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Courts and Civil Procedure

The 2007 legislative session was a significant one for the North Carolina General Court of Justice. For many years the legislative concerns of the courts have focused on monetary resources, primarily a perceived lack of personnel for the trial courts and the lack of money and people to update the court's computer systems. In this session the legislature responded to those needs in two ways. It appropriated the largest amount of expansion funding since the uniform court system was established in the late 1960s. The total amount of expansion funding was \$21 million in fiscal year 2007–08 and \$38 million in 2008–09. That does not include an additional \$5 million in 2007–08 and \$9 million in 2008–09 for indigent defense. It was a systemic infusion of funds for the entire court system. To put the increase in perspective, the courts budget (not including indigent defense) going into the session was \$407 million. But to fund that expansion, court costs and fees were raised by a similar amount—\$35 million in 2007–08 and \$38 million in 2008–09. To put that increase in perspective, the fees collected without that increase would be around \$172 million. Historically, relying on fees to support court operations has not been the preferred approach of court leaders, although it has increasingly been the approach taken by the legislature in recent years.

Another important legislative priority for the court system—an enhancement of its budgetary powers vis-à-vis the governor—was addressed but not enacted in the form sought by the court system.

Judicial Administration

Appropriations for personnel

The 2007 appropriations act (S.L. 2007-323, H 1473) provides 386 new positions in the courts in fiscal year 2007–08. It provides an additional 286 positions in 2008–09. Those positions include the following.

District attorneys. Seventy-seven positions were added in district attorneys' offices in 2007–08, with an additional seventy-five in 2008–09. Fifty-eight of the new positions are assistant district attorneys, and the remainder will be support staff. All the positions will be allocated by the Administrative Office of the Courts (AOC), except for twenty-eight assistant district attorneys that the legislature will allocate in 2008. The 2007 allocation procedure for assistant district attorneys is a departure from the traditional practice of allocating assistant district attorney positions by statute. The AOC is to use “caseload and criteria” to support its recommendations and report those to the legislature.

Clerks of Superior Court. Over the 2007–09 fiscal biennium, the appropriations act authorizes an additional 300 deputy clerk positions, 150 to be created during each fiscal year. They are to be allocated by the AOC based on its caseload and workload studies.

Magistrates. Forty-two magistrate positions were created (twenty-one in each year of the biennium) to be allocated to counties as specified in the appropriations act. The allocations follow the recommendations of a caseload and workload study conducted by the AOC.

District Court. The appropriations act also creates nine district court judges over the two-year biennium. Six of the judges are added effective January 1, 2008, in districts 10 (Wake), 11 (Johnston, Harnett, and Lee), 12 (Cumberland), 18 (Guilford), 21 (Forsyth), and 26 (Mecklenburg). The remaining three are added effective January 15, 2009, in districts 5 (New Hanover and Pender), 10 (Wake), and 26 (Mecklenburg). These positions are allocated by statute, but the allocation follows the recommendations of a caseload and workload study conducted by the AOC. The governor in office at the time the judgeships become effective will make the initial appointments to the positions. In addition, sixteen new district court support staff positions (nine in 2007–08 and seven in 2008–09) were created and will be allocated by the AOC.

Family courts have become an accepted part of the district court. Nearly every legislative session, the appropriations act includes funds to add additional districts to the program. (Although all district courts hear and decide family law cases, “family courts” have specialized staff members, and the judges receive specialized training and tend to work nearly all of their time in family court. In that sense, “family court” refers to the specialized programs that are in place in several court districts.) The 2007 appropriations act includes funds for eight positions to expand family court into two more districts, which will be selected by the AOC.

Superior Court. Continuing a recent trend, the increase in the superior court bench comes from newly created special superior court judgeships. Special judgeships are filled by gubernatorial appointment for five-year terms, and the appointee need not reside in any particular district. In contrast, regular superior court judgeships are allocated to a specific district and are filled by election by the voters of that district for eight-year terms. The 2007 appropriations act adds two additional special superior court judgeships, effective January 1, 2008. There are also funds for five support positions in superior court (two in 2007–08 to support the new superior court judgeships, and three in 2008 to be allocated by the AOC.)

Court of Appeals. Two support positions were created to help the court deal with an expanding caseload. In addition, each judge whose permanent residence is more than fifty miles from Raleigh is entitled to reimbursement for one weekly round trip to Raleigh during weeks in which the person is in Raleigh on state business.

Other programs. Several other programs also received new personnel. The Guardian Ad Litem program, which provides volunteer advocates for children in abuse and neglect cases, received fifteen new positions. The Drug Treatment Court program received funds to continue fourteen and three-quarters positions funded previously by grants set to expire in 2007. The Judicial Standards Commission received funds to establish investigator and counsel positions to assist the commission in its duties. The AOC itself received funding for eighty-two new positions, all but four of which will be allocated to its Information Technology Division.

