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## Courts and Civil Procedure

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Numerous bills affecting the court system were enacted in 2005, but most were modest in scope. There were no major rewrites of court administration statutes on jurisdiction, selection of judges, or matters relating to the allocation of power between the courts and the legislative branch. Bills concerning all of these topics were introduced, but none passed. The court system did not suffer significant budget reductions, but it also did not receive any substantial increases, even though the system's leaders presented an ambitious budget request to address what they believe to be serious funding shortfalls throughout the system.

Readers interested in matters affecting the courts should also see Chapter 4, "Children, Families, and Juvenile Law," Chapter 7, "Criminal Law and Procedure," Chapter 16, "Mental Health," Chapter 17, "Motor Vehicles," and Chapter 23, "Social Services."

### **Court Administration**

#### **Judicial and Prosecutorial Redistricting**

Legislation in 2005 continued the recent trend of dividing or reconfiguring the districts used as the basis for administration of the superior court, the district court, and the district attorneys' offices. The Current Operations and Capital Improvements Appropriations Act of 2005, S.L. 2005-276 (S 622), contains provisions dividing District 29 and reconfiguring the two districts that formerly constituted District 20.

District 29 is composed of McDowell, Rutherford, Polk, Henderson, and Transylvania counties. The appropriations act divides it into two districts—with McDowell and Rutherford counties comprising District 29A and the other three counties comprising District 29B. This division applies to the superior court, the district court, and the district attorney districts. No new judgeships were created, but a new district attorney position will be established so that each of the two districts has its own district attorney. This division was effective in December 2005, except that the district attorney division will be effective when new district attorneys are elected for both districts in 2006.

District 20 is on the southern border of the state, immediately east of Mecklenburg County, and consists of Anson, Stanly, Richmond, and Union counties. For superior court purposes only, Union and Stanly counties had comprised District 20B, and Anson and Richmond, District 20A. S.L. 2005-276

and a later technical corrections bill, S.L. 2005-345 (H 320), moved Stanly County into District 20A. Before this change there were two judges in District 20B and one in 20A. One of the current judges resides in Stanly County. Her seat was reallocated to District 20A, leaving District 20B (Union County) with one judge. The legislation adds another judge for District 20B, effective January 1, 2011. To ensure that both judges in that district are on the same election cycle, the election for the remaining Union County judge is postponed for four years—until 2010—to put them both up for election at the same time. The judgeship assigned from Stanly County to the new District 20A is also off-cycle with the other judgeship in that district. To put them on the same cycle, the election for the judge moving to District 20A is delayed until 2008. (G.S. 163-9(b) requires that multiple judgeships in a single superior court district remain on the same election cycle if any part of the district is subject to review of election changes for compliance with the federal Voting Rights Act. This policy ensures that minorities, if so inclined, may use the “single-shot” voting strategy.)

The new district court districts will have the same counties as the revised superior court districts, but S.L. 2005-345 further subdivides District 20B (Union County) into two subdistricts (District 20B and District 20C) for electoral purposes. One judge runs in District 20B and the other two run in District 20C, which is composed of the remaining parts of the county. Unlike other districts, these districts are used solely for elections; the two districts together comprise a “set of districts” which serves as the administrative unit. There will be only one chief district judge, for example, for the two subdistricts, District 20B and District 20C.

The district attorney districts will mirror the superior court districts and will be effective with the results of the 2006 election. One new district attorney position will be created to staff the new District 20B.

The appropriation for the new districts is \$148,000 in fiscal 2005-06 and \$561,000 in 2006-07. The actual annual cost will be greater; the 2006-07 appropriation funds only six months of the new district attorney positions. These district changes account for most of the new positions allocated in the budget for the court system.

### **Business Court Expansion**

In 1995, in response to recommendations from a study commission appointed by the Governor, the legislature created a special superior court judgeship intended to be filled by a judge who would preside only over complex business cases. That judgeship was filled by Judge Ben Tennille and has commonly been referred to as the “business court.” The judgeship is technically just a part of the superior court; creation of a separate business court would raise serious constitutional questions in light of provisions in Article IV of the North Carolina Constitution allowing only those courts specifically authorized in the constitution. Judge Tennille has a courtroom in Greensboro dedicated to the cases he hears. S.L. 2005-425 (H 650) expands the operations of the business court by authorizing the chief justice to designate one or more sitting special superior court judges to hear complex business cases, with one judge to be located in Raleigh and one in Charlotte. Since this bill was enacted, Chief Justice Beverly Lake appointed Judge John Jolly to sit as a business court judge in Raleigh and Judge Albert Diaz to sit in Charlotte. The state budget creates two support positions for these courts and allocates some nonrecurring funds to support the operation of the Mecklenburg court. The budget does not allocate any money for Wake County’s court. S.L. 2005-425 also increases the filing fee for a civil case assigned to the business court from \$69 to \$269. The initial \$69 is paid when the case is filed and the additional \$200 is paid upon the case’s assignment to business court. The act defines the type of case that must be assigned to a business court (presumably the nearest one) and specifies how cases are designated as business court cases.

