to account;
 - (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
 - (6) Suspend the trustee;
 - (7) Remove the trustee as provided in G.S. 36C-7-706;
 - (8) Reduce or deny compensation to the trustee;
 - (9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
 - (10) Order any other appropriate relief.
- (c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust.

§ 36C-7-706. Removal of trustee.

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable trust, a cotrustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

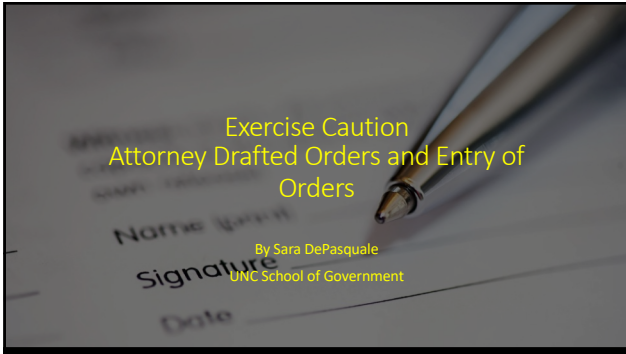
(1) The trustee has committed a serious breach of trust;

Matter Name:

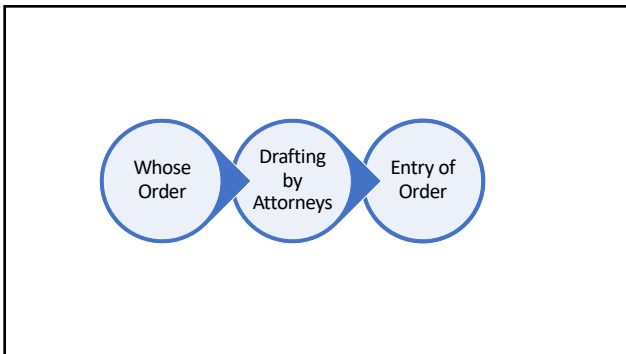
File No.:

Hearing Date:

Introductory Matters	
Findings of Fact	
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
Conclusions of Law	
1.	
2.	
3.	
4.	
Order	
1.	
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3.	






1

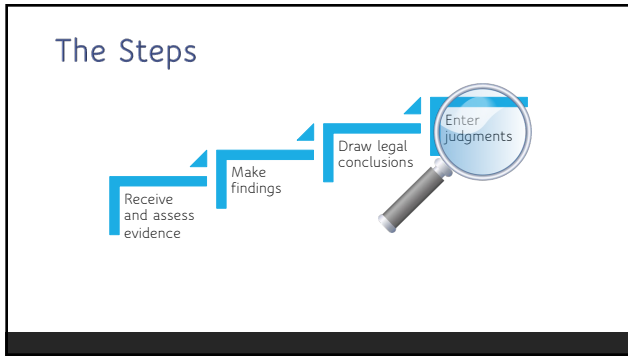


2

To make a decision

-  You determine the legal rule and its elements
-  You find the facts
-  You apply the law to the facts of the case

3



4

Answer Everything

- Find all the facts necessary to dispose of all the legal issues
- Make conclusions as to all the legal issues
- Not a checklist, it's a process!

5

A very basic outline

Introduction Who- Judicial official, parties Where- Court identification What- motions, issues heard When- date(s) of hearing
Why -- Findings of Fact
Why -- Conclusions of law
How- Decree- Concisely states the court's ruling and directs exactly who is required to do what by when
★ Signature

6

It's Your Order

Form of the Custody Order

[4] Orders and judgments in civil actions are orders of the court, and not the orders of the parties. See *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). The Custody Order

Heatzig v. McLean, 191 N.C. App. 451 (2008)

7

In re A.B., 239 N.C. App. 157

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

8



9

Attorney Drafts

Is it okay to have attorneys draft the orders?


YES
 NO

10

In re J.B., 172 N.C. App. 1 (2007)

"This Court has previously held that pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 58 of the Rules of Civil Procedure, after 'entry' of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing." *Hightower v. Hightower*, 85 N.C. App. 333,

11



12

Explain what should be in order

- Facts
- Conclusion
- Not just outcome

13

In re J.B., 172 N.C. App. 1 (2007)

The trial court directed petitioner to draft an order terminating respondent's parental rights, and it designated "specific findings of fact" it wanted included in the order. Following presentation of evidence and argument regarding John's best interests, the trial court concluded that "[u]nder the statute I will terminate the parental rights of [respondent]." In light of the foregoing, we conclude that the trial court did not err in directing petitioner to draft the termination order on its behalf. Accordingly, we overrule this argument.

14

Set deadlines

"A lawyer shall act with reasonable diligence and promptness in representing a client." RPC 1.3




15

Comments to RPC 1.3

- Professional shortcoming = procrastination
- Adverse affect because of changed conditions
- Unreasonable delay can lead to anxiety and undermine confidence
- Carry through to conclusion all matters undertaken for a client

16

What if deadline missed?