Other Funding Increases

There are several other funding increases that will affect court operations. The rate paid to retired judges who are temporarily called back into service was raised from \$300 to \$400 per day.

The hourly rate for attorneys working in the Guardian Ad Litem program was raised from \$45 to \$65. Another step was added to the salary longevity program for elected and senior appointed officials (judges, district attorneys, clerks of court, public defenders, and assistant public defenders and prosecutors). Formerly, the program provided these officials 4.8 percent in salary increases for each five years of creditable service, but the increases stopped at 20 years. The 2007 appropriations act adds a 25-year step. Finally, public defenders (including the appellate defender, the capital litigation defender, and the juvenile defender) are now included in the Judicial Retirement System. That system provides substantially more benefits than the state employees' retirement system and, before this change, included only judges, district attorneys, clerks of court, and the AOC Director. The change does not include the senior executive in the Indigent Defense System (the director of the Indigent Defense Services Office).

DA, Clerk's Conference Funding

S.L. 2007-323 moves the funding for District Attorneys and Clerk's Conferences from recurring funds to nonrecurring funds and requires the AOC to study whether and on what conditions the funding should be continued.

New Public Defenders

S.L. 2007-323, for the first time, allows the Indigent Defense Services Commission not only to add additional positions in existing public defender offices, but also to create additional public defender offices in 2008 without further legislative approval, subject to certain conditions. It also creates new public defender offices in District 5 (New Hanover) and District 29B (Henderson, Polk, and Transylvania).

Costs and Fee Increases and Statutory Changes

S.L. 2007-323 adds or raises the following fees, which collectively generate the additional \$35 million in revenue appropriated for courts for the 2007–08 fiscal year.

1. Raises the General Court of Justice fee imposed in criminal court by \$10, with one of the additional dollars to be sent to the North Carolina State Bar to fund legal services programs;
2. Raises the failure to appear fee from \$50 to \$100 and assesses the fee when a person fails to appear within twenty days instead of when the clerk sends a failure to appear (FTA) notice to the Division of Motor Vehicles (DMV), thereby imposing the fee on all FTAs and not just motor vehicle FTAs, and eliminating the fee imposed on reports to DMV of failures to comply with orders to pay fines or costs;
3. Raises the General Court of Justice fee in civil court by \$14 in superior court, \$9 in district court, and \$10 in small claims and estates cases, with \$1 of the additional amount to be paid to the State Bar for legal aid funding;
4. Raises the base fee assessed in foreclosure cases from \$60 to \$75, and raises from \$300 to \$500 the maximum amount of the additional amount that is based on the amount of the sale under a power of sale;
5. Raises the fee to provide a criminal record check from \$10 to \$15;
6. Raises the appearance fee for out-of-state attorneys from \$125 to \$225;
7. Raises the costs for civil revocations (CVRs) under G.S. 20-16.5 from \$50 to \$100, with half allocated to the General Fund, one-fourth to pay for the state's chemical testing program, and one-fourth to counties to fund jail costs in enforcing impaired driving cases; and
8. Establishes a new fee of \$100 for the issuance of any limited driving privilege under G.S. Chapter 20 [see S.L. 2007-345 (H 714) for an amendment to this provision].

In a related policy change, effective July 1, 2008, S.L. 2007-323 amends G.S. 7A-317 to eliminate the exemption previously conferred on local governments from advancing fees in civil cases.

Finally, S.L. 2007-323 also authorizes the AOC to assess a collection assistance fee on amounts remaining unpaid after thirty days by people not on supervised probation. The amount of the fee may not exceed the average cost of collection or 20 percent. The AOC may also use collection agencies or use Setoff Debt Collection statutes, but if the AOC imposes a collection assistance fee or uses a collection agency, it may not also impose a collection fee pursuant to G.S. 115C-437 (which can be deducted from the amount paid to school boards as clear proceeds of fines or forfeitures).

Interpreters

S.L. 2007-323 amends the statutes specifying who is entitled to receive state-paid foreign language interpreter services and to authorize the AOC to pay for interpreters' services in criminal or domestic violence cases where necessary for the efficient transaction of business. The act also allows the AOC to create full-time positions for interpreters where justified by the volume of business.

Telephones

In what might appear on the surface to be a minor change, S.L. 2007-323 amends G.S. 7A-302 to require counties to provide properly functioning telephones as part of their obligation to provide adequate local court facilities for the operation of the courts. The AOC may require that the phones meet certain specifications. For many years the AOC has been providing phone systems, and it has recently been investing resources in an effort to shift the courts' phone service to new computer-based technologies called Voice over Internet Protocol (VoIP). In recent years the General Assembly has been funding the capital costs of new telephone systems when new courthouses are built. This provision represents a change in policy, and it is in some ways inconsistent with the AOC's efforts to have standardized VoIP based-phones in all courthouses. This change is effective in the 2008–09 fiscal year.