### **Starting Dates for District Court Judges’ Terms**

Since the modern court system was established by constitutional amendments approved by the voters in 1962, district court judges’ terms have begun on the date that local government terms begin—the first Monday in December—and superior court judges’ and appellate judges’ terms have begun on the date that statewide officers’ terms begin—January 1 after the election. The dissimilarity

derives from the differing origins of the courts. Superior court judges have been state officials, paid from state funds, since colonial days. District court judges replaced judges who had been serving in the hundreds of local courts that sprang up in the early and mid-twentieth century. The court reform movement in the 1960s replaced the older system with a new district court. The starting date chosen by the legislature for the district court judges' terms, however, was the local government starting date. Over the next forty years, the difference in the starting dates for the two types of judges has created practical problems. S.L. 2005-415 (H 650) provides that the terms of office for district court judges also begin on the January 1 following an election. During the transition, judges will hold over from the first Monday in December until January 1.

### **Judges' Power to Marry**

Under the general law, magistrates are the only court officials allowed to conduct marriages. In most legislative sessions since the early 1990s, however, there has been at least one bill introduced to allow judges to conduct marriage ceremonies. S.L. 2005-56 (S 262) is this year's version. It allowed any district court judge to conduct a marriage ceremony in North Carolina between June 23 and June 27, 2005. It also allowed judges from other states to do so during that time. In a related matter, near session's end a technical corrections bill (House Bill 327) passed the Senate with a provision amending the general law to allow judges to perform marriages on an ongoing basis. That bill will be eligible for consideration when the legislature returns for its short session in 2006.

### **Jury Service**

Jury service is an obligation of citizenship and it is state policy that service be distributed evenly throughout the population. Over the years, however, the legislature has recognized that some senior citizens might have physical limitations that make it impossible to serve. As a courtesy to those citizens, the legislature has authorized an expedited process for them to request exemptions from service based on personal circumstances. Normally a citizen must appear in person to request an excuse from jury service. This personal appearance is not required for senior citizens; they may request the excuse in writing. The age at which a person becomes eligible to use this procedure had been set at sixty-five. S.L. 2005-149 (S 321) raises it to seventy-two. The law also clarifies that the court official handling the request may excuse the person permanently or temporarily or may defer the service to a later date. Often local court officials will defer service without requiring a personal appearance, and while S.L. 2005-149 does not specifically authorize this, it is the first North Carolina law to recognize the practice of deferrals.

S.L. 2005-149 does not entitle people over age seventy-two to an automatic exemption or excuse. In practice, many court officials grant these requests, but there is no statutory basis for them to do so. The principle that each juror's fitness should be evaluated remains the policy articulated in the jury statutes.

### **Cost and Fee Increases**

The state budget raises numerous costs and fees applied to various court procedures. It raises criminal court fees (General Court of Justice Fees) by \$9.50 in both district and superior court and civil, estate, and special proceedings fees by \$10.00. The act raises the fee paid in criminal cases to the sheriff's retirement fund from \$0.75 to \$1.25. It raises the maximum cost assessed on estates or trusts (which are based on the size of the estate) from \$3,000 to \$6,000. It raises the fee assessed when a person applies for expunction of a criminal record from \$65 to \$125. It adds a \$90 fee to be paid by any criminal defendant subject to electronic monitoring and house arrest. Finally, it raises the court costs assessed in motorcycle helmet and seat belt violation cases from \$50 to \$75.

S.L. 2005-396 (S 327) raises the fee assessed on out-of-state attorneys appearing in a court in this state for a single proceeding from \$100 to \$125. The additional \$25 is earmarked for use by the North Carolina State Bar to help offset the cost of regulating the practice of out-of-state attorneys.

Effective for offenses committed on or after October 1, 2005, S.L. 2005-363 (H 890) adds G.S. 7A-304(a)(8) to direct the judge to assess a fee of \$300 for the services of a crime laboratory operated by a local government if (1) the defendant is convicted; (2) as part of the investigation leading to conviction, the lab performed DNA analysis, tests of the defendant for the presence of alcohol or controlled substances, or analysis of a controlled substance possessed by the defendant or the defendant's agents; and (3) the judge finds that the work was substantially equivalent to the kind of work performed by the State Bureau of Investigation. The court may waive or reduce the fee for good cause. Any fees go to the general fund of the local government operating the lab and are to be used for law enforcement purposes.

### **Clerks' Conference**

S.L. 2005-100 (H 878) establishes a statutory Conference of Clerks of Superior Court. The conference will be composed of elected clerks of court (and acting and interim clerks) and will meet twice a year. It may prepare training manuals, cooperate with other agencies to promote effective administration of justice, and provide education in conjunction with the UNC School of Government and the Administrative Office of the Courts (AOC). When funds are available, it may employ an executive secretary (no funds are provided in the 2005-07 budget). The conference is modeled on a similar organization of elected district attorneys established in the 1980s, although that organization now has both state-paid and grant-funded staff to support its efforts.

