"To Effectuate a Decision Already Made": The Role of a Substitute Judge Under Rule 63

Imagine this scenario: Judge A had a busy civil calendar before leaving for vacation. Although all the hearings are complete, the judge did not make rulings on some issues. As to a couple of other matters, the judge announced her intended rulings in court but did not enter orders, some of which will require written findings of fact. Sadly the Judge fell very ill during vacation, will not be able to resume her duties on the bench, and will soon retire due to disability. Will another judge be able to complete the work Judge A started?

Rule 63 and its relationship to Rule 52

Rule 63 of the Rules of Civil Procedure allows a second judge to "perform the duties, including entry of judgment" of another judge "before whom an action has been tried or a hearing has been held." This applies for all the reasons a judge might become unavailable: "death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason." But this Rule does not mean that a second judge will be able to complete *all* the work. Despite the broad language of the Rule, our courts have made clear that the substitute judge's task is "ministerial rather than judicial." *Matter of Whisnant*, 71 N.C. App. 439, 441 (1984).

In broad terms, what this means is that Judge B will not be able to do the judicial *decision making* for Judge A. In *Whisnant*, Judge Tate presided over a termination of parental rights hearing. At the close of the hearing he announced his intended order and asked one of the attorneys to "prepare an order with the appropriate findings…[r]eflecting the broad findings that I announced." A couple of months later, however, Judge Crotty—not Judge Tate—signed the relevant order, which included detailed findings of fact and conclusions of law. The Court of Appeals reversed, citing Rule 52 of the Rules of Civil Procedure, which requires a court in a non-jury trial to make written findings of fact and conclusions of law. Because these findings and conclusions reflect the role of that judge as "both judge and juror," they cannot be performed by a judge who did not hear the matter. The court was careful to also point out that Rule 63 does not change the result. Quoting an earlier case, the court stated that

"Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only … [performing] such acts as are necessary under our rules to effectuate a decision already made. Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision making process."

Id. at 441-42 (*quoting* Girard Trust Bank v. Easton, 12 N.C. App. 153, 155 (1971).

The Court of Appeals reached a similar result in *In re Savage*, 163 N.C. App. 195 (2004). In *Savage*, at the end of a termination of parental rights proceeding, Judge Jones announced certain findings and his conclusions as to the grounds for termination. He requested that petitioner's attorney prepare the relevant orders with proposed findings. The final orders, however, were signed by a different judge. Vacating the orders, the Court of Appeals reiterated that it is the *presiding* judge's task under Rule 52 to make written findings of fact and conclusions of law in the final order, and noted that "*Whisnant* confirms that the[se] requirements are not met when the presiding judge simply announces his decision in open court without ever reducing that decision to writing and filing it." *Id.* at 197. The court again emphasized that Rule 63 does not allow a substitute judge to perform this judicial function for the presiding judge. Because the original judge in *Savage* had left office by the time the case was remanded, the Court of Appeals was "left with no choice but to remand this case for hearing *de novo*." *Id.* at 198.

So, what if Judge A had done more than just announce her intended ruling, but in fact had drafted findings of fact and conclusions of law in a form readily available to a substitute judge? We know from the cases above that a substitute judge cannot "participate in the decision making process." And we know from Rule 58 that a judge's decision is not final until it has been entered pursuant to that rule. That is, a judge can alter her decision (including any of her findings and conclusions) any time up to entry—even after announcing different intentions in court. So one could *argue* that there is never a point where Judge B can be quite certain Judge A's decision was final. Still, Rule 63's language—allowing "entry of judgment"—contemplates that there is. So, when can a substitute judge proceed enter Judge A's draft order?

At the very least, circumstances should show that Judge A had *all but signed* the order before leaving the bench. Surely this will be a rare occurrence, but one apparent example arose in *Lange v. Lange*, 357 N.C. 645 (2003). In that case, Judge Jones had announced a custody decision in favor of Defendant and had asked Defendant's attorney to draft the order. The attorneys for both parties had "consulted several times regarding the exact wording of the order." According to the record, "just prior to [the judge] signing the final order," Plaintiff's attorney informed Judge Jones that he intended to move to recuse the judge. Judge Jones delayed signing the order pending the outcome of the recusal matter, which eventually was appealed. During the appeal process, Judge Jones retired. Although not addressing the question squarely, our Supreme Court appeared satisfied that Judge Jones's pending order was in final form, because the court held that a second judge (on eventual remand) "could choose to honor Judge Jones' decision in the matter, and enter Judge Jones' order as written." *Id.* at 648.

Which leads us to one more point: In a situation like that, would the second judge *have to* sign and enter Judge A's final order? No. Rule 63 states that "[i]f the substituted judge is satisfied that he or she cannot perform [the] duties because the trial judge did not preside at the trial or hearing *or for any other reason*, the judge may, in the judge's discretion, grant a new trial or hearing." (emphasis added). The Supreme Court noted that point in *Lange*, instructing that the substitute judge in that case could either enter the first Judge's order or "could choose to grant a new trial or

hearing for the parties." *Lange*, 357 N.C. at 648.

Another limitation on Rule 63: new trial orders

In addition to not being able to write another judge's findings of fact, a substitute judge may not decide new trial motions . Only the trial judge who presided over the trial may rule on a new trial (Rule 59) motion. A second judge may not do so even where the first judge has been recused. In *Sisk v. Sisk*, 221 N.C. App. 631 (2012), the plaintiff filed a new trial motion and soon thereafter also requested the trial judge recuse himself for partiality. After the judge agreed to the recusal request, the new trial motion was heard and granted by another judge. The Court of Appeals reversed, holding that the second judge had no jurisdiction over the new trial matter. This rule arose in two earlier cases where the trial judge erroneously failed to rule on a Rule 59 motion after ruling on a JNOV motion as required by Rule 50(c). *See* Graves v. Walston, 302 N.C. 332 (1981); Hoots v. Calaway, 282 N.C. 477 (1973). By the time the cases reached appellate disposition, the trial judge was no longer on the bench. Rather than remanding to the trial court for hearing, the Supreme Court determined that "[i]t would be inappropriate for another superior court judge who did not try the case to now pass upon plaintiff's alternative motion for a new trial." Instead, the appellate court itself should determine whether a new trial is appropriate. Rule 63 does not provide authority for another judge to rule on a new trial motion when the judge who presided over the trial is unable to do so. Gemini Drilling & Found., L.L.C. v. National Fire Ins. Co. of Hartford, 192 N.C. App. 376, 390 (2008); *but see* Springs v. City of Charlotte, 22 N.C. App. 132, 135 (2012) (holding that a substitute judge may submit an opinion about punitive damages under G.S. 1D-50).

In sum, Rule 63 can be useful authority for a second judge to enter orders on decisions that have already been made by a departed judge. It does not, however, override existing rules and principles requiring that the presiding judge be the only actual *decision maker*.