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## Courts and Civil Procedure

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The 1999 legislative session, insofar as it dealt with court administration issues, was dominated by the recommendations of the Commission on the Future of Courts and Justice in North Carolina (Futures Commission). As usual the budget occupied its important place in the court's legislative agenda. The long-standing issue of control over the scheduling of criminal cases was also addressed this session in more detail than ever before. Apart from those major topics, no other major bills were enacted this session, although several bills that affect the day-to-day operations of the courts were enacted. Changes include legislation to clarify the procedures used by clerks of court in hearing civil and estate matters and by judges in hearing appeals from those matters. For the first time journalists will have a limited statutory exemption from testifying about material they gather as journalists.

The Futures Commission, appointed by former Chief Justice James Exum in 1994 to study the organization of the courts and to make recommendations to prepare the court system to meet its anticipated future needs, in 1997 released its recommendations for reorganizing the court system in North Carolina. The commission's report recommended sweeping changes in the structure of the courts as well as different organizational practices that the commission believed would make the courts more accountable, flexible, uniform, and independent. With the exception of the creation of a pilot family court, the commission's recommendations were not acted upon in the 1997 or 1998 sessions, although they were introduced and referred to a study committee. Those recommendations, however, became the foundation for nearly all of the court administration initiatives that were considered in the 1999 legislative session. Two bills that were based on the commission's recommendations were passed, another (providing for appointment of appellate judges) passed the Senate and failed in the House, one came to the House floor and was sent back to committee, and one remains alive for consideration by the 2000 session.

One of the changes that was enacted creates the State Judicial Council to assist the Chief Justice and the Administrative Office of the Courts in addressing statewide management issues. The other redraws the boundaries for the units in which superior court judges ride circuit and authorizes a pilot to try new methods of providing administrative direction to local court districts.

The budget increases this year were smaller than in recent years (and the cuts made to existing budget categories were larger), and they continued the emphasis placed in recent years on personnel expansion instead of technology.

The recurring debate on whether judges should be appointed or elected continued. S 12 would have amended the N.C. Constitution to replace the current partisan election system for appellate judges with a system of gubernatorial appointments and retention elections. This legislation passed the Senate but, as has been the case with similar bills in the recent past, failed in the House. In fact it failed to get even a simple majority, much less the three-fifths majority that would be needed to pass a proposed constitutional amendment. A bill to change the method of election of district court judges from partisan to nonpartisan elections passed the Senate but was not acted on by the House. It remains eligible for consideration in 2000.

In addition significant bills changing the criminal, domestic relations, domestic violence, juvenile, motor vehicle, and social services laws are discussed in other chapters in this book. Most of those acts affect the manner in which courts do their work and should be consulted for a complete view of how the courts have been affected by the 1999 legislative session.

## **Futures Commission Recommendations**

### **Judicial Council**

S.L. 1999-390 (H 1222) establishes a seventeen-member State Judicial Council. The members are

- the Chief Justice, who serves as chair,
- the Chief Judge of the court of appeals,
- one district attorney,
- one public defender,
- one superior court judge,
- one district court judge,
- one clerk of court,
- one magistrate,
- five attorneys, with the State Bar Council, Chief Justice, Governor, House Speaker, and Senate President Pro Tem each appointing one,
- four nonattorneys, with the Chief Justice, Governor, House Speaker, and Senate President Pro Tem each appointing one.

No incumbent General Assembly member or judicial official, unless he or she serves as a representative of a peer group, may serve on the council. Terms are for four years, although initial terms of several members are shorter than that to ensure that in the future, terms will be staggered. The appointing authorities must confer with each other to maximize fair representation from each area of the state, both genders, and each major racial group.

The council has several duties assigned by the statute. It must study the entire judicial system and report periodically to the Chief Justice on its findings. It must advise the Chief Justice on funding priorities and review the proposed budget for the courts each year. It must make recommendations on appropriate levels of salaries and benefits for court officials. It must consider any improvements in case management and uses of alternative dispute resolution. It may recommend changes in district or division lines.

The duty that generated the most discussion and concern among court officials is the duty to recommend performance standards for all courts and judicial officials and to recommend procedures to conduct periodic evaluation of the courts and of individual court officials. Evaluation of judges must include assessments by other judges, litigants, jurors, and the judge. Summaries of the data collected are to be made available to the public, but the raw data used to compile the summaries are not public record.