### **Court System Budget**

The state budget (S.L. 2005-276, as amended by S.L. 2005-345) for the 2005-07 biennium allocates only modest increases for the courts. In addition to the personnel needed for the new districts described above, the budget creates a deputy clerk of court position in Hyde County and two support positions to accompany the establishment of a separate business court in superior court in Mecklenburg County. The budget also provides a one-time appropriation to purchase a telephone system for the new Mecklenburg County courthouse, funds for the operation of the Mecklenburg Drug Treatment Court, and funds to establish a family court in Wake County. The largest source of money for system operations is a reserve fund of \$1.1 million for fiscal 2005-06 and \$1.9 million for fiscal 2006-07 to offset any increased costs associated with implementing changes to the state's impaired driving laws. These changes are included in House Bill 1048. Because the bill did not pass in 2005, however, it is unclear how the reserve funds can or will be spent in 2005-06. House Bill 1048 is eligible for consideration in the 2006 short session.

The total budget for the courts remains about \$340 million. Reductions to existing budgets nearly offset the increases, but for the most part the cuts were taken from reserve funds.

The budget bills also contain several substantive provisions that affect the court system. The most significant include the following:

1. Funds used for drug treatment courts must be used only to provide treatment and case coordination for offenders sentenced to intermediate punishment or for offenders sentenced to community punishment who are at risk of having their probation revoked.
2. The Office of Indigent Defense Services (IDS) has responsibility to set rates to be used generally to compensate attorneys hired to represent indigent criminal defendants and juveniles. However, the actual rate set in an individual case is determined by the trial judge, except in capital cases. Judges have, on occasion, awarded higher fees than the rate schedule would allow. The budget provides that compensation for attorneys representing indigent persons may not be set at rates higher than those established by rules adopted by IDS without its approval.
3. Judges have sometimes made the costs of monitoring probation treatment programs (typically monitoring alcohol usage) a higher priority than other costs due the courts or waived these other costs altogether. The budget act specifically prohibits this practice.

4. The AOC typically does not accept credit or debit card payments. The budget directs the Judicial Department to study the feasibility of implementing electronic payments for costs and other funds collected by the courts.
5. Two years ago the legislature adopted a public financing program for appellate judgeships. The sources of funding for the program did not produce enough funds to provide all the support proposed in the original plan. There was not enough money, for example, to mail a voter guide to each household in the state. The budget assesses a \$50 annual surcharge on each member of the North Carolina State Bar to provide an additional source of funds for the public financing program.

## Alternative Dispute Resolution

Two bills make changes to the alternative dispute resolution (ADR) programs. S.L. 2005-67 (H 1015) allows a clerk of court to require parties appearing before the clerk on contested matters to participate in a mediated settlement conference using a mediator. The bill exempts foreclosures and adoptions. It authorizes the North Carolina Supreme Court to adopt rules as necessary to supplement the statute. The clerk may order that parties, interested persons (for example, heirs, devisees, next of kin), and any nonparty participants and fiduciaries attend as necessary to ensure that mediation is effective. The parties may select a mediator, but if no mediator is selected, the clerk must appoint one certified by the Dispute Resolution Commission. Mediators are given judicial immunity. The parties, interested persons, and fiduciaries are required to pay the cost of hiring the mediator, subject to waivers for parties unable to pay their share of the costs. The rules adopted by the supreme court must specify how costs are to be paid. If costs are assessed against fiduciaries or the assets of a trust or estate, the clerk must enter an order that contains findings of fact supporting the assessment of costs. To promote free exchange of ideas, later testimony about what transpires in a mediation is severely limited. If a matter can be resolved by agreement of the parties, the settlement must be reduced to writing to be enforceable. If a matter requires the clerk's approval (for example, guardianship and estate matters), the parties may present a proposed settlement to the clerk "for consideration in deciding the matter." The clerk may sanction any person who fails to appear, subject to review by the superior court pursuant to statutes regulating appeals from the clerk.

S.L. 2005-167 (S 806) expands the powers of the Dispute Resolution Commission and clarifies procedures used in various ADR programs. It provides that the rule that statements made in negotiations are inadmissible in the principal action or in other civil actions applies to all persons in the mediation. It also provides that proceedings to discipline a mediator or neutral by the North Carolina State Bar or another agency and proceedings to enforce abuse laws are not covered by the rules on inadmissibility of evidence or confidentiality. It clarifies that the Dispute Resolution Commission has authority to regulate all the various mediated settlement programs established by state statutes. It removes the authority of the director of the AOC to perform commission management functions and instead requires the commission to consult the director about personnel and budget matters. It adds a clerk of court to the commission, and it allows the commission to employ special counsel or to use the Attorney General's office to conduct its regulatory responsibilities and on appeal of these matters. The act spells out procedures to be used in disciplinary proceedings; in general, it provides for confidentiality of information during the process until the commission has conducted an initial proceeding and the mediator or neutral has appealed the decision. Grounds for discipline are specified as a violation of a standard of conduct, a violation of a standard for the person's profession, a violation of a program rule, or conduct that is inconsistent with good moral character or reflects a lack of fitness to serve as a mediator or neutral. Appeals of final determinations by the commission about a mediator's fitness to serve are to the Wake County Superior Court.

