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Courts and Civil Procedure

Court administration in North Carolina, like most other state agencies in 2003, was focused on staying afloat in a difficult financial year. For the first time in several sessions, there were no serious discussions about changing the structure of the courts or the method of selecting judges. This was due in part to the significant changes made in these areas in recent years (for example, the transition of the remaining levels of the judiciary to nonpartisan elections and the creation of a public fund to provide optional subsidies to candidates in appellate court elections). This session the State Judicial Council supported two significant bills involving court administration. Those bills, which dealt with jurisdiction and budget administration, were not enacted. The court-related bills that were enacted were mostly concerned with refining existing programs or clarifying current statutes. Many important criminal, juvenile, family, and motor vehicle law bills were enacted this session and are discussed in this book in separate chapters. Since the courts are involved in all of these areas, readers interested in the justice system or court administration should consult those chapters as well.

The Judicial Council's budget administration bills, H 1218 and its companion, S 726, would have substantially revised the fiscal relationship between the courts and the legislative and executive branches of state government. In general, the bill would have allowed the court system more flexibility in spending legislative appropriations and would have restricted the Governor's authority to withhold any appropriations from the courts. The bill would not have changed the division of responsibility between the Administrative Office of the Courts (AOC) and local court officials in making budget decisions. Neither chamber took up the bill this session.

The Judicial Council also endorsed S 577, which, had it been enacted, would have

- made substantial changes in the allocation of jurisdiction among the state's trial courts;
- allowed clerks and magistrates to hear not-guilty pleas in infraction cases;
- allowed clerks and magistrates to set child support amounts according to guidelines adopted by the Conference of Chief District Judges;
- raised the small claims limit from \$4,000 to \$5,000;
- allowed district court judges to take guilty pleas in nearly all felony cases;
- allowed the entry of default judgments in simple divorce cases; and

- authorized superior court judges to conduct district court criminal matters in circumstances in which the district court was unable to finish its work in a timely manner and the superior court judge had sufficient time to hear the cases.

Senate Bill 577 passed the Senate with all provisions intact except that allowing clerks and magistrates to hear cases involving infractions. It is therefore eligible for reconsideration in the 2004 session.

Budget

Nearly all state agency budgets were reduced this session, and the court system budget was no exception [S.L. 2003-284 (H 397)]. The budget directs the AOC to cut \$3.4 million from nonrecurring funds in fiscal 2003–2004, to make \$1 million in permanent cuts, and to forfeit \$1.5 million in salary reserves on a permanent basis. (Salary reserves are funds that become available when an employee is replaced by another employee whose salary is less. If a person whose salary is \$50,000 is replaced by someone whose salary will be \$30,000, a salary reserve of \$20,000 is created if the agency continues to receive the full \$50,000 for that position.) In effect, the reduction in salary reserves reduces the court system personnel budget by \$1.5 million. The budget bill also made smaller cuts in several programs and substantially reduced state funding for the arbitration program. The arbitration program assigns certain civil cases to a lawyer-arbitrator who decides the case using a summary of the evidence; parties retain the option of having the case heard by a judge or jury. Despite the reduction in funding, the program was not eliminated and no arbitration personnel were fired. In an attempt to generate the funds needed to support the program at its current level, the legislature established a \$100 fee to be paid by the litigants in each case.

Only two new appropriations were made in the sphere of court administration. One establishes a reserve of \$450,000 to fund salaries for any personnel deemed necessary by a study being conducted by the Office of State Personnel. The second establishes a new superior court district in Moore County. Currently Montgomery, Randolph, and Moore counties comprise Superior Court District 19B, and two superior court judgeships are assigned to that district. One judge lives in Moore County and the other lives in Randolph. The budget creates a new District 19D, comprised solely of Moore County. No new judgeships are created; the judge who currently resides in Randolph County is assigned to District 19B and the judge residing in Moore is assigned to the new District 19D. The additional funds necessary to establish the new district will include the salary differential involved in upgrading a judge to the position of senior resident judge and the cost of creating a judicial assistant position for that judge (around \$50,000 per year). The district court and prosecutorial districts are not affected by this change.