Judicial District Splits

A legislative session is now unusual if it does not include a division of an existing district into two or more smaller districts. The 2007 appropriations act includes one such change in Judicial District 22. That district, which is comprised of Davidson, Davie, Iredell, and Alexander counties, was one of the larger districts, and it was one of the few districts that had not been changed since the districts were set during the court reform efforts of the 1960s. The act divides the district into two two-county districts, effective January 1, 2009. When fully implemented, the annual cost of the district realignment will be approximately \$1.3 million.

Alexander and Iredell counties will be District 22A and Davidson and Davie counties will be District 22B. Fourteen positions are added to accomplish the division, including two new district court judges, a new superior court judge, and a new district attorney. The new superior court judge will be assigned to District 22B (22A already has two judges residing in the district), and the position will be filled in the 2008 election for a term to begin January 1, 2009. The two new district judges will be assigned to District 22A, which will have a residency requirement for candidates. Two of the five district court seats assigned to District 22A must be filled by residents of Alexander County, and the other three must be filled by Iredell County residents. The six judgeships assigned to District 22B have a similar residency requirement, with four judges required to reside in Davidson County and two to live in Davie County. This continues a trend that has recently been applied to the 11th and 13th districts. Like those changes, this provision raises the issue of whether a county residency requirement is consistent with Article IV, Section 10 of the North Carolina Constitution, which specifies that "[e]very district judge shall reside in the

district for which he is elected.” Adding a requirement of residency in a specific county may impose an additional qualification to run for the office of district judge that the constitution does not authorize. Adding additional qualifications to hold elective office has in at least one instance been held to be beyond the authority of the General Assembly. *See Moore v. Knightdale Board of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992). District court residency requirements have not been challenged in litigation to date.

S.L. 2007-484 (S 613) illustrates a difficulty with the establishment of ever-smaller districts. Two years ago, Union County was removed from what was then a five-county district court district (District 20). The resulting new one-county district was further subdivided into two districts that serve only as units of election and are combined for administrative purposes. As a result, Union County has Districts 20B and 20C for district court purposes. After that split, the General Assembly created a new district court seat for Union County. The placement of that seat, which determines which voters in Union County are eligible to vote for that judge, has been the subject of legislation in the last two sessions. It was originally placed in the new one-county district before that was further subdivided, and by the time the seat was filled, the one-county district no longer existed. Putting the seat in either of the existing subdistricts would create serious population imbalances among the voters. S.L. 2007-484 creates yet another district in Union County, district 20D, which consists of the entire county. Now Union County is a set of districts for district court comprised of District 20B (one judge elected in part of Union County), 20C (two judges elected in part of Union County), and 20D (one judge elected countywide). No other district court district has such a configuration of subdistricts and countywide elections existing simultaneously.

Study of District Attorneys’ Offices

The 2007 appropriations act directs the Legislative Research Commission to contract for an independent study that assesses the availability of resources for prosecution and the use of those resources, including the resources of the Conference of District Attorneys. The report of the study is to be submitted to the General Assembly by March 15, 2008. Pending the outcome of the study, all the funding for the Conference of District Attorneys was moved from recurring to nonrecurring funding.

The study must include the following items:

1. Current prosecutorial resources
2. Services provided by the State’s district attorneys and the Conference of District Attorneys and the recipients of those services
3. Funding of prosecutorial services, adequacy of supplies, equipment, and working space, and allocation of prosecutorial resources
4. The current role of the Conference of District Attorneys and district attorneys in assessing the needs of the public with regard to prosecutorial services and providing assistance in meeting those needs, including whether the role of the conference in interacting with the General Assembly should be modified
5. The state of automation of prosecutorial services
6. Cost-management practices of district attorneys and their staffs, especially out-of-pocket costs like expert witness and travel costs
7. Caseload management, including the effect of caseload management practices on jail population and timeliness of prosecution of serious crimes
8. How the current management and use of prosecutorial resources affect the following:
 - a. Access to justice
 - b. Day-to-day functioning of the prosecution service
 - c. Case management, including the development of case-screening mechanisms and protocols for diversion
 - d. Timely resolution of caseloads
 - e. Reduction of any backlogs that exist and the jail population
 - f. The capacity to handle specialized or complex crimes

- g. The effectiveness of district attorneys and their staffs in responding to domestic violence and other crimes of violence
- h. Services and support provided to victims
- i. Accountability to the public

Judicial Branch Budget Flexibility

One of the main priorities of the Chief Justice of the Supreme Court for the 2007 session was to clarify and expand the budgetary authority of the judicial branch of government with respect to the legislative and executive branches. S.L. 2007-393 (S 1130) addresses that issue, although it does not contain the provision the court system wanted the most—the power to make budget transfers from one purpose to another without executive or legislative approval. S.L. 2007-393 amends G.S. 143C-3-2, the State Budget Act, to make it clear that the governor’s budget must include estimates of financial needs of the judicial branch as submitted by the Chief Justice and must specify where the governor has changed those requests. It also requires the governor to consult with the Chief Justice to implement expenditure reductions in the court’s budget. Finally, it authorizes the AOC director to analyze use of contractor positions and, after consultation with the Joint Legislative Commission on Governmental Operations, to create permanent state positions as appropriate.