## **Civil Procedure**

### **Service of Process**

Several bills made changes in the Rules of Civil Procedure. S.L. 2005-221 (H 1434) amends Rule 4 of the Rules of Civil Procedure to permit signature confirmation as an additional method of service on a natural person. Signature confirmation is a new service provided by the post office in which a recipient signs for a letter. Although signature confirmation costs less than certified mail, it is available only for items sent by priority mail or nonflat parcels sent by first class or parcel post. Therefore, the total cost of postage plus signature confirmation may not be less than certified mail, return receipt requested. The serving party proves service by filing an affidavit averring that a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation and that the copy was in fact received. The serving party will receive a confirmation of service, including the recipient's name and signature, either online or by fax or mail and must attach the confirmation to the affidavit.

S.L. 2005-138 (S 465) amends Rule 5 of the Rules of Civil Procedure to clarify that a certificate of service pursuant to Rule 5 must accompany every pleading and paper required to be served on any party or nonparty, except papers that must be served under Rule 4. The act requires the certificate to show the name and service address of each person served as well as the date and method of service, and if service is by facsimile transmission, the certificate also must show the telefacsimile number of the persons so served. The act requires a certificate to be signed according to Rule 11 and subjects it to Rule 11 sanctions.

### **Filing of Court Papers**

S.L. 2005-138 amends Rule 5 of the Rules of Civil Procedure to clarify which papers must be filed with the court within five days after service: all pleadings subsequent to the complaint; written motions; notices of hearings; any other application to the court for an order that may affect the rights of or commands any individual, business, or entity to forego action of any kind; notices of appearance; any other paper required by rule or statute to be filed; and all orders issued by the court. The act provides that other papers, even if required to be served on parties, should not be filed with the court unless the filing is agreed to by all parties, the papers are submitted in relation to a motion or other request for relief, or the filing is permitted by another statute or rule. The act specifically prohibits briefs or memoranda provided to the court from being filed with the clerk unless ordered by the court, and it places the burden of preserving depositions and material obtained through discovery on the party taking the deposition or obtaining the material.

### **Civil Motions in Superior Court**

To expedite resolution of cases, S.L. 2005-163 (H 514) amends Rule 7 of the Rules of Civil Procedure to allow a motion in a civil action filed in a superior court district comprised of more than one county to be heard at a regular session of superior court in any county in the district. The motion may be heard at a regular civil session or, with the consent of the presiding judge, at a criminal session.

### **Copying Charges and Indigent Clients**

S.L. 2005-251 (S 593) provides that the fee clerks charge for preparation of copies is not to be charged when an attorney appointed to represent an indigent person at state expense is requesting copies in connection with the appointed case. The provision saves time and money because clerks were required to charge attorneys for the copies and send the money to the state, and then the attorneys would be reimbursed by the AOC for the cost of the copies.

## Distribution of Residuals in Class Actions

S.L. 2005-420 (S 911) requires the court before entry of judgment in class action cases to determine the total amount that will be payable to all class members. When the parties report the amount actually paid to class members, the court must direct the defendant to distribute the unpaid residue in equal shares to the Indigent Person's Attorney Fund (for providing criminal indigent legal defense) and to the North Carolina State Bar (for providing civil legal services to indigents).

## Exemptions from Judgments

For the first time since 1991, the General Assembly in S.L. 2005-401 (H 1176) increased the value of property a judgment debtor may exempt from seizure to satisfy a judgment against the debtor. The increases are as follows:

- In a residence, from \$10,000 to \$18,500.
- In any property (wild card exemption), from \$3,500 to \$5,000 to the extent of the unused exemption amount under the residence exemption. This provision substantially increases the amount to be exempted under this exception because the previous provision allowed \$3,500 "less any amount of exemption used." A person who claimed a residence with \$3,500 equity would not be entitled to claim any wild card exemption under the previous law but, under the new provision, that person would have an unused amount of \$15,000 in the residence exemption and could claim \$5,000 under the wild card exemption.
- In one motor vehicle, from \$1,500 to \$3,000.
- In household furnishings, from \$3,500 to \$5,000, plus \$1,000 for each dependent, not to exceed \$4,000 for dependents.
- In tools of the trade, from \$750 to \$2,000.

The act also adds new types of property that may be claimed as exempt. A judgment debtor may exempt up to \$25,000 in a qualified college savings plan; all retirement benefits under retirement plans of states other than North Carolina to the extent that the benefits are exempt under the laws of those states (retirement benefits from the State of North Carolina already are exempt by statute); and alimony, support, and child support payments that have been received or to which the debtor is entitled to the extent these are reasonably necessary for support of the debtor or the debtor's dependents.

