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Courts and Civil Procedure

It was a relatively quiet year for legislation affecting the courts. After the 1990s, in which there was much talk of court reform involving family court, appointment or merit selection of judges, reorganizing the courts into circuits, and other similar efforts, 2001 saw relatively few such ideas finding their way into legislative activity. The most significant bill affecting the administration of the system was S.L. 2001-403 (S 119), which shifted district court elections from partisan to nonpartisan. There were, as usual, a few bills changing judicial district lines, and there were a few bills that would have made significant changes that did not pass this session. Senate Bill 1054, proposing public financing of appellate judicial races, was passed by the Senate very late in the session but was not voted on by the House. The bill would set up a voluntary system for candidates for appellate judgeships in which they could receive public funding for their campaigns, but they would have to agree to fund-raising and spending limits. It is eligible for consideration in the 2002 session.

After an aggressive effort in the late 1990s to come up with a long-term plan to modernize the system's information system, 2001 was a disappointing year. Chief Justice Lake, in his State of the Judiciary address on March 26, noted that

the report of the internationally respected Gartner Group . . . warned of severe, pending problems due to lack of technology in our courthouses across the state. [The legislature's] initial funding has already been used to begin a number of urgently needed and cost-effective programs. I emphasize "to begin" because without additional or at least continuation funding, these programs will falter and fail, thus wasting the investment made to date.

The state budget's difficulties are noted elsewhere in this publication, but one of many effects of the budgetary difficulties was the elimination of funding for court technology improvements.

This chapter will discuss this funding cutback and its effects in more detail and will also describe the significant changes to noncriminal court procedural rules and to statutes regulating

the work of magistrates and the clerks of superior court. Chapter 6 (“Criminal Law and Procedure”) and Chapter 19 (“Motor Vehicles”) also contain information about legislation that affects the courts.

Court Organization and Administration

Budget

The court system’s budget [Section 22, S.L. 2001-424 (S 1005)] for 2001–2003 was included in two categories, judicial operations and indigent defense. This categorization reflects the fact that funds to provide indigent defense services are the responsibility of the Indigent Defense Services Commission, which was established by the General Assembly in 1999. For the current biennium, the court system’s operating budget is \$305.5 million per year and the indigent defense budget is approximately \$70 million. The operating budget was cut by approximately \$3 million per year. The cuts came in many administrative categories such as jury fees, unemployment payments, temporary services, fringe benefit costs, equipment maintenance costs, overtime costs, and lease costs. The cuts also include a reduction in superior court judges’ travel for educational conferences; those judges also receive an annual subsistence allowance to cover their costs when they rotate into out-of-town districts to hold court. In 2000 the amount of overnight travel in which judges were expected to engage was reduced by a significant realignment of the divisions through which they were expected to rotate. The superior court judges’ expenses for educational events will now have to be paid from that annual allowance.

There were also some new positions created. A superior court judgeship that was established for district 4B (Onslow) in the 2000 legislative session was redirected to District 24 (Avery, Mitchell, Watauga, Yancey, and Madison). Effective October 1, 2001, the Governor is authorized to appoint the initial occupant of that judgeship. A vacant, never-filled district judgeship in district 17A (Rockingham) was eliminated, and a new district judgeship was established in District 10, effective January 1, 2002. In addition, a new special superior court judgeship was established effective October 1, 2001, as were new magistrate positions in Columbus and Chowan counties, and a vacant magistrate position was moved from Johnston to Swain County. Two new clerk positions were established—a new deputy in Brunswick and a new assistant in New Hanover, effective July 1, 2001.

The court system prepared a budget requesting \$7 million in additional technology funding for fiscal year 2001–2002 and \$6 million for 2002–2003. The request addressed the items included in the technology plan prepared in the late 1990s at the legislature’s request by the Gartner Group (a private consulting firm selected to prepare the plan). The request would have funded improvements in Internet connectivity, wide-area network security, increased support for the computer services helpdesk, increased field support for court officials using personal computers, the provision of laptops for prosecutors and public defenders, limited use of wireless technology to provide computer network services to courtrooms, improvements in a program to further computerize the civil judgment process, and increased technological support for family courts. None of those items were funded.