The Office of Magistrate

The General Assembly made two changes that will affect the magistrate’s office. S.L. 2007-393 deletes a requirement that basic training for magistrates must be held in Asheville but retains a requirement that continuing education be held at locations convenient for magistrates. S.L. 2007-484 prohibits magistrates who are licensed to practice law in North Carolina from engaging in the private practice of law. Many magistrates who are licensed to practice law have done so on their off hours in matters unrelated to their work (estate planning, for example), to supplement their salaries, which is substantially less than the salaries received by judges and other lawyers who serve in the court system.

Alternative Dispute Resolution

District court criminal mediation. S.L. 2007-387 (S 728) intends to encourage and standardize the provision of mediation services in district court criminal cases. Typically those services are conducted by volunteers associated with community mediation centers, also known as dispute resolution centers. The act specifically allows a district attorney to delay prosecutions in order for mediation to take place. It authorizes local community mediation centers to (1) assist the court in administering a program for mediation services and in the screening and scheduling of cases for mediation and (2) provide certified staff to conduct criminal court mediations. The Supreme Court must adopt rules by January 1, 2008, to implement criminal district court mediations, and those rules must include provisions specifying qualifications for mediators.

Medical malpractice arbitration. S.L. 2007-541 (H 1671) adds a new Article to G.S. Chapter 90 establishing a detailed procedure for voluntary arbitration of claims of injury allegedly resulting from negligent health care. The act received support from both the medical and legal communities, a unification of forces rarely observed in recent years in tort reform discussions. The new law allows parties to agree at any time after a claim arises to submit the case to an arbitrator for a decision binding on both parties. Arbitration is triggered by filing a stipulation to arbitrate with the clerk of superior court in the county in which the alleged negligence occurred. This action tolls the statute of limitation and vests the superior court with jurisdiction to enforce the procedure. The parties may select an arbitrator by agreement; their failure to agree within forty-five days after filing the stipulation will result in selection of an arbitrator from a list of emergency superior court judges who have agreed to serve. The act limits

the number of expert witnesses that may be used by each party, the amount of allowable discovery, and the time frame within which discovery must be completed and the hearing held. Significantly, the maximum amount of damages that an arbitrator may award is \$1 million. The decision of the arbitrator may be challenged on appeal only for fraud, bias, serious procedural irregularity, arithmetic miscalculation, or other reasons set out in G.S. 1-569.23 and 1-569.24 of the Revised Uniform Arbitration Act, regarding vacating or modifying an award. No *de novo* review of the merits of the arbitrator's decision is allowed. A health care provider who attempts to contractually bind a patient to arbitration under S.L. 2007-541 in the event of a later claim of injury will receive short shrift; the law declares such anticipatory agreements void and unenforceable. The new law specifically excludes from this declaration agreements for arbitration not governed by the new procedure.

Marriage by Judges

Virtually every legislative session receives a request from a judge to amend the state's marriage laws to allow the judge to conduct marriage ceremonies for a narrow window in time (usually a week). That kind of legislation must be done by general law, so the mechanism to allow these personal requests to be honored is to amend the state law on marriage to allow all judges to conduct marriage ceremonies and to repeal that amendment a week after it becomes effective. S.L. 2007-61 (S 1131) allows district judges to perform marriages between June 4 and June 8, 2007. Some legislators in the recent past have attempted to make a change to the marriage law permanent, but those attempts have not yet been successful. Under the general law, only magistrates (and clergy members) can conduct marriage ceremonies, which is something that the vast majority of judges would not like to see changed.

Removal and Discipline of Elected Judicial Officials

Much important legislation in the 2006 and 2007 sessions of the General Assembly was in response to various ethical or criminal violations by prominent elected officials. Judicial officials also figured into the overall debate, and, in 2007, three acts addressed various aspects of ethics and discipline of court officials. The first, S.L. 2007-104 (S 118), deals with situations in which judges or district attorneys lose the right to practice law while they are serving. (The state constitution requires judges and district attorneys to be licensed to practice law to be eligible for election, but until this act there had been no provision dealing with the consequences of losing that license.) S.L. 2007-104 amends G.S. 7A-410 and G.S. 7A-410.1 to provide that the governor must declare the office of a judge or district attorney vacant when the holder of the office is no longer authorized to practice law. The act also provides that the salary of a judge or district attorney is suspended immediately when an order of disbarment or suspension of license becomes effective. During the 2007 legislative session, one district court judge and one district attorney were disbarred, and while the new law does not apply to either of them, it establishes a procedure for such cases in the future.