Finally, in its most global responsibility, the council must monitor “the administration of justice and assess the effectiveness of the Judicial Branch in serving the public.” The law creating the council becomes effective January 1, 2000.

The Futures Commission report, in recommending the creation of a Judicial Council, noted:

If the chief justice’s role is to be strengthened, that office will need assistance. We believe that a council composed of both lawyers and lay members can best provide the perspective of other parts of the court system and of the general public. A council with experienced judges, lawyers, civic leaders, business and professional people can also be a sounding board for managing the courts. The council will not interfere with the independent performance of judicial functions, but it can provide the General Assembly with comfort that the system will be governed in a manner that truly is sensitive to the broad public interest. . . .

It is intended that the State Judicial Council be an important, influential body. . . . It can guarantee that the judicial branch will not lose sight of its mission to serve the public. It can provide the chief justice with invaluable counsel. And the Council can be an effective advocate for the courts in the legislature and with the public. (“*Without Favor, Denial, or Delay.*” Report of the Commission for the Future of Justice and the Courts in North Carolina, Dec. 1996, pp. 34–35.)

### **Division Reorganization, Pilot Management Programs**

The other bill that was based on Futures Commission recommendations was S.L. 1999-396 (S 1025). Some background information is necessary to put it in context. A central recommendation of the Futures Commission is that the district and superior courts be merged into a new circuit court. In addition to consolidation of the subject matter jurisdiction of the existing courts, the circuit court proposal also would change the geographic area in which each judge serves. Under current law district judges serve in districts (of which there are thirty-nine), and superior court judges rotate, or ride circuit, throughout a division that is composed of several districts. Currently four divisions serve this purpose.

The Futures Commission recommended that circuits be sized somewhere in between districts (the largest of which has seven sparsely populated, rural counties) and divisions (the smallest of which has twenty counties and extends from South Carolina to Virginia). Under this plan a judge generally would hold court in all parts of the circuit over time. The commission did not suggest any specific boundary lines or circuits, but it did recommend dividing the state into fourteen to sixteen circuits. Moving to a circuit court system, however, requires a constitutional amendment.

That presented a problem. Futures Commission advocates apparently decided in 1997 that constitutional amendments to reform the structure of the court system were unlikely to obtain legislative approval. As a result, with one exception (selection of appellate judges), they focused their efforts in 1998 and 1999 on changes that could be accomplished by statute. That meant that the more comprehensive changes, such as the establishment of circuits, were left for future sessions to consider.

As an alternative, in 1998 the General Assembly enacted legislation (S.L. 1998-212, sec. 16.17A) requesting that the Chief Justice convene a task force of judicial officials to do two things: one, make recommendations for the reorganization of the Superior Court Division into no fewer than eight and no more than twelve divisions and, two, recommend the steps necessary to establish pilot programs in up to three new judicial divisions to approximate, as closely as possible in the district/superior court organizational model, the operation of a “circuit court” as envisioned by the Futures Commission. The Chief Justice appointed the task force, which made several recommendations to the General Assembly. The task force concluded that it could not make recommendations on how to implement a circuit court, but it did recommend dividing the state into eight divisions for the purpose of superior court rotation. With respect to the circuit pilots, the task force requested more information about exactly which parts of the Futures Commission’s ideas should be included. It declined to recommend any specific action to establish pilots.

S.L. 1999-396 was introduced as a result of the task force report. The legislation divided the state into eight judicial divisions, and it authorized pilot court management programs.

The eight divisions are

- Division 1—Districts 1, 2, 3A, 6A, 6B, 7A, 7B-C
- Division 2—Districts 3B, 4A, 4B, 5, 8A, 8B
- Division 3—Districts 9, 9A, 10, 14, 15A, 15B
- Division 4—Districts 11A, 11B, 12, 13, 16A, 16B
- Division 5—Districts 17A, 17B, 18, 19B, 21, 23
- Division 6—Districts 19A, 19C, 20A, 20B, 22
- Division 7—Districts 25A, 25B, 26, 27A, 27B
- Division 8—Districts 24, 28, 29, 30A, 30B

The new division lines are effective January 1, 2000.