The only new funds for the court’s technology initiatives were \$475,000 in 2001–2002 and \$125,000 in 2002–2003 to provide telephone services to new courthouses that are to be completed in those years.

The indigent defense budget was reduced in two instances. The first reflects an increase in the amount collected from criminal defendants who use the indigent defense services system. That increase allowed the General Assembly to reduce the appropriation to the Indigent Defense Services Commission by the amount of the increase (\$750,000 per year). In addition the General Assembly has in recent years earmarked some indigent defense funds for the North Carolina State Bar to support the work of Legal Services of North Carolina (which provides services in civil

matters to poor people in the state). The General Assembly instead earmarked a portion of the court costs to provide that funding and the funding to the commission was reduced by that amount.

The indigent defense budget received an overall increase of around \$3 million. This reflects the increasing costs of providing these services, which are generally required to be provided by the United States Constitution.

District Court Elections

S.L. 2001-403 provides that, beginning in the 2002 election, district court judges will run in nonpartisan elections. District judges will still run in designated seats, so that if there are two vacancies in a single district, there are two separate elections. Superior court judgeships in a district, on the other hand, are filled as a group. If there are two superior court judgeships in a district, there is a single election and the two candidates receiving the most votes are the winners of the election. Since 1998 superior court elections have used the nonpartisan system. Appellate judgeship elections remain partisan.

Vacancies in district judgeships are currently filled by gubernatorial appointments from a list of candidates submitted by the bar of the district in which the vacancy occurs. The current law requires the candidates to be members of the same party as the vacating judge. The new law retains the gubernatorial appointments and local bar nomination of candidates but imposes no requirement of partisanship on the bar nominees. This last change is effective in December of 2002.

Senate Bill 712, which would authorize a vote on a constitutional amendment to increase the terms of district court judges to eight years, was passed by the Senate and will be eligible for consideration by the House in the 2002 session.

Districts

There were several bills that realigned judicial districts this year. Some, like S.L. 2001-333 (S 476) and S.L. 2001-507 (H 1195), are largely technical and move precincts from one superior court district to another. In those bills districts in Wake (District 10), Guilford (District 18), and Forsyth (District 21) were rearranged. Others are more substantive. S.L. 2001-400 (H 844), which applies to the district court district in District 11 (Harnett, Johnston, and Lee), requires a specified number of judges from each of the three counties. It requires that of the eight district judgeships assigned to that district, five must reside in Johnston, two must reside in Harnett, and one must reside in Lee. This bill raised a considerable amount of discussion about whether this county residence requirement is consistent with the provisions of Article IV, Section 10, of the North Carolina Constitution. That section specifies that “[e]very district judge shall reside in the district for which he is elected.” Adding a requirement of residence in a specific county may impose an additional qualification to run for the office of district court in District 11 that is not authorized by the constitution. Adding additional qualifications to hold elective office has in at least one instance been held to be beyond the authority of the General Assembly to impose. *See Moore v. Knightdale Board of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992).

Civil Procedure

Rules of Civil Procedure

S.L. 2001-379 (H 439) makes numerous changes to the Rules of Civil Procedure as recommended by the Civil Litigation Study Commission created by the 1999 General Assembly. That commission followed on the heels of an earlier Civil Procedure Study Commission that had recommended fifteen changes to the Rules of Civil Procedure to the 1998 General Assembly, only one of which was enacted. The Civil Litigation Study Commission revisited and then

re-recommended some of the changes suggested by the 1998 commission. S.L. 2001-379 changes service of process under Rules 4 and 5 to modernize the statutes. It extends the life of a summons from thirty to sixty days to give more time for the officer or party serving process to effect service. It allows service by reliable private delivery services in addition to the U.S. Postal Service by allowing Rule 4 service by depositing the summons and complaint (addressed to the party to be served) with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2), delivering it to the addressee, and obtaining a delivery receipt. Currently the authorized services are Airborne Express, DHL Worldwide Express, Federal Express, and United Parcel Post. The party using one of these delivery services proves service in the same manner as service by certified mail. The new law also allows service under Rule 5 on a party's attorney by sending the document to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. on a regular business day. If the telefacsimile is received at any time after that, it is deemed completed on the next business day.