17

Ex Parte



18

RPC 3.5: Ex Parte



(d)(1)

Communication on behalf of a party to a matter pending before a tribunal in the absence of an opposing party, without notice to that party, and outside the record

19

RPC 3.5: Ex Parte



(a)(3)

Lawyer shall not communicate ex parte with the judge or other official regarding a matter pending before the judge or official unless authorized to do so by law or court order

20

2019 FEO 4, Opinion #5

Judge instructs lawyer to send briefs to judge via email with copy to opposing counsel. Is this ok?

Yes. If the presiding judge has instructed counsel to communicate directly with the court, the communication is not a prohibited ex parte communication under Rule 3.5 and is not prejudicial to the administration of justice under Rule 8.4(d) even if the requested communication will be on the merits of a pending matter. This conclusion applies to any appropriate request from a judge to all counsel for communication, including trial briefs and proposed orders. Again, the Rules of Professional Conduct are not meant to disable or abridge "the inherent powers of the court to deal with its attorneys." N.C. Gen. Stat. § 84-36. The presiding judge has the authority to determine how counsel are to communicate with the court; except as prohibited by law or court rule, such communications are within the discretion and preference of the tribunal and the presiding official.

21



Attorney Drafts

Tips

- Instruct parties how to communicate with you about drafts (email, etc.)
- Remind parties to copy the other parties on all communications

22



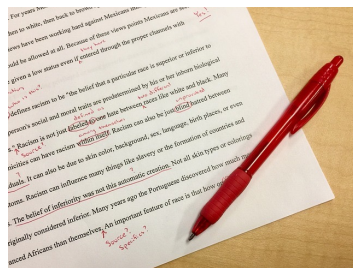
Attorney Drafts

Review Draft Orders Carefully

- Avoid rubber stamping one side's draft of an order
- Lack of thorough review can lead to appearance of partiality

23

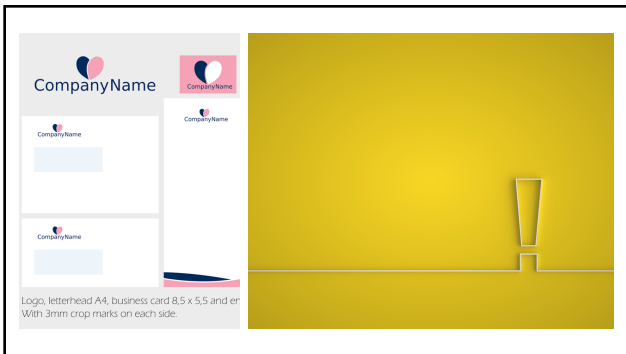
Can revise



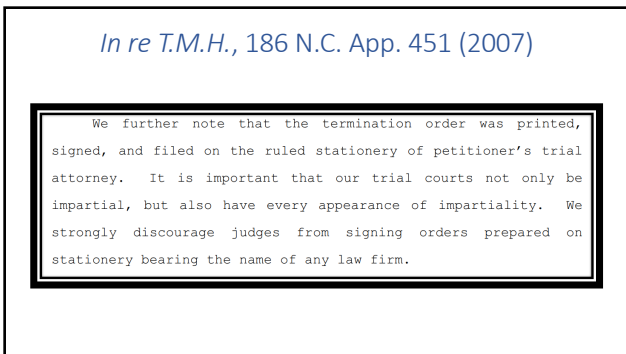
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25



26



27

Habitat for Humanity of Moore Co., Inc. v. Pinebluff, 187 N.C. App. 764 (2007)

III. Order

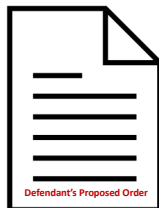
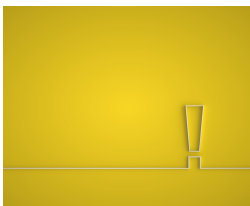
We note that Judge Webb's order was printed, signed and filed on the ruled stationery of Habitat's trial attorney. Without deciding whether this practice violates either the Code of Judicial Conduct or the Revised Rules of Professional Conduct, we strongly discourage lawyers from submitting or judges 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. *In re TMH*, 186 N.C.App. 451, 652 S.E.2d 1 (2007).

28

Heatzig v. McLean, 191 N.C. App. 451 (2008)

This Court has held that a trial court should not sign orders prepared on stationery bearing the name of the law firm that prepared the order, since it does not convey an appearance of impartiality on the part of the court. See *In re T.M.H.*, 186 N.C.

29



30

Attorney Drafts
Heatzig v. McLean, 191 N.C. App. 451 (2008)

764, 653 S.E.2d 886 (2007). Similarly, the signing of an order marked as "Defendant's Proposed Order" does not convey an appearance of impartiality on the part of the court. We also note

31

FRIENDLY REMINDER!
 The order is the clerk's, and the clerk is responsible for the contents.

Form of the Custody Order

[4] Orders and judgments in civil actions are orders of the court, and not the orders of the parties. See *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). The Custody Order

32

Entry of Order

33

After Hearing, you announce your decision

The respondent is incompetent based on the following findings of fact, which are based on clear, cogent, and convincing evidence ...