The second act, S.L. 2007-179 (S 659), deals with the effect of felony convictions on the ability of elected officials to receive governmental retirement benefits. No court officials were convicted of felonies during this session, but sitting and former legislators were. This act applies to elected governmental officials, including judges, district attorneys, and clerks of superior court. It provides that elected officials lose retirement benefits for certain felony convictions. The offenses that trigger this loss of benefits are specified state and federal corruption offenses. The conduct must occur while the person is serving in an elected office and must be directly related to the person's service in that office. Officers vested as of July 1, 2007, are not entitled to any creditable service that accrued after that date if they commit one of the designated offenses after that date. Officials not vested as of July 1, 2007, forfeit all benefits if they commit one of the designated offenses after that date.

The final act, S.L. 2007-29 (S 184), modifies 2006 ethics legislation as it applies to judicial officials. The 2006 legislation required elected judicial officials (and many others) to file annual

statements of economic interest with the State Ethics Commission. Many court officials were concerned about including their home addresses in the filings, given the nature of their work. S.L. 2007-29 allows judicial officers to use a business address on their statements of economic interest, but they must provide their home address to the commission in a separate filing, which is not a public record. S.L. 2007-29 also allows judicial officers to use only the initials of any unemancipated children in their statements of economic interest, if they concurrently provide the commission with the names of the unemancipated children. The act also provides that a judicial candidate must file a statement of economic interest at the same place and in the same manner as the candidate's notice of candidacy.

Jury System

One persistent problem for counties preparing the master jury list that is used to summon jurors for a two-year period is the quality of the list of names that they begin with. The list is prepared by DMV and includes voters and driver's license lists. Quite often the raw list has many names of deceased people, poor addresses, and otherwise unusable names. S.L. 2007-512 (H 943) addresses that problem in a modest way. It requires the State Registrar to assist jury commissions in updating juror lists by providing to each county's jury commission (the body responsible for preparing the two-year list for the county) the names and addresses of all residents of the county who have died in the previous two years before July 1 of each odd-numbered year. It also requires local jury commissions to remove from the jury list names of residents who are deceased based on that information supplied by the State Registrar. Finally, it addresses the issue of bad driver's license addresses by directing DMV to refrain from including in the lists they provide to counties any names of formerly licensed drivers whose licenses have expired and not been renewed for eight or more years.

S.L. 2007-393 (S 1130) authorizes the AOC to operate a pilot program in one judicial district allowing jurors to waive their daily compensation for jury service. Any compensation that is waived would be designated by the juror to be used for various specified programs operating in the county. If the juror does not designate a program, the fees waived go to the Crime Victims Compensation Fund.

Domestic Violence

In 2005 the General Assembly established a permanent sixteen-member Joint Legislative Committee on Domestic Violence. In 2007 the committee's recommendations resulted in two new pieces of legislation. First, S.L. 2007-15 (H 46) requires the clerk of superior court, upon request of a victim of domestic violence, to coordinate with the county sheriff to provide the victim a segregated secure area within the courthouse to await the hearing of the victim's case. The clerk must also notify the presiding judge of the victim's presence in the secure area. The General Assembly recognized that providing a secure area in every county courthouse may be challenging: S.L. 2007-15 imposes this requirement only "where practical," and it requires the AOC to report to the committee in 2008 on progress in identifying a secure area in each courthouse.

Another piece of legislation recommended by the committee was approved in the form of S.L. 2007-116 (S 30), which amends G.S. 101-2, the statute governing name change. The new law exempts victims of domestic violence and certain others from the usual requirement that applications for name change be posted at the courthouse door. To qualify for the exemption, an individual must either participate in the address confidentiality program outlined in G.S. Chapter 15C or provide evidence that the applicant is a victim of domestic violence, stalking, or sexual offense. S.L. 2007-116 requires an applicant to present governmental records or files in support of a claim of eligibility as a victim, or (in the case of domestic violence) documentation from a program funded by the Domestic Violence Center Fund. An earlier version of the bill would have allowed an applicant to establish eligibility by documentation from a religious,

medical, or other professional, but this provision was deleted prior to the bill's passage. In addition to relieving the applicant of the publication requirement, the new law requires that the entire record of court proceedings relating to the name change be secured from public inspection. A court order or written consent of the applicant is required for access to the record.

S.L. 2007-116 also requires the clerk of superior court to provide individuals obtaining a protective order under G.S. Chapter 50B with written information identifying available services for victims of domestic violence and sexual assault, as well as information about victims' compensation, legal aid, address confidentiality, and the right to apply for a concealed handgun permit. The law directs the AOC to develop an information sheet to be handed out by clerks. The AOC currently provides such a form, but this act codifies the requirement that the form be provided.