The Chief Justice may choose up to two divisions of these eight or portions of a division in which to establish pilot programs for the organization and management of the trial courts in that area. In an area designated as a pilot, the Chief Justice is to name a judge to serve as the coordinating judge for the pilot program. That judge must then work with the existing administrative structure to achieve the goals of the pilot program. Each district included in the pilot area will still have a chief district court judge and a senior resident superior court judge, whose positions are established by the statutes and constitution of this state. For the pilot to work the coordinating judge must get the cooperation of those judges. The legislation requires the coordinating judge to obtain the consent of the clerks of court, district attorneys, and senior resident and chief district court judges in the pilot area to take any significant action. It does not specify whether that consent may be by simple majority or by unanimous consent, nor does it specify if consent from each group is required for all actions. With that consent, the coordinating judge may establish the schedule for all the sessions of court in the pilot area, assign judges, develop calendaring procedures for both criminal and civil court, assign cases to individual judges, establish local rules, and allow judges to hear motions and pretrial proceedings in any county in the pilot area.

While the legislation does not explicitly say so, the clear implication is that superior court judges in a pilot area will not rotate outside the pilot and will be assigned by the coordinating judge instead of by the Chief Justice. Similarly the implication is that district judges may be assigned outside their district but within the pilot area by the coordinating judge and not by the Chief Justice.

The coordinating judge may hire staff and must appoint an advisory council to assist him or her in the conduct of the pilot program. The legislature appropriated \$250,000 to provide staff and other support to the pilot areas. The Chief Justice and Administrative Office of the Courts must report on the experience gained by the pilot programs by March 1, 2002.

The pilot programs do not possess the clear lines of accountability that the Futures Commission envisioned in its proposals. That kind of accountability would require major reorganizational legislation and possibly a constitutional amendment. This effort may, however, allow some experimentation with a higher level of administrative support and a greater emphasis on assignment of judges to hear individual cases. It may also provide experience on how local assignments of judges over an area larger than the existing districts can work.

S.L. 1999-396 takes effect January 1, 2000.

## **The Budget**

Funds allocated to the court system for the 1999–2001 biennium by S.L. 1999-237 (H 168) reflected a net gain of around \$3 million in the first year and \$7 million in the second. That figure does not include the funds necessary to finance the pay raise for all court officials and employees. The funds for new activities were substantially greater than that figure, but corresponding cuts were made in such items as salary reserve funds, equipment and operating reserves, software

maintenance agreements, and out-of-state travel. The increase suggested by the Governor to provide indigent defense also was reduced. The indigent defense cuts do not reflect an actual reduction in expenditures; instead they are a reduction in the amount by which the base budget for that activity was increased in the Governor's proposed budget.

The increases are mostly for new personnel, especially for judges. The budget adds four special superior court judges, one new resident judge in District 22, and nine new district court judges added in Districts 2, 5, 13, 15A, 18, 19A, 26, 27A, and 30. The superior court judges are effective October 1, 1999, and the district court judges are effective January 1, 2000. In addition eight new court reporter positions, seven new judges' support positions, and three magistrates are created. Prosecutors and clerks have received substantial increases in personnel over the last two years. This year's increases are much smaller—eleven new deputy clerk positions and nine new assistant district attorneys. The prosecutors are added in Districts 5, 10 (two positions), 12, 13, 15A, 19A, 20, and 26. Twenty-five victim witness/legal assistant positions were added in district attorney offices in anticipation of the demand for services created by the inclusion of some domestic violence misdemeanors in the coverage afforded by the victims' rights legislation enacted in 1998. Four new assistant public defender positions also are created. All these new positions are effective January 1, 2000. Family court funding was increased to support expansion of the program into two or more additional districts. Finally, funding was provided to the Department of Health and Human Services because that agency will begin to handle the financial transactions associated with child support collections in all non-IV-D cases. Formerly the clerk handled those cases. See Chapter 4 (Children and Families) for a detailed discussion of the child support changes.

Notable for its absence is funding for new initiatives in technology. Court officials and the public have demanded modernization of the court technology programs and equipment now in use. In 1998 the legislature authorized an independent study of the court system's technology needs, but that report was not available by the time the legislature considered the court system's budget. It is likely that increased funding for technology will be a high priority in the future. One item funded was a disaster recovery program for the court computer operations.

Relatively few nonappropriation matters were included in the court system's portion of the budget bill for this biennium. However, one such provision directs the Administrative Office of the Courts to establish an education program about custody and visitation issues for married couples with children who are involved in separations or divorces.

In addition the Administrative Office of the Courts is authorized to establish a court technology fund. The fund will receive any fees collected from third parties that provide remote access to court records for the public.

In two districts, 5 and 19B, the existing district is subdivided into smaller districts. The new subdistricts will be used only for elections and will have no bearing on the administration of the courts in those districts.