34

Is that an order?

Is it enforceable?

35


Rendition

The respondent is incompetent based on the following findings of fact, which are based on clear, cogent, and convincing evidence ...



36

Rendition



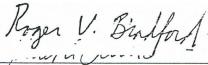
Oral judgment pronounced in open court

37


When Is an Order Entered?

Rule 58

1. In Writing
2. Signed by Judge
3. Filed by Clerk



Judge Roger V. Bradford



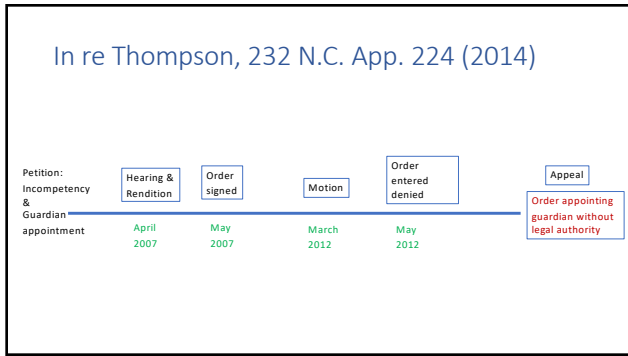
38

What's the Problem with Rendition?

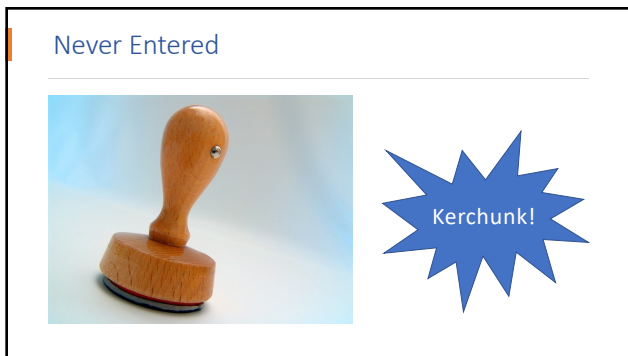
An oral order does not become enforceable until it is reduced to writing, signed by the judge, and filed with the clerk of court.

Dabbondanza v. Hansly, 249 N.C. 18 (2016)
 Carland v. Branch, 164 N.C. App. 403 (2004)

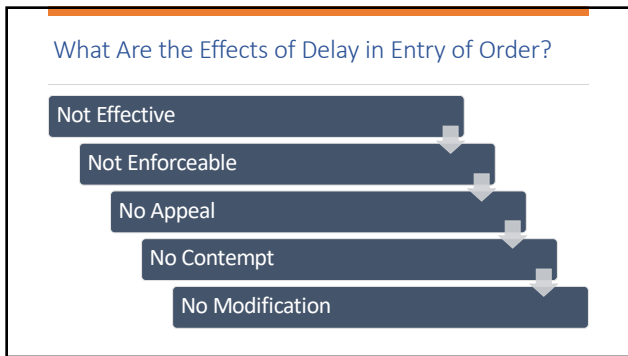
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40



41



42

What Are the Effects of Delay in Entry of Order?

```
graph TD; A[Frustrating for parties] --> B[Stressful for you]; B --> C[Memory fades];
```

43

What About New Evidence after Render?

44

In re O.D.S., 247 N.C. App. 711 (2016)

this Court has held that the trial court can consider evidence presented *following* the oral rendering of the judgment in order to better inform its subsequent written judgment.

45

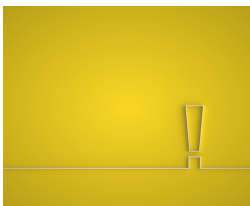
Can the entered order differ from rendition?

46

In re O.D.S., 247 N.C. App. 711 (2016)

[1] [2] Furthermore, this Court has not generally required written entered judgments to adhere to the prior non-entered, orally rendered judgments upon which they were based. “ ‘The announcement of judgment in open court is the mere rendering of judgment,’ and is *subject to change* before ‘entry of judgment.’ ‘A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.’ ” *Morris v. Southeastern Orthopedics Sports Med.*

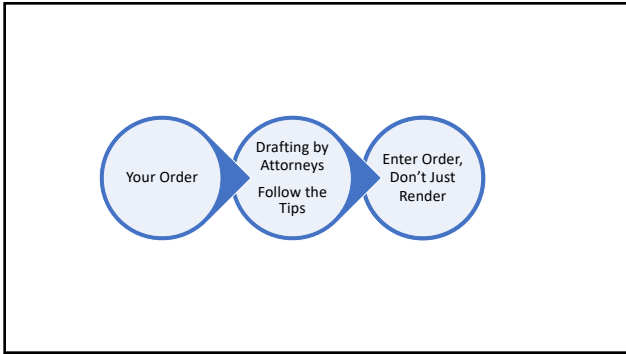
47



Yes, But...

**Not a direct contradiction
Transcript is dispositive**

48



49

From The
NCCALJ Final
Report:

"Ask citizens what they want from a court system and an immediate answer is likely to be 'fairness.' A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision."