S.L. 2001-379 also makes two changes to the discovery rules. It amends Rule 28(c) to provide that a person otherwise disqualified from taking a deposition may take a deposition by videotape if (1) the notice for taking the deposition indicates the name of the person before whom the deposition will be taken and that person's relationship to a party or a party's attorney and (2) the deposition is also recorded by stenographic means by a nondisqualified person. This provision merely allows an attorney's employee to operate the videotape equipment when a deposition is both recorded by videotape and by stenographic means. In order to assure that parties have tried to resolve discovery disputes before necessitating court involvement, the General Assembly amended Rule 37(a) to require a motion to compel discovery to include a certification that the movant, in an effort to secure the information, has in good faith conferred with the person failing to respond to the discovery.

S.L. 2001-379 also modifies Rule 46 to clarify that the rule providing for objections to rulings and orders applies to pretrial rulings and interlocutory orders. It also removes the provision regarding exceptions to jury instructions that conflict in part with Rule 10(b) of the Rules of Appellate Procedure. With regard to temporary restraining orders, Rule 65 is amended to enhance notice by providing that the order may be granted without written or oral notice to the adverse party only if it clearly appears from the specific facts shown that immediate and irreparable damage will result to the applicant before the adverse party can be heard in opposition and the applicant's attorney certifies in writing the efforts that have been made to give the notice and reasons supporting the claim that notice should not be required. This new provision mirrors the current federal rule of civil procedure.

In addition, S.L. 2001-379 amends Rule 63 to expand the circumstances for substitution of a judge when the original judge is not available to perform the duties to complete a case after a verdict has been returned or a trial or hearing has been concluded. The new provision allows another judge to complete the duties, including entry of judgment, if the original judge is unable to perform his or her duties because of resignation, retirement, removal from office, or other reason as well as because of death, sickness, and disability.

In 1995 the General Assembly added subsection (j) to Rule 9, requiring a party bringing a medical malpractice action to have an expert evaluate the case before the complaint is filed and agree to testify in the case that medical malpractice has occurred. The party may file a motion with a resident judge of the county where the cause of action arose to extend the statute of limitations for 120 days in order to comply with this special rule. S.L. 2001-121 (H 434) authorizes additional judges to extend the statute of limitations. These now include resident judges for a district in which venue is appropriate, which includes any county in which any of the plaintiffs or defendants reside, and any presiding judge in the district if a resident judge is not available, able, or willing to consider the motion. However, on October 2, 2001, the North Carolina Court of Appeals, in a two-to-one decision in *Anderson v. Assimos*, ___ N.C. App. ___, 553 S.E.2d 63 (2001), found Rule 9(j) unconstitutional in that it unduly restricts the access to the courts' provision of the state constitution and violates the Equal Protection Clause of the state and federal constitutions. Because of the split decision, the case will go to the North Carolina Supreme Court for final resolution.

In 2000, the General Assembly amended Rule 5 by requiring briefs or memoranda in support of or opposition to a motion seeking final determination of the rights of a party to be served on parties at least two days before the hearing. The purpose of the bill was to eliminate surprise at hearings. Rule 5(d) requires that all papers that must be served on a party be filed with the court. No exception was made for briefs and memoranda, though these had not previously been being filed with the clerk's office. Thus the clerks were required to file these memoranda in the case files even though they were not needed as part of the official file. S.L. 2001-388 (S 951) corrects the problem by amending the rule to provide that briefs and memoranda provided to the judge may not be filed with the clerk of court unless ordered by the judge.

As part of a larger bill dealing with health care insurance, S.L. 2001-446 (S 199) amends Rule 42(b) to provide that upon motion of any party in an action that includes a claim for negligent care against a managed care company, the court must order separate discovery and a separate trial of any claim or counterclaim against a physician or other medical provider.