The budget also made some salary- and fee-related changes that will affect the courts. Among them are amendments to the following statutes:

- G.S. 7A-102. Clerks of court are given the authority to appoint employees at a salary higher than the statutory minimum, pending AOC approval and availability of funds (salary reserve funds, which as noted above were reduced by \$1.5 million). If clerks do not have this flexibility, their employees are paid pursuant to a salary schedule based solely on years of service in the clerk's office and the job classification within the office.
- G.S. 7A-65 and -498.7. Inconsistencies in prerequisites for longevity pay are eliminated. Previously wide variation existed in the types of service that qualified for the credit used to determine when certain employees got longevity raises. Rules that had been used only for judges now apply to district attorneys, public defenders, and the attorneys' and defenders' assistants.
- G.S. 7A-455.1. The option of making partial payments on the \$50 fee assessed when an attorney is appointed for an indigent criminal defendant is eliminated.
- G.S. 7A-38.7. The \$60 fee for mediation of criminal cases assigned to dispute settlement centers will now be imposed for each mediation in the case. Each center must attach the receipt for the fee to any dismissal form submitted to the district attorney and note the docket number for each case. Dispute settlement centers receive substantial sums in state

grants, and these changes are designed to make financial reporting more uniform and consistent among the various centers.

- G.S. 7A-308. Various miscellaneous fees are rounded up to at least the nearest whole dollar. These modifications were made to reduce the need for clerks to make change, and, since all the figures reflect a rounding up instead of down, to raise additional revenue.

Court Administration

Case Management Pilot Projects

Two significant provisions affecting court administration were enacted. The first, a special provision in the state budget, authorizes the AOC to designate up to four judicial districts to conduct a pilot in civil case assignment using assignments of cases to individual judges or sessions of court in the district or superior court. Currently, only the level of court to which a case is assigned determines how it will be administered (for example, the type of alternative dispute resolution designated to handle a case is largely a product of whether the case is filed in superior or district court). This pilot is intended to experiment with a method of case management that considers other factors that could be used to make such assignments. The factors to be studied include

- the nature of the case,
- the amount in controversy,
- the complexity of the issues involved,
- the likelihood of settlement,
- the availability and suitability of alternative dispute resolution programs, and
- any other appropriate factors relevant to just resolution of the cases and efficient use of court resources.

The pilot's authority expires June 30, 2005.

Master Jury Lists

As part of the Help America Vote Act, S.L. 2003-226 (H 842) modifies the rules governing the preparation of each county's master jury list. Master jury lists are used to summon jurors for a two-year period (with some urban counties preparing a list every year). Currently the county jury commission must prepare the master jury list using at least the county driver license list and the voter registration list. These two lists must be merged to form a raw list from which the master jury list is created.

Jury systems have had a significant problem with the accuracy of the addresses used to summon jurors; often a very high percentage of these summonses cannot be served because the addresses are no longer valid. S.L. 2003-226 is intended to improve the quality of the voter registration list and to update the statutes on jury list preparation generally so that the master lists might be more accurate and easier to use. The new law requires the Division of Motor Vehicles (DMV) to include both licensed drivers and registered voters in the lists it provides to the jury commissioners of each county. The DMV must eliminate duplicate names from the lists and indicate which persons are only registered to vote and which are only licensed to drive (or are suspended from driving). The list provided to a jury commission is confidential and is not subject to the public records law. The jury commission must use the list provided by the DMV; it may include other sources of names, but additional lists must be merged in their entirety with the DMV list and duplicates removed (a complicated task unlikely to be executed very frequently). The names for the master list must then be selected randomly from the DMV list. Previously jury commissions in counties that prepared the list manually (without computers) used samples of names from various separate lists, but S.L. 2003-226 now prohibits that practice. The new law is effective January 1, 2004.

S.L. 2003-266 is discussed in more detail in Chapter 7, "Elections."