1




2

Kahneman
and Tversky

The book cover for 'Thinking, Fast and Slow' by Daniel Kahneman. It features two small black and white portraits of Kahneman and Amos Tversky on the left. The title 'THINKING, FAST AND SLOW' is written in a stylized font, with 'AND' in smaller letters between 'FAST' and 'SLOW'. Below the title is a drawing of a pen. The author's name 'DANIEL KAHNEMAN' is at the bottom, with a small note 'WINNER OF THE NOBEL PRIZE IN ECONOMICS' underneath.

3



• *"The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why. . . ."*


• Daniel Kahneman

4

Discretion, Discretion

- Do I take a risk for you—in appointing a fiduciary?
- Do I trust you?
- Do I believe you?
- Assessment of character?
- Do I go to the mat for you?

Identify the discretionary decisions in your work as a hearing officer



5

How We Think Matters



AKA "System 1"

Vs.

Or as a Team



AKA "System 2"



6

Your Brain

Dash

- Automatic
- Cannot be turned off
- Uses little or no effort
- Principle purpose is to survive

Sloth

- Voluntary
- Used when we “pay attention”
- Limited bandwidth
- Tires easily
- What makes us human

7

Dash Decides

- If a face is hostile
- What 2 + 2 equals
- How to drive on a familiar road



8

Sloth Decides

- How to maintain a faster walking pace than is natural
- The number of “a”s in a page of text
- How to drive in an unfamiliar, congested area



9

BUT . . . While Dash is normally right

- It is an "associative machine" that builds stereotypes and "boxes"
- Avoids hard questions
- Poor on statistics
- Uses "heuristics" to make quick judgments

AND
CANNOT BE TURNED OFF













10



11

Say the Color of the Square

12

Automatic Processing and Interference:
Read the **Word**

BLUE BLACK GREEN
YELLOW RED BLUE
RED BLACK GREEN

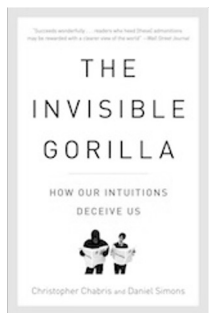
13

Automatic Processing and Interference:
Say the **Color** of the Word

BLACK BLACK GREEN
YELLOW BLUE RED
RED COLORS! BLUE

14

What You See Is
Not All There Is--
Ever

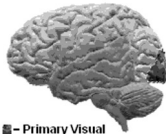


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You Don't See with Your Eyes, Only



PLUS

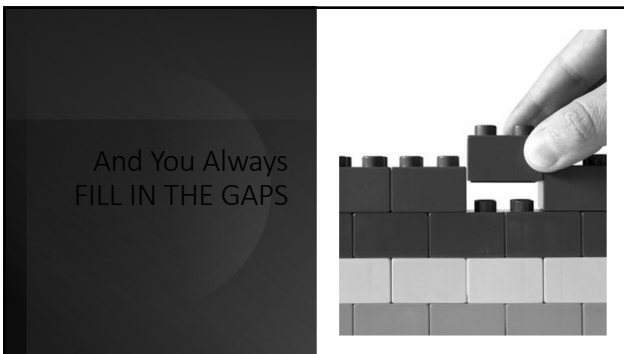


■ - Primary Visual Cortex (V1)

16



17



And You Always
FILL IN THE GAPS

18


Kahneman on Dealing with Cognitive Limits

"The question that is most often asked about cognitive illusions is whether they can be overcome.

Because System 1 operates automatically and cannot be turned off at will, errors of intuitive thought are ... difficult to prevent. Biases cannot always be avoided because System 2 may have no clue about the error. . . Constantly questioning our own thinking would be impossibly tedious, and System 2 is much too slow and inefficient to substitute for System 1 in making routine decisions. The best we can do is a compromise: **learn to recognize situations in which mistakes are likely and try harder to avoid significant mistakes when the stakes are high.**"

Kahneman, Thinking, Fast and Slow

19



Risk Factors
Cognitive Errors More Likely When:

- Experiencing anger, disgust, happiness
- Stressed, fatigued, distracted, bored
- Attempting to "multi-task"
- Falling prey to "1st Instinct Fallacy"
- Not realizing attention is like a spotlight
- Forgetting the influence of perspective

20

What We Want

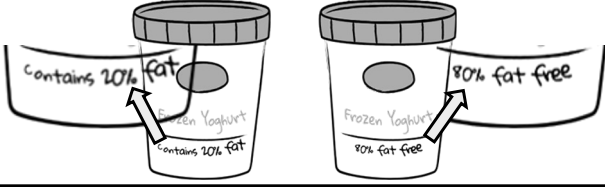
8 Common Fast-Thinking Traps

- | | |
|----------------------------------------|-----------------------------------------|
| 1) Framing Error | 5) Confirmation Error |
| 2) Overconfidence Error | 6) Familiarity Principle / Affect Error |
| 3) Anchoring Error | 7) Attribution Error / Pro-Self Bias |
| 4) Availability Error / Recency Effect | 8) Blind Spot Bias |