S.L. 2005-401 also modifies G.S. 1C-1601(c) to conform it to the court's holding in *Household Finance v. Ellis*, 107 N.C. App. 262, *aff'd per curiam*, 333 N.C. 785 (1993), that the constitutional exemptions from judgments cannot be waived because of failure to respond to the notice of rights. Although the practice has been for the judgment creditor to serve a copy of the motion to claim exemptions on the debtor along with the notice of rights to claim exemptions, until the enactment of S.L. 2005-401, the statute itself did not require the service of the motion.

The new exemptions and exemption amounts apply to judgments filed on or after January 1, 2006.

## Involuntary Commitments

S.L. 2005-135 (H 1199) amends the involuntary commitment law to conform to practice. Physicians and psychologists are not required to personally appear before a magistrate or clerk to initiate an involuntary commitment. They may send a sworn petition to the judicial official in lieu of personally appearing. Rather than sending a hospital employee to the magistrate or clerk's office with the petition, many hospitals have been sending a copy by facsimile and, if the judicial official issues a custody order, the law enforcement officer who goes to the hospital to take the respondent to the 24-hour facility where he will be held picks up the original petition and returns it to the clerk's office. The new law specifically authorizes physicians and psychologists to file the affidavits by facsimile so long as the original paper copy is mailed to the clerk or magistrate within five days after the facsimile transmission.

## **Matters of Particular Interest to Clerks**

### **Trust Administration**

The most extensive legislative change in 2005 was the adoption of the Revised Uniform Trust Code by S.L. 2005-192 (S 679). The new Code takes effect January 1, 2006, but applies to all trusts no matter when created. Only the changes that affect the clerks of superior court and the court system directly are discussed in this chapter.

The 2001 General Assembly expanded the jurisdiction of clerks to allow them to administer trusts, similar to their duties to administer decedent's estates. S.L. 2005-192 continues that authority and adds to it. It grants clerks jurisdiction to (1) convert a trust to or from a unitrust, (2) transfer a trust's principal place of administration, (3) require a trustee to provide a bond and to set the amount of the bond, (4) make orders with respect to a trust for the care of animals, and (5) make orders with respect to a noncharitable trust having no ascertainable beneficiary. The new Code provides that if a party files an action for a declaratory judgment, either party may move for a transfer of the trust proceeding from the clerk to the superior court, but if the proceeding is not removed, the clerk is to apply the declaratory relief to the extent it is consistent with Code provisions. Because of uncertainty about whether the Rules of Civil Procedure apply in estate proceedings, the Code specifies certain rules that always apply and others that apply if directed by the clerk. It allows a superior court judge to consolidate in superior court a trust proceeding before the clerk and a civil action before the superior court if the cases involve a common question of law or fact.

Because the 2001 legislation authorizing clerks to remove a trustee specified no grounds for removal, clerks have been left to look at general case law from North Carolina and other states to determine what grounds were sufficient. S.L. 2005-192 sets out the following grounds for removing a trustee:

- The trustee has committed a serious breach of trust.
- Lack of cooperation among cotrustees substantially impairs the administration of the trust.
- Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that the removal of the trustee best serves the interests of the beneficiaries.
- There has been a substantial change of circumstances, the court finds that the removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

Pending a decision on a request to remove a trustee or in lieu of or in addition to removing the trustee, the new Code specifies various forms of relief the court may order if necessary to protect the trust property or the interests of the beneficiaries. It also specifies when the clerk may require a trustee to post a bond and how the clerk sets compensation for the trustee.

### **Decedents' Estates**

In 2003 the General Assembly provided that an equitable distribution action could be filed after the death of a spouse and that the statutory provisions about claims against a decedent's estate apply to claims for equitable distribution as well. Thus, equitable distribution claims were paid as Seventh Class claims along with all debts of the estate and paid pro rata with debts of the estate if there were not sufficient funds to fully satisfy all claims. S.L. 2005-180 (H 804) amends G.S. 28A-19-6 to provide that a claim for equitable distribution is paid as a Seventh Class distribution of a decedent's estate and all general debts and claims become a new Eighth Class distribution, meaning equitable distribution awards are to be paid before general debts and claims.

S.L. 2005-411 (S 290) creates the Uniform Transfer on Death Security Registration Act. It allows owners of securities to execute registration in beneficiary forms that transfer listed securities to named beneficiaries on death of the owner. The law is similar to the statute authorizing transfer on death bank accounts. The registering entity is discharged from claims of the estate, creditors, and heirs if it registers a security in the name of the beneficiary in accordance with the form. S.L. 2005-411 adds

“Transfer on Death” securities to the list of assets that are not part of the decedent’s estate but that may be acquired by the personal representative to satisfy claims if needed.

In a minor change to the year’s allowance for a child of a deceased parent, S.L. 2005-225 (S 533) allows the full allowance to be paid without subtracting the value of articles consumed by the child after the parent’s death.

### **Guardianships**

S.L. 2005-333 (H 1394) enacts G.S. 35A-1212.1 authorizing a parent to recommend by will the appointment of a guardian for an adult, unmarried, incompetent child. The recommendation is a “strong guide” but not binding if the clerk finds that a different appointment is in the incompetent’s best interest. The guardian may qualify without a bond if the will specifically directs that no bond is necessary.