Judges' Power to Conduct Marriage Ceremonies

S.L. 2003-4 (H 382) reflects another trend in court administration. By law the only court officials authorized to perform marriages are magistrates. Over the last several years, some judges have been interested in performing marriage ceremonies for their friends or relatives. Rather than attempting to amend the general law, these judges typically have sought to amend the law for a narrow period of time to authorize these marriages. This year's law allowed district court judges to conduct marriages between March 27, 2003, and March 31, 2003. Some indication exists that some legislators do not approve of this use of the legislative power—one edition of this bill would have permanently authorized judges to perform marriages. However, it is generally believed that most judges do not wish to have this authorization.

Civil Procedure

Subpoenas

Rule 45 of the Rules of Civil Procedure governs subpoenas. S.L. 2003-276 (H 785) rewrites this rule to conform it to the comparable federal rule of civil procedure. Although new Rule 45 is not identical to the federal rule, it reflects the form of and includes much of the same language as the federal rule. The method of issuance and service of a subpoena remains unchanged, but the new rule requires a copy of any subpoena to be served on all parties under Rule 5 except in criminal cases. The new rule also

- requires a party to produce records and permits inspection and copying of those records.
- requires a party issuing a subpoena to take reasonable steps to avoid imposing undue burden or expense on the person subject to the subpoena.
- sets out procedures for filing a written objection to a subpoena or a motion to quash or modify a subpoena and specifies the grounds upon which motions may be granted.
- compels compliance with subpoenas.
- sets out procedures for responding to a subpoena for documents.
- specifies that failure to respond to a subpoena may be punished as contempt and a party's failure to respond may subject that party to sanctions.

Legal Holidays

Numerous civil statutes provide that if the last date on which a particular act may be executed falls on a legal holiday, the act may be executed by the end of the next day instead. For example, an answer to a complaint must be filed within thirty days of service of the complaint and an upset bid in a foreclosure sale must be filed within ten days of the filing of the report of sale. If the thirtieth or tenth day falls on a legal holiday, however, the act may be executed the following day. Because many of the numerous legal public holidays listed in G.S. 103-4—such as Robert E. Lee's birthday, Greek Independence Day, and the Anniversary of the signing of the Halifax Resolves—fall on days the courts of the state are open for business, court officials and litigants may not be able to properly calculate the amount of time legally permissible for executing a particular act. S.L. 2003-337 (H 394) corrects this problem by amending Rule 6 of the Rules of Civil Procedure and other statutes specifying that an act may be completed by the end of the next day after a legal holiday to provide that legal holiday means "legal holiday when the courthouse is closed for transactions."

Judgment Docketing

For over two hundred years, clerks of court have docketed judgments by writing information about the judgments in judgment docket books. In 1988 and 1989, clerks' offices began using a computerized indexing system developed by the AOC for use with civil cases. Sometime within the next year, the AOC also plans to implement a computerized system to be used for docketing

judgments and eliminate the judgment docket books. In preparation for the changeover, the AOC recommended S.L. 2003-59 (H 636) to remove obsolete provisions and otherwise make the docketing judgments statutes compatible with the proposed electronic system. The new law emphasizes the importance of the time of entry and the time of the indexing of the judgment by providing that:

- A judgment will constitute a lien against real property owned by the defendant for ten years from the date of the entry of the judgment rather than the date of the rendition of the judgment.
- Judgment liens will be effective against third parties from the time of the indexing of the judgment.
- Each judgment be given individual priority based on the time of its indexing. Previously, all judgments docketed during the same session of court were given equal priority.

Guardian ad Litem in Civil Cases

S.L. 2003-236 (H 1123) deals with whether a guardian ad litem can be appointed under Rule 17 of the Rules of Civil Procedure for a person alleged to be mentally incompetent without a determination of incompetency under G.S. Chapter 35A. In *Culton v. Culton*, 96 N.C. App. 620, 386 S.E.2d 592 (1989), *rev'd*, 327 N.C. 624, 398 S.E.2d 323 (1990), the court of appeals held that G.S. Chapter 35A was the exclusive procedure for determining whether a person is incompetent and that a guardian ad litem could not be appointed under Rule 17 until the person had been adjudicated incompetent under Chapter 35A. Although the case was reversed and dismissed by the supreme court on grounds that the appellant did not have standing to challenge the appointment of a guardian ad litem, it is still cited by many to challenge the appointment of a guardian ad litem under Rule 17 for a person alleged to be but not adjudicated incompetent. S.L. 2003-236 lays the issue to rest by amending G.S. 35A-1102 to provide that the statutes for determining incompetence do not interfere with the authority of a judge (and presumably a clerk) to appoint a guardian ad litem under Rule 17 for a party to litigation.