21

**Predictable Fast-Thinking Trap:
Framing Error**

◆ Being overly influenced by how information is presented (the “frame” around it)



22

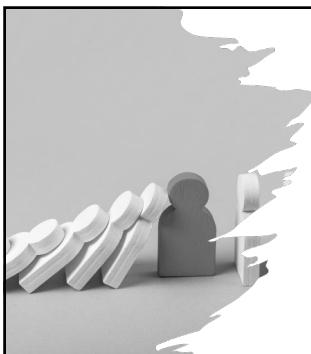
**Framing:
Stanford
Study**

- ❑ Crime as a **beast** preying on the community
 - ✓ More support for enforcement-based solutions

vs

- ❑ Crime as a **virus** infecting the community
 - ✓ More support for solutions focusing on addressing causes

23




**Predictable Fast-Thinking Trap:
Overconfidence Error**

- People's confidence in their judgments and knowledge typically is higher than the accuracy of them ...
- And we tend to think confidence equates with accuracy

24



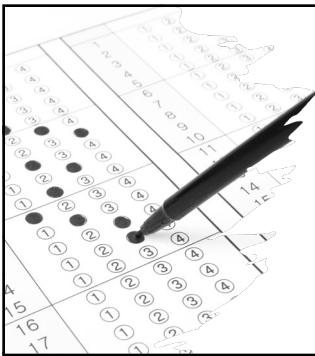
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Predictable Fast-Thinking Trap: Anchoring Error

- Tendency to be biased toward an initial value or position
 - Use the first number or position as a starting point, get "anchored" to it

26



Five Seconds to Calculate:

$1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8 =$

27

Five Seconds to Calculate:

- $1 \times 2 \times 3 \times 4 \times 5 \times 6 \times 7 \times 8 =$
- $8 \times 7 \times 6 \times 5 \times 4 \times 3 \times 2 \times 1 =$
- Actual Answer = 40,320

• Average Estimate
• 512
• 2250

28

How much is a mouse pad worth? And what are the last two digits of your SS number?

29

Predictable Fast-Thinking Trap: Availability Error / Recency Effect

- Tendency to base projections of probability/plausibility on how easily an example comes to mind
 - Instances of large numbers usually recalled better and faster than smaller ones
 - BUT--biased toward vivid, unusual, or emotionally charged examples; over-reported incidents; recency of example

30



31

Predictable
Fast-Thinking
Trap:
Confirmation Error

- Tendency to look for information that supports what we already believe and filter out disconfirming information
 - More energy to confirm own view
 - More likely to remember info supporting
 - Weigh confirming data more heavily


32



33


Predictable Fast-Thinking Traps:
Familiarity Error / Affect Error

- Familiarity Error: Developing preferences for people or things merely because we're familiar with them



34

"We all have the tendency to make right and true that which is merely familiar and comfortable."
 ~ Robert Kegan, Harvard School of Education



35

Study – Michigan U and Michigan State


kadira
 savicik
 biwonini

"Mere Exposure Effect"
 iktitaf

36

Predictable Fast-Thinking Traps:
Attribution Error / Pro-Self Bias


- ❖ Over-estimating internal (personality) factors and underestimating external (situational) factors to explain the behavior of others; vice versa for self
- ❖ See self as responsible for good outcomes, not bad; opposite for others



37

I had a bad day at work, and I need a lemon slice! Where is that lazy waitress?

As soon as I split these checks, make some more coffee, run my three desserts, clean up that spill, take the order from Table 5 and refill waters, yes I will get you another slice of lemon.

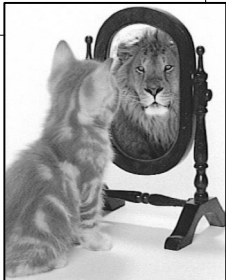


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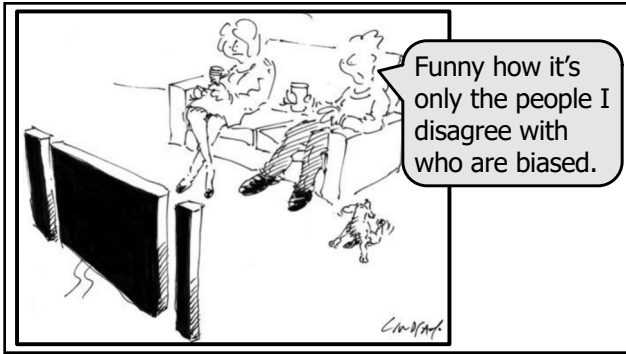
Predictable Fast-Thinking Trap:
Blind Spot Bias

Thinking others are much more susceptible than we ourselves are to these cognitive errors