Cover Sheets in Civil Actions

S.L. 2001-388 adds G.S. 7A-34.1 to correct what some attorneys believed to be an unnecessary requirement by the Administrative Office of the Courts to include cover sheets with all filings with the clerk. The new statute provides that a cover sheet is not required in civil actions in filings subsequent to the initial filing if the filing itself contains information that would be required on the cover sheet.

Statute of Limitations

S.L. 2001-175 (H 665) extends the statute of limitations for the intentional torts of assault and battery and false imprisonment to three years instead of one year in order to make it comparable to the statute of limitations in negligence cases. The one-year statute of limitations remains for libel and slander actions.

Motions to Review Decisions to Seal Records or Close Courtrooms

S.L. 2001-516 (H 1284) creates a procedure for news media organizations and others for seeking access to court proceedings or records that have been ordered closed by a court. The statute was passed in response to a decision of the North Carolina Supreme Court, *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999), in which the court ruled that news media organizations cannot intervene in court proceedings to assert their right to access court proceedings or records. The statute effectively reverses that decision; it allows the news media to seek access by filing a motion which must be heard and ruled on by the trial court in writing.

The statute also allows for an immediate appeal of a trial court's decision in some cases. If the trial proceeds before the appeal is resolved, however, the appellate court may not retroactively order that closed documents or transcripts of court proceedings be opened.

S.L. 2001-516 does not create new or further restrict the instances in which access is appropriate. *Virmani* approved the closing of court proceedings and the sealing of some records related to a hospital's review of a doctor's fitness to serve on its staff. One finding in the case is that there are instances in which a court may order the closure of court proceedings or records. S.L. 2001-516 simply provides a procedure for news media organizations to challenge such rulings.

S.L. 2001-516 does, however, allow parties to ask a court to order that records used in a trial be treated as confidential, and it allows the party to make the request to the judge in private. If the judge rules that the records must be public, the party then has the choice of making them public or not offering them as evidence.

Domestic Violence Law Changes

On the last day of the session, the General Assembly enacted S.L. 2001-518 (S 346), which made some significant changes in the law regarding domestic violence protection orders. The major changes in the bill affect criminal law pertaining to domestic violence. The special pretrial release rule requiring a judge to determine conditions of pretrial release for the first forty-eight hours after arrest is expanded to include certain felony charges, including rape and sexual offenses, kidnapping, and arson and other burnings. The punishment for violating a protective order is modified as well. Those provisions are discussed in detail in Chapter 6, "Criminal Law and Procedure."

S.L. 2001-518 adds new conduct for which a civil domestic violence protective order may be granted. Effective March 1, 2002, a protective order may be issued if the defendant in the protective order action places the aggrieved party (plaintiff) or a member of the aggrieved party's family or household in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. Harassment is defined in the statute as "knowing conduct, including written or printed communication or transmission, telephone or cellular or other wireless telephonic communication, facsimile transmission, pager messages or transmission, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." What constitutes "substantial emotional distress" is not defined.

G.S. 50B-2(c1) provides that if a magistrate is authorized by the chief district judge to issue ex parte orders, those orders expire the earlier of seventy-two hours or the end of the next day in which district court is in session in the county. This statute has presented a problem in rural counties where district court is held infrequently and the order expires after seventy-two hours with no opportunity for a judge to issue a new ex parte order. Effective March 1, 2002, S.L. 2001-518 corrects this problem by providing that an ex parte order entered by a magistrate expires by the end of the next day on which the district court is in session in the county. Therefore, the victim will now be protected by the magistrate's ex parte order until a district judge can decide whether to continue the order.