Bonds in Large Civil Judgments

In order to deal with multimillion-dollar tobacco litigation judgments, the 2000 General Assembly amended G.S. 1-289, which requires a bond to stay execution of money judgments while cases are on appeal, to set a maximum bond of \$25 million for judgments with noncompensatory damages of \$25 million or more. S.L. 2003-19 (S 784) modifies that provision to set the bond cap at \$25 million regardless of the type of damages that have been awarded. To give foreign judgments sought to be collected in this state the same protections as judgments entered in North Carolina, the new law also amends G.S. 1C-1705 to require North Carolina courts to stay execution of foreign judgments registered in North Carolina upon the posting of the stay of execution bond if the judgment is stayed by the court in which it was entered, an appeal is pending, or the time for taking an appeal has not yet expired.

***Pro Hac Vice* Appearances by Out-of-State Attorneys**

S.L. 2003-116 (S 539) amends G.S. 84-4.1 to require that an out-of-state attorney who files a motion to appear in a North Carolina case (*pro hac vice* motions) include with the motion a complete disciplinary history and a list of any revocations of previous *pro hac vice* admissions.

Evidence

S.L. 2003-101 (H 689) makes a substantial change in Evidence Rule 103 by providing that once the court makes a definitive ruling on the record admitting or excluding evidence, either

before or during a trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

S.L. 2003-342 (H 743) grants nurses a testimonial privilege similar to the physician-patient privilege. A nurse is not required to testify about any information acquired in rendering professional nursing services if the information is necessary to render those services. However, a judge may override the privilege and compel disclosure if such disclosure is necessary for the proper administration of justice.

S.L. 2003-62 (H 126) allows the admission in a juvenile case of hearsay and any other evidence the court finds relevant and reliable and necessary to determine the most appropriate disposition of the case.

Alternative Dispute Resolution

This session the General Assembly continued its trend of encouraging the use of methods alternative to court proceedings to resolve civil litigation.

- S.L. 2003-371 (H 1126) sets up a collaborative law settlement procedure for all family law issues except absolute divorce. This procedure allows a husband and wife and their attorneys to agree in writing to follow the collaborative law procedure in an attempt to resolve Chapter 50 actions (which include alimony, child custody, child support, and equitable distribution) rather than bringing a case to court. Entering into such an agreement tolls the statute of limitations and other statutory time limits for filing Chapter 50 actions or for proceeding with an action after it has already been filed. S.L. 2003-371 is discussed in detail in Chapter 3, “Children and Families.”
- If a person claiming to be injured in an automobile accident requests the defendant’s insurance company to provide the limits of coverage, S.L. 2003-307 (S 775) allows the insurance company to require the person claiming to be injured to try to settle the claim through mediation before filing a civil action.
- S.L. 2003-345 (S 716) repeals the Uniform Arbitration Act and replaces it with the Revised Uniform Arbitration Act.