... and failing to compensate for these very human errors



39



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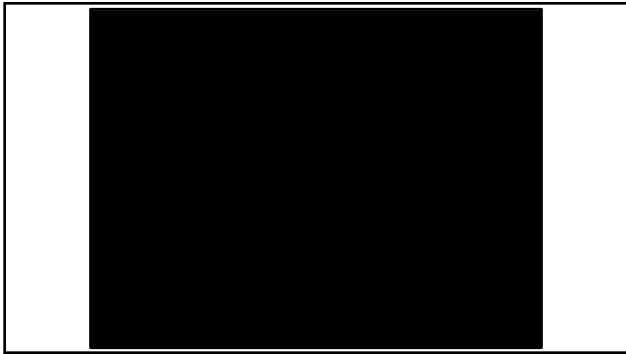
Ask Yourself Open-Ended Questions to Activate Reflective Thinking

- ❖ What's another possibility?
- ❖ What would I do differently if _____?
- ❖ What are my key assumptions? (Where did they originate? How accurate are they?)
- ❖ What do I not know?
- ❖ What makes this (person, case, etc.) different?
- ❖ What would make me change my mind?

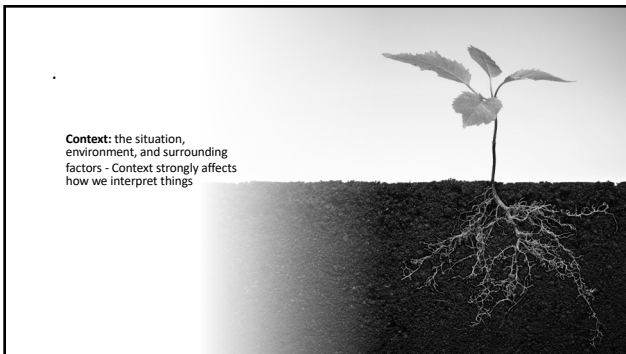
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Question assumptions and don't judge too quickly...

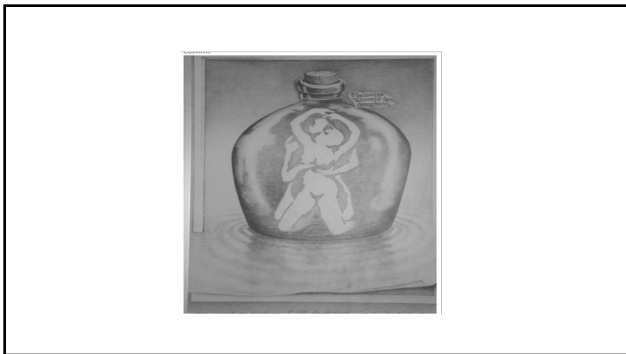
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44



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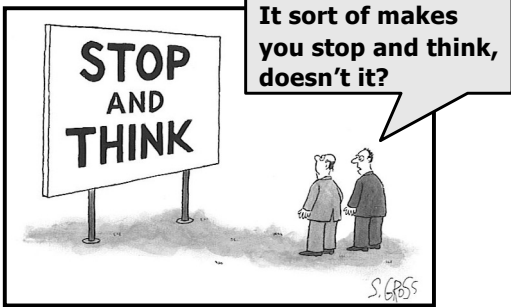
Purposefully Build-In Objectivity

How?

- ❖ Try a different perspective
- ❖ Apply objective measures
- ❖ Structure your decision-making



46



47

Issue: Decision Fatigue

- Recent studies
- Importance of "defaults" (easiest answers)
- More decisions: harder for brain, more likely to use (unconscious) shortcuts.
- More likely to:
 - Act impulsively
 - Be more influenced by cognitive errors
 - Default to status quo

48



49

IMPLICIT BIAS

BIV?

WV?

brain does so much more than that, but only after it takes care of survival first.

In a very helpful and important book, *Thinking, Fast and Slow*, Nobel Laureate Daniel Kahneman describes two systems: System 1 (Fast) and System 2 (Slow). System 1 is the workhorse of our existence. It is virtually effortless, quick and automatic. It works without our knowing it. It is also sometimes wrong. It puts survival first. Well over 90% of the decisions we make are automatic System 1 decisions—the underwater part of the iceberg. Mostly it's done without thinking (as we typically think about what it means to think—taking a hand off a hot stove, or recoiling from a snake, etc.). Ever driven somewhere and don't remember anything about how you got there? System One was driving.

System 2 is slow and cumbersome. It is the opposite of unconscious and automatic. Unlike System 1, it has a very limited bandwidth and can only do one thing at the time. Try to remember a number longer than seven digits. You probably can't. Look at this number, 837402118. Now put aside the newsletter, wait 30 seconds and write the number down.

Despite System 2's extremely limited capacity, it is the system we can (and should) use when we have something important to decide. It's the decision-making capacity that separates us as a species.

Here are some examples of System 1 decisions:

- Detect that one object is more distant than another.
- Orient to the source of a sudden sound.
- Complete the phrase "bread and . . ."
- Make a "disgust face" when shown a horrible picture.
- Detect hostility in a voice.
- Answer to 2 + 2.



It seems so simple. Treat everyone fairly and only consider things that are relevant in handling cases. Avoid any effects of race, gender, national origin, religion, appearance, sexual orientation, gender identity, cultural biases, etc. If only that were true.