Matters of Particular Interest to Trial Judges

Evidence

In response to a case in Orange County in which a defendant charged with rape subpoenaed the local rape crisis center's records searching for information about the alleged victim's credibility, the North Carolina Coalition Against Sexual Assault and the North Carolina Coalition Against Domestic Violence sought from the General Assembly protection of information gained in assisting victims of sexual assault and domestic violence similar to testimonial privileges granted to physicians, psychologists, and other professionals providing medical treatment. S.L. 2001-277 (H 643) provides that no employee of a domestic violence program or rape crisis center is required to disclose information acquired during the provision of services to a victim in a court proceeding unless the judge compels disclosure after finding that (1) the records or testimony sought contains information relevant and material to factual issues in a civil proceeding or is relevant, material, and exculpatory upon the issue of guilt in a criminal case; (2) the evidence is not sought merely for character impeachment purposes; and (3) the evidence sought is not merely cumulative of other evidence available or already obtained. The statute also requires the party seeking the information to make a sufficient showing that the records are likely to contain information subject to disclosure.

S.L. 2001-152 (S 739) expands the testimonial privilege in G.S. 8-53.6 for doctors, psychologists, and marital family therapists who have provided marital counseling for testifying in

divorce and alimony actions. The new law extends the privilege to licensed psychological associates, licensed social workers, and licensed marriage and family therapists and covers testimony in actions for divorce from bed and board and postseparation support in addition to those for divorce and alimony.

S.L. 2001-115 (H 342) allows the Employment Security Commission to copy official records it is required to keep and provides that these copies are admissible as evidence as the originals would have been if the copies are certified by the commission to be true and accurate.

New Causes of Action

S.L. 2001-62 (H 162) creates a new district court civil action to authorize a child who is fourteen or fifteen years old to marry under certain circumstances. This law is discussed in detail in Chapter 3, “Children and Families.”

S.L. 2001-391 (S 723) adds G.S. 75-20 regulating entities who send unsolicited checks that, if cashed, require the recipient to repay the amount of the check with interest. The new law specifies the disclosures that must be made on the check and on accompanying documents to clearly indicate to the recipient that the check is a solicitation for a loan. A violation of the law is an unfair trade practice.

S.L. 2001-446 creates a new cause of action, effective July 1, 2002, against managed care companies that fail to exercise ordinary care in making health care decisions.

Matters of Particular Interest to Clerks of Court

Estate Matters

Administration of trusts. Several changes affecting clerks of court were made in the estate law. The most significant of these was S.L. 2001-413 (H 1070), which gives clerks original and exclusive jurisdiction over proceedings concerning the internal affairs of trusts. Formerly, clerks had jurisdiction to appoint successor trustees and, depending on the provisions in the trust, jurisdiction over testamentary trustees with regard to bonds and accountings. The new law gives the clerk the same jurisdiction over testamentary and inter vivos trusts that, and in some cases broader jurisdiction than what they have over decedents’ estates. The clerks now have jurisdiction to appoint or remove trustees; to review the fees paid to trustees; to ascertain beneficiaries; and to determine any question arising in the administration or distribution of a trust, including questions of construction and determination of existence of a nontestamentary trust. However, in issues of construction and existence of a trust, the clerk may, on his or her own motion, determine that a superior court judge should hear the matter originally. Proceedings concerning trusts are filed as estate matters and appeals are governed by G.S. 1-301.3.

Special proceedings to exercise control over real property or to sell land to create assets in decedents’ estates. S.L. 2001-413 also intended to modify the law governing administration of decedents’ estates by providing that if a personal representative has filed either a special proceeding to exercise custody and control over real property or to sell land to create assets to pay debts, the personal representative may seek the other remedy in the proceeding already filed without having to file a second special proceeding. However, as actually drafted the act makes no change in the current law, and a future General Assembly will have to correct the drafting error to accomplish the intended result.

Anti-lapse statute. In 1999 the General Assembly rewrote the anti-lapse statute, which directs how property passes if the person inheriting under a will dies before the testator (person making the will). S.L. 2001-83 (H 182) reinstates a provision inadvertently omitted from the 1999 revision regarding devises to a class of persons—for example, “to my nephews and nieces.” It provides that if a member of a class dies before the testator and leaves no issue, that person’s share goes to the other members of the class.