Civil No-Contact Orders

In 2004 the General Assembly enacted new G.S. Chapter 50C allowing victims of stalking or nonconsensual sexual conduct to obtain a civil no-contact order similar to those available to victims of domestic violence under G.S. Chapter 50B. The 2004 law defined stalking in part as "following on more than one occasion or otherwise harassing as defined in G.S. 14-277.3(c)." G.S. 50C-1(6). While similar to the language in G.S. 14-277.3 (criminal stalking), the new statute reorganized the wording, creating a question about whether a single instance of harassment would be included in the conduct addressed by G.S. Chapter 50C. In *Williams v. Vonderau*, 181 N.C. App. 18, 638 S.E.2d 644 (2007), the North Carolina Court of Appeals considered but did not answer this question. A dissenting opinion, which did answer the question, propelled the case into the North Carolina Supreme Court, where it was pending when S.L. 2007-199 (H 1482) was enacted. The law amends the language of G.S. 50C-1(6) to conform to the criminal offense in G.S. 14-277.3, thereby clarifying that more than one instance of harassment is required.

The Family Court Advisory Committee requested the General Assembly to prohibit Chapter 50C actions against children under the age of sixteen because of two concerns. First, a large number of Chapter 50C orders were being sought because of minor incidents between school children. Second, use of criminal contempt against juveniles to enforce Chapter 50C orders was problematic. S.L. 2007-199 amends G.S. 50C-1(7) to provide that the unlawful conduct leading to a no-contact order is limited to acts committed by a person sixteen years or older. The General Assembly addressed more generally the issue of contempt and juveniles by enacting S.L. 2007-168 (H 1479), establishing a procedure for holding juveniles in contempt. The act is discussed in Chapter 4, "Children and Juvenile Law."

Civil Procedure

Awarding Court Costs

S.L. 2007-212 (H 21) was recommended by a House of Representatives select committee charged with resolving confusion about a trial judge's authority to award court costs. The confusion arose out of two statutes: G.S. 6-20, which gives the trial judge discretion to award costs, and G.S. 7A-305(d), which lists specific expenses that may be recovered as part of costs. Some appellate cases held that expenses are recoverable only if listed in the statute, some held that the trial judge had discretion to award other expenses as well, and some limited expenses to those either listed in the statute or recognized at common law prior to 1983. S.L. 2007-212 puts an end to the confusion by amending G.S. 6-20 to specify that the trial judge has discretion to award costs only if they are specifically listed in G.S. 7A-305(d), subject to limitations set out in that statute. The act also amends G.S. 7A-305(d) to add to the list of recoverable costs (1) fees of mediators, (2) reasonable and necessary fees for recording and transcribing depositions, and (3) reasonable and necessary fees of expert witnesses for time spent testifying. Finally, the act specifies that the

amendments do not affect the trial court's authority under G.S. 1A-1, Rule 26(b) and Rule 37 to award fees and expenses related to pretrial discovery.

Peremptory Challenges

S.L. 2007-210 (H 244) amends G.S. 9-20 to authorize a trial judge to apportion peremptory juror challenges between multiple plaintiffs. Prior to this amendment, the statute gave a trial judge discretion, in a civil case involving multiple defendants with antagonistic interests, to either apportion eight peremptory challenges among the defendants or to increase the number of challenges to six per defendant. The new law extends the judge's authority to plaintiffs with antagonistic interests as well. The law also authorizes a judge who has increased the number of challenges available to one side under this provision to grant an equal increase to the other, even if additional challenges would not otherwise be permitted. Finally, the amendment deletes language providing that the judge's decision regarding the nature of interests and number of challenges "shall be final." This language was relied upon by the North Carolina Supreme Court in *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E.2d 292 (1951), to dismiss as untenable an assignment of error challenging the trial court's determination of antagonistic interests. It is unclear whether this deletion was intended to render the trial court's decision, while entitled to deference as an exercise of discretion, more available to challenge on appeal.

Subpoenas

Lawsuits involving multiple parties also prompted amendment of G.S. 1A-1, Rule 45, governing use of subpoenas in civil actions. S.L. 2007-514 (H 316) amends Rule 45 to provide that any party who wishes to inspect and copy material received pursuant to a subpoena must be allowed a reasonable opportunity to do so.

Subpoenas of a different sort received legislative attention in 2007 in S.L. 2007-251 (S 1432). Prior law authorized the Employment Security Commission and the Property Tax Commission to issue subpoenas and provided enforcement mechanisms for failure to comply with subpoenas, but made no mention of a procedure for challenging a subpoena. S.L. 2007-251 amends G.S. 96-4 and G.S. 105-290 to establish such a procedure. The new law provides for a hearing by the relevant administrative agency on a motion to quash and allows immediate judicial review of a denial of a motion in the Superior Court of Wake County or in superior court in the county where the person subject to the subpoena resides.