Finally, the budget adds new statutes authorizing cities and counties to provide funds to the Administrative Office of the Courts to supplement the operations of prosecutors when the district attorney demonstrates that "overwhelming public interest" or his or her inability to keep the dockets current requires additional resources. This authorization is the latest in a continuing debate over whether the state, and only the state, should provide funding for the court system, including prosecution. It is the first time since the court reform of the 1960s that the legislature has explicitly authorized local governments to use local tax revenues to fund the operation of the state court system.

## **Criminal Calendaring**

In North Carolina, the General Statutes allocate the responsibility for preparing the criminal calendars (schedules setting out when the court will hear cases) to the district attorney. For several years that has been a subject of litigation and proposed legislation. It is a debate in which the

arguments are well known. [For a discussion, see Stanley Hammer, "Should Prosecutors Control the Criminal Trial Calendar?" 59 *Popular Government* (Spring 1994): 2–11; and Thomas J. Keith, "A Prosecutor's View of Criminal Trial Calendaring," 60 *Popular Government* (Spring 1995): 2–17.] S.L. 1999-428 (S 292) enacts the first legislation on the subject since 1983. While it provides for mandatory procedures that district attorneys must follow, it maintains the power of the district attorney to calendar cases. If the district attorney does not expeditiously calendar the cases, a defendant has new statutory rights to involve a judge in the calendaring process.

Specifically the act adds a new G.S. 7A-49.4 to set out the rules applicable to calendaring of criminal cases in superior court. Effective January 1, 2000, each district attorney (DA) must develop a case docketing plan with input from judges and the local bar. The plan must contain provisions requiring an administrative hearing regarding each felony within sixty days of indictment (or service of notice of indictment). The judge presiding over the hearing must set any necessary deadlines for discovery, arraignment, and motions. The hearing may include a plea conference if the district attorney has offered a plea. The law establishes a preference for resident judges to conduct the hearings but allows others to preside as well. It allows for multiple administrative settings as needed. If parties do not agree on a trial date by the end of the last setting contemplated by the plan, the DA must propose a trial date, which will be the date unless the judge sets a different date. The date for a trial may not be set earlier than thirty days after last setting without consent of the defendant. Administrative hearings may be held anywhere within a district, but a defendant may only be required to attend if the hearing is in the county of filing. S.L. 1999-428 allows a defendant to apply to the senior resident judge (or designee) for a specific trial date if no date is set within 120 days of indictment, and that judge must hold a hearing to determine when the trial should be held. All printed calendars must list cases in the order of intended trial or disposition and should not contain cases that the DA does not reasonably expect to be ready for trial. Deviations from the printed order require approval of the judge if the defendant objects. If all the cases are not reached before court adjourns, the DA must set new trial dates for the cases not reached.

## **Clerk's Procedures and Appeals from Clerk**

### **Background**

S.L. 1999-216 (S 246) revises the statutes specifying when clerks of court should hear issues arising in civil matters, special proceedings, and estate matters and when they should transfer the matter to a trial court. In addition it specifies how appeals from the clerks' decisions are to be handled and the standard of review the trial court is to apply in hearing the matter on appeal. The General Statutes Commission recommended the bill.

Appeals or transfers of cases started before the clerk of superior court are the exception. When they have occurred, they have been governed by statutes that are quite old and by cases interpreting those statutes that also are decades old. The basic statutes that govern these matters were enacted right after the Civil War, when the state was fashioning a governmental structure to secure its reentry into the Union. It served those times well.

Since those times the court system has undergone significant changes. Over the latter part of the nineteenth century and the first half of this century, local courts sprang up like weeds in virtually every county of the state. A hodgepodge of local trial courts below the superior court—more than 250—developed, as did widely differing treatments of clerk of court jurisdiction. This resulted in a system that was not uniform in the manner in which clerks exercised jurisdiction or in the manner in which appeals from their decisions were handled.

In the 1950s and 1960s a new court system was established to deal with these and other problems in court administration. The clerks' jurisdiction was made uniform. The statutes that governed appeals and transfers, however, were hardly touched at all. The divergence in practice that grew during the days of local courts survived the court unification effort. S.L. 1999-216

repeals many of those post–Civil War statutes and replaces them with a more uniform treatment of appeals and transfers.