### **Liens on Real Property**

S.L. 2005-229 (S 887) clarifies G.S. Chapter 44A provisions dealing with laborers’ liens for work performed on real property. A change in terminology helps to make clear whether a lien is against real property or funds owed to a contractor—what has commonly been referred to as a “claim of lien” becomes a “claim of lien on real property,” and a subcontractor who has a claim against funds in the possession of a contractor now has a “claim of lien upon funds.” A notice of a claim of lien upon funds is not filed with the clerk, docketed, or indexed in any way that would affect title to real property, except when it is attached to a claim of lien on real property.

Another provision in G.S. Chapter 44A was enacted in 2001 when a rash of liens not authorized by North Carolina law were being filed by “freemen” and from “common law courts.” The law prohibits a clerk from docketing a lien unless the lien is authorized by statute and appears on its face to contain all information required by the statute under which it is offered for filing. S.L. 2005-229 attempts to make it more difficult for clerks to reject liens offered by attorneys licensed in North Carolina. It provides that a clerk may not reject for indexing and docketing a claim of lien upon real property or other document purporting to claim a lien on real property filed by an attorney licensed in North Carolina if the lien “otherwise complies with subsection (a) of the section.” Subsection (a) requires the clerk to reject the lien if it is not specifically authorized by statute and appears on its face to contain all the information required by the statute. Since the subsection (a) provision is substantially identical to language in the 2001 law, however, S.L. 2005-229 may not offer much protection to attorneys presenting these liens.

### **New Proceedings before the Clerk**

A real estate broker who holds earnest money under a contract to purchase real estate may not dispense the funds if the sale falls through, except with the written agreement of the parties or a court order. Sometimes the buyer and seller will not agree and neither will file a lawsuit to determine who is entitled to the moneys, leaving the real estate broker holding the funds. S.L. 2005-395 (H 1284) allows the broker to deposit the funds with the clerk in the county where the property for which the funds are being held is located. Once the money is deposited, the buyer or seller may file a special proceeding with the clerk to determine the rightful ownership of the funds. If no proceeding is filed within one year, the clerk forwards the funds to the Escheat Fund in the Department of the State Treasurer.

In response to the controversy over the release of Dale Earnhardt’s autopsy photographs, the General Assembly enacted S.L. 2005-393 (H 1543) to provide that autopsy photos are not public records and to limit access to those photos. It authorizes a person who wants to access autopsy photos to file a special proceeding before the clerk to gain access to the photos upon a showing of good cause. Both the personal representative of the decedent’s estate and any surviving spouse must be given notice of the proceeding.

In criminal cases where dogs used for fighting have been placed in an animal shelter, S.L. 2005-383 (H 1085) authorizes the trial court to fix the reasonable expenses for caring for the dogs

and requires the funds to be posted with the clerk every thirty days until the criminal charges are resolved. The funds can be paid to the animal shelter based on the actual costs incurred in caring for the dogs. A person found not guilty in the underlying criminal action is entitled to a full refund of the deposit. Although the statute does not specify, presumably the clerk is responsible for refunding only any funds held by the clerk and the animal shelter is responsible for refunding any moneys paid to it from the funds deposited with the clerk.

S.L. 2005-414 (S 1048) deals with curbing identity theft, a major concern in today's society. Among its many provisions, S.L. 2005-414 prohibits someone filing a document in the official records of the court from including in that document a person's social security, taxpayer identification, driver's license, state identification, passport, checking account, savings account, credit card, or debit card number or a personal identification (PIN) code or password unless expressly required by law or court order or unless the information is redacted. The act grants a person the right to request that the clerk of court remove any of this information from official records placed on any part of the court's Internet Web site available to the general public. The clerk must post notices in the office and on any Internet Web site informing the public of the right to redaction.

## **Domestic Violence**

### **Legislative Committee on Domestic Violence**

As has been the case in every legislative session in recent years, the General Assembly made changes in the domestic violence laws. In 2004 the General Assembly created an interim legislative committee to study and recommend changes to strengthen these laws. This year, S.L. 2005-356 (H 569) creates a permanent sixteen-member Joint Legislative Committee on Domestic Violence to make ongoing recommendations to reduce domestic violence. The committee is to examine policies and recommendations of the Domestic Violence Commission, established in G.S. 143B-394.15; study funding of domestic violence programs; explore new programs; examine law enforcement and judicial responses to domestic violence; and review data collected on domestic violence. S.L. 2005-356 also requires the AOC, with the Department of Correction, to study the use of Global Positioning Satellite (GPS) technology to track criminal offenders and to recommend to the General Assembly a pilot project using GPS technology as a condition of pretrial release for domestic violence offenders.