Complex Business Cases

In 2005 the General Assembly established a procedure for certain complex business cases to be heard by a special superior court judge designated by the Chief Justice of the Supreme Court. Now there are three special superior court judges designated to hold "Business Court," one residing in Mecklenburg County, one in Guilford County, and one in Wake County. S.L. 2007-491 (S 242) amends G.S. 7A-45.4 to add actions involving tax refunds or assessments (as discussed in newly amended G.S. Chapter 105, Article 9) as a new category of complex business case eligible for "Business Court". The new law provides that an aggrieved taxpayer must follow Business Court statutory procedures when seeking judicial review of an adverse decision by the Office of Administrative Hearings or wishing to challenge the constitutionality of statutes. It also requires these cases to be heard in Wake County Superior Court.

Use of Evidence by Jury

S.L. 2007-407 (S 1117) enacts G.S. 1-181.2, a new statute that comprehensively addresses whether a jury may access evidence during its deliberations in a civil case. The new law provides that if the jury asks to review testimony or other materials admitted into evidence, the judge has discretion to grant the jury's request in open court after giving the parties notice and an

opportunity to be heard. If the judge fears that review of the evidence specifically requested may give that evidence undue prominence, the law authorizes the court to require review of other evidence relevant to the same factual issue. This new legislation governing civil cases is identical to that applicable to criminal cases (see G.S. 15A-1233), with the exception of the provision giving parties an opportunity to be heard, which is not required in criminal cases.

The new law dramatically departs from both criminal law and prior civil case law. However, it gives the trial judge discretionary authority to allow the jury's request to take certain types of evidence into the jury room without first obtaining the consent of the parties. While the statute requires that parties have an opportunity to be heard, the new law makes clear that their consent is no longer required for the jury to take into the jury room exhibits that jury members were allowed to examine during the trial, as well as photographs and illustrative exhibits used by witnesses in testifying. On the other hand, evidence prepared during the course of trial by a party, such as summaries of testimony or lists, may not be sent into the jury room. Finally, depositions and any exhibits not falling into the first category may be sent into the jury room only with the consent of all parties.

Civil Procedure in Context of Predatory Lending Practices

In December 2006 a divided North Carolina Supreme Court decided two cases limiting the ability of homeowners to challenge lending practices in connection with foreclosure proceedings. Less than four months later, the General Assembly responded by enacting legislation specifically overturning the results in both cases. In *Skinner v. Preferred Credit*, 361 N.C. 314, 638 S.E.2d 203 (2006), the court was confronted with a common situation in which North Carolina homeowners were challenging terms of a loan that had been sold by the original lender to an out-of-state corporation, which placed the loan into a trust. The court held that there were insufficient contacts between the trust and North Carolina under the long-arm statute to permit the homeowners to bring an action here. S.L. 2007-351 (H 1374) amends the long-arm statute, G.S. 1-75.4(6), to mandate a different result. Under the new law, an action may be brought in this state if (1) the loan was made to a resident of this state; (2) the loan was incurred primarily for personal, family, or household purposes; and (3) the loan is secured by real property including a residential dwelling in this state.

The companion case to *Skinner* was *Shepard v. Ocwen Federal Bank*, FSB, 361 N.C. 137, 638 S.E.2d 197 (2006). In *Shepard*, the Supreme Court held that the statute of limitations on a claim for usury based on a loan origination fee began to run at closing, rejecting plaintiff's claim that the statute of limitations should apply to each individual loan payment. The court acknowledged that the loan origination fee was usurious and that the plaintiff had paid the origination fee out of loan proceeds. The court rejected, however, the argument that the fact that the fee was financed as part of the loan justified a different analysis of when a cause of action accrued for statute of limitations purposes. Again, the General Assembly responded in S.L. 2007-351, amending G.S. 1-53(2) to specify that in an action alleging usury based on points, fees, or other charges, the two-year statute of limitations begins to run anew with each individual payment made and accepted.

Matters of Particular Interest to Clerks

Abandoned Cemeteries

The House Study Committee on Abandoned Cemeteries recommended the legislation enacted as S.L. 2007-118 (H 107), which replaces several sections of G.S. Chapter 65 with a new Article 12, addressing a number of issues pertaining to abandoned and neglected cemeteries. From the clerk's point of view, the new law makes only minor changes to existing procedure for funding perpetual maintenance of graves and cemeteries. The most important change is an increase in the minimum amount that may be deposited with the clerk from \$100 to \$5,000. Another significant

modification is that the clerk is no longer required to make an annual report of how income from the fund has been used; S.L. 2007-118 instead requires only that a copy of the accounting be placed in the file. Finally, the old provision requiring annual payment of a 10 percent commission to the clerk has been removed. The new law applies only to trusts created on or after July 1, 2007. Trusts created before that date will continue to be governed by the former statutory provisions.