Matters of Interest to Clerks of Court

Incompetency and Guardianship Issues

In the past year a number of newspaper articles have discussed the forced sterilizations authorized by the state’s Eugenics Board, indicating that from about 1933 to 1974 the state sterilized approximately seven thousand women. In 1974 the General Assembly substantially rewrote the law to require a parent, a guardian, or certain public officials to petition the district court to authorize sterilization of a mentally retarded or mentally ill person. A district court judge could authorize sterilization upon a finding from the evidence presented that (1) because of a physical, mental, or nervous disease or deficiency that would not likely materially improve, the mentally ill or retarded person would probably be unable to care for a child, or (2) the mentally ill or retarded person would be likely, unless sterilized, to have a child which would probably have serious physical, mental, or nervous diseases or deficiencies. This statute specifically provided that the requirement for a court order did not apply to medical or surgical treatment for sound therapeutic purposes that also might involve the destruction of the reproductive function. The 1974 legislation drastically reduced the number of involuntary sterilizations, but advocates for the affected groups believed more action on the part of the General Assembly was needed. This year’s legislation, S.L. 2003-13 (H 36), forbids forced sterilizations except when they occur as side effects of otherwise medically necessary surgery. It repeals the 1974 law and creates an entirely new procedure to be held by clerks of court. The new law requires the guardian of a mentally ill or retarded person to receive authorization from the clerk before consenting to the person’s sterilization for any purpose. The clerk cannot authorize the guardian’s consent unless the

guardian proves by a sworn statement from a North Carolina licensed physician that the proposed procedure is medically necessary and is not being performed solely for the purpose of sterilization, hygiene, or convenience. In addition a psychiatrist or psychologist licensed in this state must examine the ward to determine if he or she is able to comprehend the nature of the proposed procedure and its consequences and is able to give informed consent. If the ward is able to give consent, the clerk cannot authorize the procedure unless the ward gives sworn consent to it.

S.L. 2003-236 encourages the use of limited guardianships by requiring guardians ad litem to consider the possibility of limited guardianships and to make recommendations to the clerk about the rights a ward should retain under a limited guardianship. It also explicitly authorizes the clerk to use a limited guardianship if the nature and extent of the capacity of the ward justifies that use. S.L. 2003-236 requires a guardian ad litem to personally visit the respondent and specifies the duties of the guardian ad litem in representing the respondent. The guardian ad litem must present to the clerk the respondent's express wishes but may also make recommendations to the clerk regarding the respondent's best interests if these are different from the respondent's wishes.

Decedents' Estates

Three bills this session concerned the administration of decedents' estates. In 2001 new legislation provided that a pending equitable distribution action did not abate upon the death of one of the parties. S.L. 2003-168 (S 394) extends that provision to allow an equitable distribution action to be filed after the death of one of the parties if the parties were living separate and apart at the time of the death. The new law treats an equitable distribution action by the surviving spouse as a claim against the decedent's estate for purposes of the requirement to file the claim and for purposes of the order of payment. In addition, the law also allows a personal representative of the decedent to file an equitable distribution action against a surviving spouse within one year of the decedent's death.

Under current law only a cotenant of a safe-deposit box or a person holding letters of administration or letters testamentary may have access to a decedent's safe-deposit box without the presence of the clerk of court. S.L. 2003-255 (S 502) grants access to a deputy as well, as long as the lessee of the box has, in writing, specifically appointed the deputy as someone having the right of access. The new provision will allow deputies named by the lessee on the account card to enter the box not only while the lessee is living but also upon the lessee's death.

S.L. 2003-295 (S 881) addresses a problem that has occurred with payments to tobacco growers under the National Tobacco Grower Settlement Trust established by the tobacco companies in the settlement agreement in *North Carolina v. Philip Morris, Inc.* Some tobacco growers entitled to payments have died and their estates have been administered and closed before the payments were due. S.L. 2003-295 provides that in cases where persons who are entitled to payments under Phase II of the settlement have died, the personal representative may file a list of Phase II distributees with the clerk upon filing the final accounting if all of the debts and general monetary bequests of the estate have been paid. The list must contain the name and Social Security number of the decedent and the name and address of each devisee or heir entitled to receive Phase II benefits and the percentage of Phase II payments to be received by each. The clerk must determine whether the list is accurate and if so, approve it. Upon approval the Phase II benefits can be paid directly to the distributees without the estate having to be reopened solely for the purpose of distributing the payments. The new law also allows closed estates to be reopened for the purpose of filing a list of distributees.