### **Domestic Violence Protective Orders**

G.S. 50B-3 provides that the court may grant a domestic violence protective order to bring about a cessation of domestic violence. Appellate court decisions have implied that any relief granted in the order must be supported by facts that the specific relief is necessary to bring about a cessation of violence. S.L. 2005-423 (S 1029) rewrites the statute to provide that the court must issue a domestic violence protective order restraining the defendant from further acts of domestic violence if the court finds an act of domestic violence has occurred. It authorizes the court to give any relief listed in the statute, eliminating any requirement to show that the specific relief is necessary for a cessation of the violence. One possible type of relief in a protective order is to direct the defendant to stay away from the child's school. If that relief is granted, S.L. 2005-423 requires the sheriff to deliver a copy of the order to the principal of the school.

Previously, a judge could renew a protective order for an additional year upon a showing of good cause. S.L. 2005-423 authorizes renewals of protective orders for up to two years, but the length of the original order remains one year.

Under certain circumstances, a judge or magistrate must order a defendant, as part of a protective order, to surrender his or her firearms to the sheriff. The defendant may retrieve the firearms after the order is no longer in effect, subject to certain restrictions. S.L. 2005-423 adds a provision that the defendant is not entitled to retrieve the weapons until there is a final disposition of any pending

criminal charges in either state or federal court for any offenses committed against the person who was the subject of the protective order.

Many domestic violence advocates believe that victims of domestic violence should not be required to settle legal issues with their batterers through mediation. Because domestic violence is based on one party's power over and control of the other, mediation cannot be a true meeting of the minds and compromise between two equal parties. Many judicial districts have a mandatory custody and visitation mediation program under which any action for child custody is referred to mediation. S.L. 2005-423 allows a waiver of the mandatory setting of a custody matter for mediation if there has been domestic violence between the parents in common.

S.L. 2005-423 also made several changes to the landlord-tenant law affecting victims of domestic violence. Those changes are discussed in "Matters of Particular Interest to Magistrates," below.

### **Domestic Violence Victims and Concealed Weapon Permits**

The General Assembly passed S.L. 2005-343 (H1311) allowing a sheriff to issue a temporary concealed weapon permit to a person who is protected by a domestic violence protective order if that person is not otherwise prohibited from getting a permit. The clerk must give a person for whom a protective order is issued a copy of an informational sheet explaining his or her right to get a concealed weapon permit. The bill was enacted even though it was opposed by many domestic violence advocates, and the Governor signed the bill after announcing that the General Assembly would later make some changes to the law. However, the General Assembly adjourned without readdressing the legislation.

## **Matters of Particular Interest to Magistrates**

### **Domestic Violence Victims' Tenant Rights**

S.L. 2005-423 creates several new statutes concerning the rights of tenants or household members who are victims of domestic violence, sexual assault, or stalking. First, it prohibits a landlord from terminating a tenancy, failing to renew a tenancy, refusing to enter into a rental agreement, or otherwise retaliating in the rental of a dwelling based substantially on a tenant, applicant, or household member's status as a victim of domestic violence, sexual assault, or stalking or based on the tenant or applicant having lawfully terminated a lease because of domestic violence, sexual assault, or stalking. The landlord may be provided law enforcement, court, or federal agency records or files or documentation from a domestic violence or sexual assault program or from a professional as evidence of domestic violence, sexual assault, or stalking.

Second, the new law sets out procedures for victims of domestic violence, sexual assault, or stalking (protected tenants) to have the locks changed on the rental unit at the cost of the tenant. If the perpetrator is not a tenant in the same dwelling, the protected tenant may request the landlord to change the locks upon giving notice of the tenant's status as a protected tenant. The landlord must change the locks or give the tenant permission to change them within forty-eight hours. If the landlord fails to act within the required time, the tenant may change the locks without the landlord's permission but must give a key to the new locks to the landlord within forty-eight hours after changing the locks. If the perpetrator is a tenant in the same dwelling unit, the protected tenant may request that the landlord change the locks. The tenant must provide the landlord a copy of a court order requiring the perpetrator to stay away from the dwelling unit. The landlord must change the locks or give the tenant permission to change the locks within seventy-two hours and if the landlord fails to act, the tenant may change the locks without permission but must give a key to the landlord within forty-eight hours after changing the locks. The landlord has no duty to allow the perpetrator access to the dwelling unit unless the court order allows the perpetrator to return to the dwelling to retrieve personal belongings. The

landlord also has no duty to provide keys to the perpetrator. A perpetrator who has been excluded from the dwelling remains liable under the lease with any other tenant for rent or damages to the dwelling unit.

Third, S.L. 2005-423 allows a protected tenant to terminate his or her rental agreement by giving the landlord notice of termination to be effective on a date at least thirty days after the landlord's receipt of the notice. The tenant must include with the notice a copy of a valid regular (not ex parte) order of protection issued under G.S. Chapter 50B or 50C, a criminal order that restrains a person from contact with the tenant, or a valid Address Confidentiality Program card issued to the victim. Additionally, if the protected tenant is a victim of domestic violence or sexual assault, the tenant must attach a copy of a safety plan to the notice to terminate. The safety plan must be provided by a domestic violence or sexual assault program and recommend relocation of the protected tenant. If other tenants besides the protected tenant reside in the dwelling unit, the tenancy continues for those other tenants. A perpetrator who has been excluded from the dwelling unit under a court order remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the unit.