### Current law

Clerks handle three basic kinds of actions. They enter orders in civil actions, typically in pre- or post-trial situations. They often preside over and enter orders and judgments in special proceedings in an amazingly wide array of cases, ranging from name changes to cartway proceedings to partitions of land. All of these cases share the common characteristic of needing court approval to confer a new status or to authorize the taking of some kind of action; many are uncontested. Finally, clerks are the judges of probate, and in that capacity they preside over matters related to the estates of decedents, minors, and incompetents.

Article 27 of G.S. Chapter 1 provided some limited procedural guidance in these cases. It established a procedure for the clerk to follow in making a record; that procedure, however, was rarely followed. It provided some guidance in appeals and transfers of special proceedings, but another section (G.S. 1-399), in an article dealing only with special proceedings, had conflicting language. In estate matters, where the clerk’s actions have the most finality, virtually no statutory guidance was offered. In addition, two very important cases were not followed consistently, and from time to time that inconsistency was a trap for the unwary estate lawyer who was unfamiliar with the cases.

### New Legislation

The commission’s stated goal was to bring some order to the handling of these cases and to provide easily accessible, clear guidance to clerks, judges, attorneys, and litigants who appear before a clerk of court in a civil action, special proceeding, or estate matter. The commission’s stated intent was to preserve the substance of the existing law, changing it only where ambiguity required clarification.

S.L. 1999-216 adds a new Article 27A to G.S. Chapter 1 that consists of three sections. One deals with appeals or transfers of issues heard by the clerk in civil actions, one with special proceedings, and one with estate matters. Existing statutes on those subjects are repealed.

**Civil matters.** Section 1-301.1 deals with the clerk’s handling of civil matters. It is consistent with current law. In most civil matters in which the clerk exercises civil jurisdiction, the clerk holds that power concurrently with the judge. Parties typically chose to file the matter with the clerk to get a more expeditious hearing or ruling. The new law continues that rule. Any decision of the clerk may be appealed for a de novo review by the judge. On appeal the judge may hear the entire matter or dispose of only the matter that led to the appeal. If the proceeding is one that must be heard by the clerk initially, the judge must resolve only the matter appealed and recommit the case for final resolution by the clerk.

**Special Proceedings.** Section 1-301.2 provides that special proceedings are to be transferred to the trial courts when issues of fact or law are raised. In doing so the section clarifies the existing law, since one current statute requires a transfer “if issues of law and of fact, or of fact only” are raised, and another requires a transfer if a party “may plead any equitable or other defense, or ask any equitable or other relief in the pleadings.” The new law requires transfer if issues of fact, equitable defenses, or equitable relief are sought *in the pleadings* in the special proceeding. If the matter is not pleaded but is raised in the course of hearing the special proceeding, the clerk continues to hear the matter, and the issue may then be appealed for a de novo review. Three important and high-volume special proceedings—incompetency determinations, foreclosures, and partitions—are exempted from these rules. All three have highly developed laws with special rules about transfer, and those specific rules apply.

**Estates.** Section 1-301.3 applies to appeals of estate matters. Estates are not transferred under current law. They are heard by the clerk as the judge of probate and are appealed to superior court if further review is sought. The basic law is found in two cases, *Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967), and *Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976). *Lowther*

holds that the clerk's jurisdiction is exclusive in probate matters, that the superior court has appellate jurisdiction only, and that appeals from clerks' orders in such cases will be heard de novo by the superior court if the appellant challenges the findings of fact. If the appellant does not except to the findings, "a general exception to the judgement presents only the question whether the facts found support the conclusions of law" (271 N.C. at 355-56, 156 S.E.2d at 702). *Adamee* reaffirmed that the establishment of the district court and the uniform court system did not affect the holding in *Lowther*. The new law restates that rule and requires the clerk to enter orders, including findings of fact and conclusions of law in estate orders.

The commission's intent was to follow the basic principles established in *Lowther*. The superior court acts in an appellate capacity to review the decision of the clerk, not to conduct a de novo hearing of the matter. Evidentiary matters, however, may be raised for the first time before the trial judge, but the judge may only review the specific evidentiary issue. He or she may not review all the evidence and substitute his or her judgment for the clerk's.

Since the clerks hear estate matters to their conclusion and appeals are on the record made in the proceeding, clerks or parties may require that a verbatim record be kept. Electronic equipment must be used unless a party chooses to pay for a court reporter to create a verbatim record.