Uniform Simultaneous Death Act

S.L. 2007-132 (H 775) adopts in large part the most recent version of the Uniform Simultaneous Death Act (USDA). The act is a legislative resolution of a problem most easily understood by example. Imagine a married couple with no children where each spouse has a will leaving everything to the other spouse and they die together in an automobile accident. In that situation, the property of the first to die would pass to the surviving spouse and, upon the death of the spouse, then to the heirs of the spouse. In the case of simultaneous death, however, determining how property should be distributed is difficult. The USDA, adopted in one form or another in most states, deals with this problem by providing that in these circumstances neither person inherits from the other. The property of each person is treated as if that person outlived the other. Under the original version of the USDA, however, this “legal fiction” did not apply in cases with “sufficient evidence that the persons have died otherwise than simultaneously.” The result was often protracted litigation as one set of potential beneficiaries strove to establish that one party survived the other, even if only for a few seconds. In 1991 the National Conference of Commissioners on Uniform State Laws modified the USDA to extend the presumption to cases in which the relevant persons die within 120 hours of each other. With the enactment of S.L. 2007-132, North Carolina joins a number of states adopting this presumption. Under the amended version of G.S. Chapter 28A, Article 24, one person will acquire property upon the death of another only if clear and convincing evidence demonstrates that person survived the other for at least 120 hours.

The General Assembly also included language specifying the manner in which death and the time of its occurrence may be demonstrated. Under the new law, death is considered to have occurred upon declaration by a physician under G.S. 90-323 or pursuant to the statutory procedure established in G.S. Chapter 28C, which governs missing persons. Acceptable evidence of the time of death includes a death certificate, a report of a governmental agency, or other clear and convincing evidence.

S.L. 2007-132 leaves unchanged the right to avoid application of the act by use of specific language in a will or other legal document. Furthermore, S.L. 2007-132 contains a specific provision, not found in the USDA, that a victim is presumed to have survived the death of a slayer if that presumption operates to allow the victim some right or benefit, absent demonstration by clear and convincing evidence that the slayer survived the victim by at least 120 hours. Finally, the new law adopts the language of the USDA extending protection to payors and other third parties who rely on a survivor’s apparent entitlement to property before receiving notice to the contrary. Upon receiving notice of a claimed lack of entitlement, a payor or other third party may avoid potential liability by depositing with the clerk of superior court funds or other property pending the clerk’s determination of the person entitled to the property.

Priority of Health Care Agent Over Personal Representative

S.L. 2007-502 (H 634) concerns health care powers of attorney. The provision that is of particular interest to clerks amends G.S. 28A-13-1, the statute governing the duties and powers of a personal representative. The new law clarifies that a duly authorized health care agent under G.S. 32A-19(b) takes precedence over a personal representative in making arrangements related to a decedent’s body, funeral, and burial.

Foreclosures

Modified Notice of Foreclosure Hearing

S.L. 2007-351 amends G.S. 45-21.16 to increase the amount of information a debtor is entitled to receive in connection with foreclosures. In 1999 the General Assembly required the notice of a foreclosure hearing to confirm that notice has been sent to the debtor within the previous thirty days and that the debtor was informed of the amount of principal and interest owed. The new law adds to that requirement a provision that the debtor must be supplied with a detailed written statement of all amounts alleged to be due, including “any other fees, expenses, and disbursements.” Further, the notice of foreclosure must set out whether the debtor has requested detailed information about the loan within the last two years, as well as identifying the response to any requests. Finally, the new law requires the notice to contain specific information, identified in detail in the statute, concerning the debtor’s rights and possible consequences of the debtor’s response to the notice. S.L. 2007-351 also adds a new Article to G.S. Chapter 45, imposing specific requirements on a loan servicer and creating a cause of action on behalf of a debtor injured by a servicer’s failure to comply with the statutory requirements.

Protection of Tenants in Foreclosure Proceedings

Under the law prior to enactment of S.L. 2007-353 (H 947) tenants might learn that their leased property is going through foreclosure only upon receiving a notice after the foreclosure sale informing them that they must vacate the property within ten days. In fact, a close reading of the statute reveals that a tenant was not even entitled to that notice, although in actual practice, tenants were typically provided with some advance warning of their upcoming ouster. The new law provides a tenant with more time to find alternate housing. Under G.S. 45-21.17 as amended, persons occupying the property are added to the list of those required to be given notice that the property is to be sold at a foreclosure proceeding. This provision applies, however, only if the property is residential and contains less than fifteen rental units. The new law requires that the notice of sale include information about the order for possession likely to be issued following the sale. In addition, the notice must inform tenants of their right to terminate the lease upon ten days’ written notice to the landlord. The provision for early termination of the lease is set out in G.S. 42-45.2 and states that tenants are responsible for payment of prorated rent up to the date the tenant has stated that the lease ends. Finally, G.S. 45-21.29 is amended to allow an order for possession to be issued for residential property containing fifteen or more rental units if parties remaining in possession have received at least thirty—instead of ten—days’ notice that they must vacate the property.

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