### **Summary Ejectments**

**Notice to terminate lease of mobile home space.** G.S. 42-14 specifies the time by which a landlord or tenant must give notice to terminate a periodic tenancy at the end of the term if the lease does not provide a specific time for notice of termination. Under that provision, if the lease is for the rental of a mobile home space, the landlord or tenant who wishes to end the periodic tenancy at the end of a term must give at least thirty days' notice before the end of the term that the lease will terminate at the end of that term. Thus, if the tenant rents a mobile home space month-to-month with the term beginning on the fifteenth of the month and if the landlord wishes to terminate the lease at the end of the term in January, the landlord must give notice to the tenant by December 15 that the lease will terminate on January 15. If the tenant remains on the premises after January 15, the landlord may bring a summary ejectment action for holding over after the end of the term. S.L. 2005-291 (H 1243) lengthens the time of the notice from thirty to sixty days before the end of the term and applies to notices to quit given on or after January 1, 2006.

**Summary ejectment judgment on the pleading.** S.L. 2005-423 makes a major change in procedure in one type of summary ejectment judgment. General small claims law provides that failure to file a written answer constitutes a general denial, meaning that the plaintiff must offer sufficient evidence to prove by a preponderance of the evidence that the plaintiff is entitled to a judgment. The summary ejectment law provides that the magistrate must give judgment for possession if the plaintiff proves the case by a preponderance of the evidence or the defendant admits the allegations of the complaint. S.L. 2005-423 amends G.S. 42-30 to provide that the magistrate must give judgment for possession based solely on the filed pleadings if the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed, the defendant has not filed an answer, the defendant fails to appear on the day of court, and the plaintiff requests, in open court, a judgment based on the pleadings. In that case, the magistrate must give judgment for possession without asking the plaintiff to offer any evidence. However, if the plaintiff is seeking monetary damages for back rent, the plaintiff must prove by a preponderance of the evidence any monetary damages that are due.

**Bond to stay execution of summary ejectment judgment on appeal.** G.S. 42-34 requires a tenant to post a bond to stay execution of a summary ejectment judgment for possession if the tenant wishes to remain on the premises during the appeal. S.L. 2005-423 makes some clarifying changes to that provision. First, it specifies that the tenant's undertaking to pay into the clerk's office the contract rent as it becomes due during the time the case is on appeal applies to the "tenant's share" of the contract rent. Thus, in cases in which the tenant is receiving housing assistance (such as Section 8 or public housing), the tenant must pay only the share of the rent he or she is obligated to pay, not the full amount of the contract rent, of which part is paid by an agency. Second, the tenant also must pay in cash to the clerk the amount of undisputed rent in arrears. The magistrate must determine this amount in the summary ejectment judgment. The new law specifies that the magistrate must base that determination on the available evidence presented or on the amounts listed in the complaint. Third, if a

party requests a hearing before the clerk to modify the terms of the undertaking, the clerk must hold the hearing within ten calendar days.

### **Military Termination of Lease**

G.S. 42-45 sets out a procedure for military personnel to terminate a residential lease if they are required to move because of a permanent change of station orders or are prematurely discharged from the military. S.L. 2005-445 (S 1117) grants the same right to military personnel who are deployed with a military unit for a period of not less than ninety days. The termination is effective thirty days after the next rental payment is due or forty-five days after the landlord's receipt of the notice of termination, whichever comes first.

### **Counterclaims**

G.S. 7A-219 provides that counterclaims making the amount in controversy exceed the jurisdictional limit for small claims cases are not permissible in a small claims action. The statute then provides: "No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action, which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claims action." Questions have been raised as to whether a defendant must file a compulsory counterclaim that falls within the jurisdictional amount of small claims court and whether a compulsory counterclaim that exceeds the jurisdictional amount must be raised on appeal of the case to district court. The Court of Appeals in *Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258, 536 S.E.2d 331 (2000), held that a defendant would lose the right to assert a compulsory counterclaim for more than the small claims jurisdictional amount if the defendant did not appeal the small claims action and raise the counterclaim in district court. S.L. 2005-423 clarifies the issue by providing that the defendant's failure to file a counterclaim in a small claims action or to appeal a small claim judgment to district court does not bar the defendant from filing the claim as a separate action.

### **Pending Bills**

Under the rules governing the 2006 short session, any bill that passed one house by June 2, 2005, is eligible for consideration. Bills affecting the courts that have passed one house include the following:

- Senate Bill 523, which would submit to the voters a constitutional amendment to provide for gubernatorial appointment of appellate judges, with subsequent retention elections to determine whether appointees remain in office
- Senate Bill 353, which would place primary responsibility in the North Carolina Supreme Court for amending rules of evidence or of civil or criminal procedure, subject to a veto by the legislature
- House Bill 1323, which would establish an Actual Innocence Commission to review claims by persons who assert that they did not commit the crime for which they were convicted
- House Bill 1417, which would revise the procedures and operations of the Judicial Standards Commission to provide that separate panels of that body conduct the prehearing investigations and the formal hearings

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