The desire for a "fair" justice system is nearly universal. In my teaching over the past forty years, I've asked hundreds of new court officials what value is the most important for the system. Well over 90% say "fairness"—over efficiency or promptness or anything else. It's a value that we learn from our earliest days, especially if we had siblings who sometimes got more stuff than we did. It's a primal need. And when the state is about to impose its will on a defendant to imprison or fine or permanently mark a person as a criminal, the desire for fairness (although some defendants prefer mercy) is very strong. That desire is simply made stronger by the reality that many of the decisions (charging, sentencing, bail) that lead to the state's action are discretionary and frequently unreviewable.

Yet if you want to scatter people at a cocktail party, tell them that you want to talk to them about their biases. Or watch when they are told that they are about to hear a presentation on "implicit" biases. It is natural to think that any conversation about bias must be talking about other people and not about you or me. Wrong.

Enter the brain. Everyone has one. And everyone's works basically the same way. It is a marvelous organ in our heads that performs miracles of perception and awareness and decision-making every day. Unfortunately, it is not designed with fairness as the preeminent value. Job #1 is survival. And survival, in today's world, is not about avoiding tigers and lions and snakes, as it may have been for our ancestors. It is about detecting danger and difference and reacting accordingly. The

- Read words on large billboards.
- Drive a car on an empty, familiar road.
- Find a strong move in chess (if you are a chess master).

These are System 2 decisions:

- Brace for the starter gun in a race.
- Focus attention on the clowns in the circus.
- Focus on the voice of a particular person in a crowded and noisy room.
- Look for a woman with white hair.
- Maintain a faster walking speed than is natural for you.
- Monitor the appropriateness of your behavior in a social situation.
- Count the occurrences of the letter a in a page of text.
- Tell someone your phone number.
- Park in a narrow space (for most people except garage attendants) or drive in a congested, unfamiliar city.
- Compare two washing machines for overall value.
- Fill out a tax form.

One way to “feel” the interplay between these two ways of

thinking is to take a Stroop Test. First created in 1935, and used in a variety of settings by psychologists, this test requires word and color recognition of letters. Read the words: **Red, Blue, Green, Yellow**. System One reads words, automatically; it’s easy. Then you must recognize colors: **Red, Green, Blue**. It not so easy to do it quickly because you have to override System’s One’s automatic reading of letters that make words. System Two has to be used to recognize colors when they are in the form of letters. The conflict between the two will become obvious if you try the exercise.

What does that have to do with implicit bias? The answer lies in the way the same two systems in the brain store and use data, particularly data about other people.

The amount of data that a brain processes in a single day is huge. System One’s efficiency kicks in and it classifies data into categories. Social scientists tell us that within a second upon meeting a person, we have categorized the person into various categories; male/female, black/white/other, old/young, etc. Each category has various traits or tendencies assigned to it, based on one’s experiences. The brain has stored all the previous interactions. For some, the traits for a particular group are positive; that is often the case if the person shares traits with us. Using extensive research including Functional Magnetic Resonance Imaging (fMRI), Social Scientist believe that the part of the brain processing information about people like us is the

same part of the brain that processes information about ourselves. But for people who are different, parts of the brain associated with fear and danger may initially interpret the interaction. If we are not careful, where we start may determine where we end up in evaluating a situation.

Khaneman puts it this way:

The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way. You like or dislike people long before you know much about them; you trust or distrust strangers without knowing why.

Khaneman, *Thinking, Fast and Slow*, p. 97

That intuition is framed by the categories you have already put

the new person into and the traits that are associated with the categories. They become stereotypes. Stereotypes are formed by the brain’s storage of massive amounts of data about the category. Family, personal experience, TV, movies, social media, cultural norms—all of these sources are updating our stereotypical understandings of various categories of people. They may be positive or negative.

Stereotypes are effortless and require little energy. They are powerful because they are often right. They are never always right. And figuring that out in a particular situation may take time. But that is what fairness demands—not relying on first impressions.

“ Ask citizens what they want from a court system and an immediate answer is likely to be ‘fairness.’ A system is fair when cases are decided based on the law as applied to the relevant facts. Bias arising from characteristics such as wealth, social class, ethnicity, race, religion, gender, and political affiliation have no place in a fair decision. ”

North Carolina Commission on the Administration of Law and Justice, Final Report, pp 15-16. Available at: https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_final_report.pdf

In other words, the brain is an “us” vs. “them”, as well as a categorizing machine. Stereotypes leave a powerful first impression. As an evolutionary matter, “thems” were initially perceived as dangerous. That might not always be the case, but it was the safest thing to think. False negatives don’t get you killed. False positives might.

These initial evaluations are not conscious. They cannot be turned off. But that is not the end of the story. System Two kicks in eventually. And that is where intentionality can play a positive role. Human decision-making and the interplay between System One and System Two is a complex topic (e.g., Stroop Test) and one that is the subject of many books and research studies. But it is pretty clear that Systems One’s stereotypes are never completely turned off.