Trust bank accounts. S.L. 2001-267 (H 1098) changes the name of trust bank accounts to “payable on death” (POD) accounts to more clearly reflect their nature. It also specifies who is entitled to the proceeds of these accounts when there are either two or more owners of the account or two or more beneficiaries.

Effect of equitable distribution action on decedents’ estates. S.L. 2001-364 (H 1084) provides that an equitable distribution action that has not been completed before the death of one of the parties does not abate upon the death. This new law’s effect on decedents’ estates is relevant to clerks of court if a spouse dies before a divorce is finalized. If the surviving spouse claims an elective share, the net value of the marital estate awarded in the equitable distribution action is counted as property passing to the surviving spouse, which means that the hearing before the clerk to determine an elective share cannot be conducted until the equitable distribution judgment is entered. If the decedent died intestate, the surviving spouse’s share is determined as if there were no equitable distribution award and then reduced by the net value of the equitable distribution award. In that case, the surviving spouse’s share may be determined before the equitable distribution award, but the share cannot be distributed to the spouse until the equitable distribution action is final. For more information about this new statute, see Chapter 3, “Children and Families.”

Judicial and Execution Sales

Whenever real property is sold at a judicial or execution sale, the sale is not final. Rather it is subject to an upset bid within ten days after the person holding the sale files a report of sale with the clerk. When an upset bid is filed, the clerk orders a new sale and the property must be re-offered for sale at a public auction. In some cases property has been resold numerous times before the bid reaches an amount close enough to fair market value that no other person is willing to raise the bid. The process of resales is cumbersome, time-consuming, and costly since each resale must be advertised in the newspaper. In many cases the expense of the resales consumes much of the additional amount of the bid. In 1993 the General Assembly modified a similar procedure in the foreclosure law to eliminate resales and to provide for rolling upset bid periods. If a person files an upset bid within the ten-day period after the report of sale, a new ten-day period for upset bids begins. A series of upset bids can be filed until no one files a new bid within ten days after the last bid is filed. This rolling upset bid process allows the auction to proceed to the highest bid more quickly and economically. S.L. 2001-271 (S 681) applies this rolling upset bid procedure to judicial and execution sales. However, the procedure differs in two respects from foreclosure sales. First, any interested party may file a motion with the clerk to seek a resale rather than continued rolling bids, and the clerk orders the resale upon a showing of good cause. Second, the clerk must confirm a judicial or execution sale. S.L. 2001-271 applies to judicial sales when the order of sale is issued on or after January 1, 2002, and to executions sales when the execution is issued on or after that date.

Civil Matters

Workers’ comp awards. S.L. 2001-477 (S 881) amends G.S. 97-87 to provide that workers’ compensation awards be indexed and docketed as a judgment by the clerk when a certified copy of the award is filed with the clerk. Current law requires a judge to enter judgment based on the award. If the award provides for periodic payments rather than a sum certain due and payable, the claimant may seek a certificate of accrued arrearages from the Industrial Commission, and that certificate is docketed as a judgment. This new law takes effect June 1, 2002, and applies to awards filed on or after that date.

Filing of unauthorized liens prohibited. S.L. 2001-495 (S 912) is one of two bills enacted by the General Assembly this year to address the problem of the filing of unauthorized liens that tie up real property owned by those against whom the liens are filed. Many of these liens originate in “common law courts,” which are created by groups that believe they are not bound by the laws of the United States and individual states. S.L. 2001-495 prohibits the clerk from indexing and

docketing a claim of lien or any other document purporting to assert a lien on real property unless the document is offered for filing under a statute that provides for indexing and docketing of claims of lien on real property and appears on its face to contain all of the information required by the statute under which it is offered for filing. The clerk may accept the document for filing only but must indicate to the person filing it that it will not be indexed and docketed. S.L. 2001-495 also prohibits the register of deeds from recording a document affecting title that does not comport with a specific statute. A related bill, S.L. 2001-231 (S 257), prohibits fraudulent Uniform Commercial Code filings with the Secretary of State affecting real property.

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