

Finding Facts and Drafting the Order



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Contested Hearings: Essentials for Clerks
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Most orders of the clerk after hearing are
final acts of a superior court judicial officer.

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



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Appellate Review

In Estates, Trusts, and Guardianship matters:

Review is by the Superior Court,
and it is “on the record”.



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Appellate Review

In Estates, Trusts, and Guardianships:

§ 1-301.3(d)

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

The Law

- In estates, trusts, and guardianships:

– “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.” G.S. § 1-301.3

Components of an Order

- INTRODUCTORY PARAGRAPH

– Nature of Matter and Hearing;
Jurisdiction



FINDINGS OF FACT

- CONCLUSIONS OF LAW

- ORDER/DECREE



Why?

- Provides a basis for review by Superior Court and Court of Appeals.
- Gives parties better understanding of your decision.
- Encourages you to make a careful review of the evidence.
- Helps ensure you address all relevant issues.

What is “finding fact”?

Determining what the facts are
from the disputed evidence.

(There is no jury, so this is the
clerk's job.)



What is “finding fact”?

Steps:

- Take all the admissible evidence on both sides.
- Decide (“find”) what the “facts” are among the disputed evidence.
- Write in your order the findings that determine the issues in the case.
 - The “controlling” or “ultimate” facts.



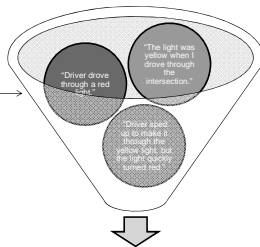
What is “finding fact”?

GATHER THE EVIDENCE
FIND THE FACTS
WRITE DOWN YOUR FINDINGS



“Finding” a fact

The evidence.
(The “facts”
according to the
witnesses.)



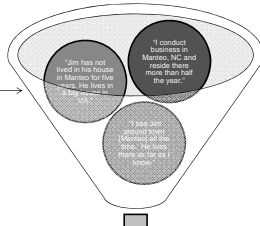
Finding of
fact.

Driver ran a red light.



“Finding” a fact

The evidence.
(The “facts”
according to the
witnesses.)



Finding of
fact.

Jim is a resident of North
Carolina.





“Finding” a fact

The evidence.
(The “facts”
according to the
witnesses.)

Respondent used ward's funds to buy a van
for her own use.

Finding of
fact.

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“Finding” a fact

Findings of fact should not merely
recite or recount the evidence.

They present what you have decided
the facts are.

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“Finding” a fact

- NO:

“Mr. Jones testified that Mr. Davis did not review the accounting filed on June 28, 2013.”
- YES:
 “Mr. Davis did not review the accounting filed on June 28, 2013.”

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“Finding” a fact

“[R]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.”

- Chloride, Inc. v. Honeycutt, 71 N.C. App. 805 (1984)



“Finding” a fact

Findings of Fact Nos. 12-15 are not even really facts as they simply recite what some unknown source said:

*703 12. That collaterals state that [B.F.] has a history of cocaine and crack use.

13. That collaterals also state that [B.F.] has a bad temper, he is impatient, he hollers at the baby and slaps her on her hands.

14. That collaterals state that B.F. only wants the child, so he won't have to pay child support.

15. That collaterals stated that [the] paternal grandmother, states that she is unwilling to help to baby-sit the child while she is in her home.

A more appropriate example of an “ultimate finding of fact” would have been for the court to state that “B.F. has a history of cocaine and crack use” or that “B.F. has a bad temper, he is impatient, he hollers at the baby and slaps her on her hands,” if it found these facts were true.

In re O.W., 164 N.C. App. 699 (2004).

“[I]t is not the role of the trial court as fact finder to simply restate the testimony given.”



“Finding” a fact

Findings of fact should not sound equivocal or uncertain.

Avoid leaving the reader with uncertainty about whether you have actually decided the facts.





“Finding” a fact

- NO:

“It would seem that Mr. Davis did not inform the heirs.”

(“It seems that...”; It would appear that..., “The Court is inclined to find that...”; It appears to the Court that...”)
- YES:
 “Mr. Davis did not inform the heirs.”

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“Finding” a fact

How do I get there?

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

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How many of the facts do I have to include?

Orders only have to contain
“controlling facts”.

Usually called “ultimate facts”.

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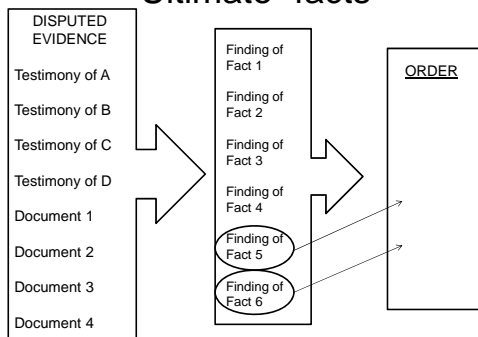
“Ultimate” facts

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

Woodward v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).



“Ultimate” facts



What is a conclusion of law?

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



EXERCISE: Fender bender



Drafting Tips

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



Drafting Tips

- Make sure there are conclusions of law to address the questions you must decide.
- Make sure each conclusion of law is supported by findings of fact.

Attorney Drafts

- Okay to have attorneys draft the orders?
 - Yes.

But, remember:

Attorney Drafts

- Avoid *ex parte* contact.
 - Include both (all) parties in all communications.
 - Helpful:
 - Instruct parties how to communicate with you about drafts (email, etc.).
 - Remind parties to copy the other party(ies) on all communications.

Attorney Drafts

- Review draft orders carefully.
 - Avoid wholesale adoption of one party's draft of a complicated order.
 - Lack of thorough review can lead to appearance of partiality.

Attorney Drafts

- *Habitat for Humanity of Moore Co., Inc. v. Pinebluff*, 653 S.E.2d 886, 889 (2007):
 - Trial judge's order was "printed, signed, and filed on the ruled stationary of [prevailing party's] trial attorney."
 - Court of Appeals: "*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 stationary bearing the name of the law firm. Such orders could call into question the impartiality of the court.*"

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



EXERCISE: *Trust of Percy*



ALEXIS



JANE

- What law applies?
 - What is my authority?
 - Does the law provide the remedy petitioner seeks?
- What does the petitioner need to prove? Has he or she proven it?
- What are my (fact) findings?
- How does the law apply to those findings?
- What will I order? Is my order supported by my findings/conclusions?