Trust Administration

In 2001 the General Assembly significantly expanded the responsibility of clerks of superior court over trusts by providing that the clerks have original jurisdiction over all proceedings concerning the internal affairs of trusts except proceedings to modify or terminate trusts. The clerk's jurisdiction is exclusive with regard to appointing or removing a trustee, reviewing a trustee's fees, and settling accounts. S.L. 2003-261 (H 656) is a follow-up to the earlier statute, expanding some of the clerk's powers and clarifying the earlier law.

- It provides that clerks have exclusive, original jurisdiction over proceedings allowing a trustee to resign or renounce. However, a trustee may resign or renounce and have a successor named without the clerk's approval if the trustee does not have to file accountings with the clerk and if the trust names or provides a procedure for naming a successor trustee.
- It clarifies the procedures for the hearing before the clerk, specifying how the proceeding must be filed, who must be made respondents, and the type of hearing the clerk must hold.
- It provides that no trustee, even a successor trustee appointed by the clerk, may be required to file accountings unless the trust instrument requires accountings.

S.L. 2003-261 also changes the law regarding whether trustees must provide bonds and testamentary trustees must qualify and file accountings as do executors. For inter vivos trusts created before or testamentary trusts in wills executed before January 1, 2004, the trustee named in the instrument and any other trustee appointed by the clerk must post a bond unless the terms of the governing instrument provide otherwise. For trusts created on or after January 1, 2004, the trustee must provide a bond if the instrument requires one. If the instrument is silent, the clerk may require a bond if a beneficiary requests one and the clerk finds the request reasonable or if the clerk determines a bond is necessary to protect the interests of beneficiaries who are not able to protect themselves. If the governing instrument provides that the trustee serve without bond, no bond may be required of the trustee, including a trustee appointed by the clerk, regardless of when the trust was created. In a similar manner, the current law concerning testamentary trusts provides that the trustee must qualify and file accountings as if an executor unless the will provides differently. For testamentary trusts created under a will executed on or after January 1, 2004, the trustee must qualify under the laws applying to executors and file accountings with the clerk only if the will directs the trustee to do so. No trustee, including a trustee appointed by the clerk, may be required to account to the clerk unless the will directs it.

S.L. 2003-207 (S 315) concerns minors' contracts for certain artistic, creative, and athletic services. It establishes a procedure by which the superior court must approve of the contract and requires the creation of a trust for a portion of the minor's earnings. For all trusts created under the new law, the trustee must report annually to the clerk of court on the trust's activities.

Motor Vehicle Liens

G.S. 20-77 requires the operator of a business for storing, repairing, or parking vehicles in which a motor vehicle remains unclaimed for ten days or a landowner upon whose property a motor vehicle has been abandoned for more than thirty days to file an unclaimed vehicle report with the Division of Motor Vehicles (DMV) within five days after the expiration of those time periods. To ensure compliance with this requirement, S.L. 2003-336 (H 944) further provides that the business operators and landowners on whose property motor vehicles are abandoned cannot collect storage costs for the period of time between when they were required to make the report and when they actually did send the report to DMV by certified mail.

Matters of Interest to Magistrates

S.L. 2003-370 (S 847) modifies the residential rental late fee statute to include a specific provision dealing specifically with week-to-week tenancies and subsidized tenancies. It amends G.S. 42-46 to provide that if the rent is due in weekly installments, the maximum late fee to which the parties may agree is the greater of \$4 or 5 percent of the weekly rent. S.L. 2003-370 makes no change in late fees for rent due in monthly installments, leaving the maximum fee at the greater of \$15 or 5 percent of the monthly rental payment. If the rent is subsidized by a government agency, the late fee is calculated on the tenant's share of the contract rent only and not the rent subsidy.

Bills That Did Not Pass

Several bills on other topics affecting the courts were introduced but did not pass.

- House Bill 33 would have authorized private prosecution of certain criminal cases.
- House Bill 578 would have eliminated the mandatory retirement age of seventy-two for judges.
- House Bill 969 would have proposed a constitutional amendment to extend magistrates' terms to four years after an initial two year term.
- Senate Bill 572/House Bill 1125 would have provided for eight-year terms for district court judges.

Having passed the House in this year's session, H 969 is the only bill of this group eligible for legislative consideration in 2004.

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