As the Greek maxim puts it, “Know Thyself”. Knowing the traits your automatic System One brain has stored is a key to doing that. And being fair, among other things, requires you to follow the maxim to minimize any biases that might be triggered by your personal stereotypes.

How can you know yourself? One way is to take the Implicit Association Test, found online at <https://implicit.harvard.edu/implicit/takeatest.html>. The test can help us to understand what kinds of associations—negative or positive—are stored in the brain. How much more it can do—can it predict behaviors, for example—is the subject of much debate and study. But it is pretty easy to feel in one’s fingers using the keyboard in taking the test when it is harder to associate good traits with a particular category of people. There are tests keyed to race, or gender/work, or religious groups, or sexual orientation, among others. It is a good way to begin to unpack what kinds of associations are stored in your head.

If, for example, you associate negative concepts with a particular race or gender or religion or sexual orientation, what does that mean? Here’s what it doesn’t mean—that, at your best, you act in a discriminatory way. It does mean that your particular history of family, and experience, cultural norms, and media exposure has filled your stereotype buckets with a peculiar mix of data points. Yours will be different from everyone else’s. That’s been done automatically. It’s not something you can opt out of. And quite likely, some groups of people are stereotypically viewed more negatively than others.

Your first impressions happen beyond your control. When you intuitively feel some one is dangerous, or when you feel that someone is not worthy of trust, it’s often a “feeling” that can’t be described any better than that. A feeling. That’s System One at work. What we do next, after the “feeling”, is not important in many contexts. In the context of a justice system where many of the most important decisions are unreviewable and


discretionary, it is critical.

It is important to remember that having these unconscious associations (or as it is often described, implicit biases) is not a character flaw. It is part of the universal human condition. The question is not whether you have them. The question is what you do about this part of the human condition. If you want to minimize the impact of your particular set of associations, what can you do?

- Recognize that differences matter. Consciously consider the impact of differences.
- Reverse the parties in your mind.
- Develop a structured way to make important decisions; use checklists to help keep focus on the relevant aspects of a decision.
- Check your decisions with colleagues; the process of articulating a rationale can be very helpful.
- If you are fortunate enough to work in a diverse workplace, learn from your colleagues; seek out opportunities to interact with people of different backgrounds as the opportunity arises.
- If it is available, look at data about your discretionary decisions. Patterns can be a clue to creeping stereotypical decisions.
- Do not make any important decisions when you are angry, tired, stressed or in a hurry. That is when System One’s stereotypes are at their most powerful.

Fairness requires more than judging how dangerous or worthy of taking a risk a person is by the group they belong to. Unfortunately, there is no pill, vaccine, or surgery that can do that. It is a daily chore. Some have reduced it to three simple ideas.

- Intention (a commitment to fairness).
- Attention (a commitment to avoiding the easy, automatic decision prompted by stereotypical thinking).
- Taking your time, particularly for important discretionary decisions.

The justice system is not perfect. To paraphrase Judge Jerome Frank in his important book, *The Mind of the Law*, though, we come closer to perfection when we realize that we are not perfect and have the humility to seek out and work on our imperfections. 

NOTES ON SOURCES AND REFERENCES

For more information about the concepts discussed in this article, these sources will be helpful.

Web based resources:

Implicit Bias, A Primer for Courts, Jerry Kang, National Center for State Courts (2009) available at <http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx>.

Project Implicit®, Web site: <http://projectimplicit.net/>.

Kirwin Institute on Race and Ethnicity, Ohio State University, <http://kirwaninstitute.osu.edu/> (Website contains extensive materials on ongoing research studies dealing with implicit bias, along with other resources, such as webinars and other educational materials. Updated frequently).

A Meta-Analysis of Procedures to Change Implicit Measures, Forscher, Lai, Axt, Ebersole, Herman, Devine, Nosek. A continuing effort by multiple scholars to monitor studies in the area, last updated in August, 2018. Detailed analysis of methodology of studies and of difficulty in measuring changes in behavior. Pre-print available at <https://psyarxiv.com/dv8tu>.

Hidden Injustice: The Prosecutor's Paradox, ABA Legal News Network, <https://vimeo.com/176681786/5a69f94cf3> (12 minute video).

Helping Courts Address Implicit Bias: Resources for Education, National Center for State Courts (website) <https://www.ncsc.org/ibeducation>.

Books:

Thinking, Fast and Slow, Khaneman; Farrar, Straus, and Giroux (2011).

Blind Spot, Hidden Biases of Good People, Banaji and Greenwald; Delacorte Press (2013).

Decision-making Resources Drennan,

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1. *Thinking Fast and Slow*, Kahneman; Farrar, Straus, and Giroux (2011)
2. *Blind Spot*, Banaji and Greenwald; Delacorte Press (2013)
3. *Mistakes Were Made (But Not by Me)*, Tarvis and Aranson; Harcourt (2007)
4. *The Invisible Gorilla*, Chabris and Simon; Crown Publishing (2009)
5. *Think Again*, Grant, Viking, (2021)
6. *Decisive: How to Make Better Choices in Life and Work*, Heath and Heath, Crown Business, (2013)