**Partition proceedings.** The legislature added an amendment to the commission's bill to specify that, in proceedings to divide jointly owned land, the clerk may not decide how the land should be divided. Instead the clerk must appoint disinterested experts (commissioners) to review the land and divide it according to the respective interests of the parties. A clerk who does not agree with the commissioners' recommendation may direct them to reconsider their recommendation, or he or she may appoint new commissioners. The amendment also provides that judges, in reviewing a clerk's decision, may not do anything that the clerk could not do. Thus a judge may not change the suggested division of land, but he or she may send the matter back to the commissioners to reconsider the matter or direct that new commissioners be appointed.

## Alternative Dispute Resolution

S.L. 1999-354 (H 924) makes several modifications to current programs that provide alternatives to litigation. It modifies the procedure followed in mediated settlement conferences for superior court civil actions and district court family law actions by providing that settlements arising out of these mediations may not be enforced unless the settlement has been reduced to writing and signed by the parties. It has been a practice of many mediators to reduce settlements to writing, but now the statutes will require it. The mediated settlement conferences have provided that statements made in a mediation proceeding may not be admissible in a court proceeding; nor may a mediator be compelled to testify about statements made during a mediation proceeding. S.L. 1999-354 makes an exception for proceedings for sanctions or proceedings to enforce a settlement of the action, providing that a mediator can be compelled to attest to the signing of a settlement agreement in a court proceeding to enforce the settlement.

S.L. 1999-354 adds a statutory provision to G.S. Chapter 7A that recognizes the importance of community mediation centers (dispute resolution centers) and encourages each chief district court judge and district attorney to send civil cases and criminal misdemeanors to the mediation center when it provides an appropriate alternative to a court proceeding. Because of the nature of mediation services, mediators potentially could be charged with violating two professional licensing requirements. Therefore the new law amends G.S. 84-2.1 to provide that "practicing law" does not encompass the writing of memoranda of understanding by mediators at community mediation centers. It also amends G.S. 90-330 to provide that settlement of conflicts by mediators at community mediation centers does not constitute the "practice of counseling." It adds provisions governing admissibility of statements made during community mediation sessions that are similar to those in place for mediated settlement conferences. Statements made during a mediation are not subject to discovery and are not admissible in any court proceeding except one to enforce the settlement. The settlement must be reduced to writing to be enforced; no mediator is

compelled in a civil or criminal case to testify about statements made during a mediation, except that in a criminal case the judge may compel disclosure if the information is unrelated to the dispute that is the subject of the mediation and the judge believes the testimony is necessary to the administration of justice. However, a mediator must comply with the statutory requirement for reporting suspected abuse of a child or a disabled adult.

S.L. 1999-185 (H 495) adds a new law on family law arbitration. That bill is discussed in Chapter 4 (Children and Families).

## **Civil Procedure**

### **Rules of Civil Procedure**

S.L. 1999-187 (S 921) amends Rule 55(b) to allow a judge to grant a default judgment without a hearing when (1) the motion for default notifies the party against whom the judgment is sought that the judge will decide the motion without a hearing if the party against whom the motion is sought fails to file a written response within thirty days and (2) that party fails to file a response.

S.L. 1999-264 (S 1055) amends Rule 28(c) to prohibit a deposition from being taken before a court reporter who is an independent contractor under a blanket contract for court reporting services with an attorney of the parties, a party to the action, or a party having a financial interest in the action unless the parties waive disqualification by stipulation after written disclosure. It also prohibits a court reporter from taking a deposition under a contractual agreement that requires transmission of the original transcript without the transcript having been certified.

### **Civil Contempt**

S.L. 1999-361 (S 170) modifies civil contempt law. It began as an attempt to limit the period of imprisonment for civil contempt, but as enacted its limitation seems to apply to only a very small number of civil contempt cases. It provides that the maximum imprisonment for civil contempt for refusal to comply with a court order is ninety days, with possible recommitment hearings for ninety-day periods up to a total of twelve months imprisonment. However, a person who is imprisoned for civil contempt for failure to pay child support or for failure to perform an act that does not require payment of a monetary judgment may be imprisoned as long as the contempt continues. Because those two exceptions constitute many of the situations in which a person is found in civil contempt, very few cases will be affected by the new requirement. One example of the kind of case that will be covered is a person who is held in civil contempt for failing to make a lump sum distributive payment as ordered in an equitable distribution judgment.

S.L. 1999-361 also amends G.S. 5A-21 to require the judge or clerk who is imposing civil contempt to make specific findings of fact that the noncompliance is willful, which has been required by the appellate courts but is now stated in the statute. The new law also allows contempt proceedings to be initiated by a party by motion and notice in addition to the current procedure of motion to a judicial official who issues an order to appear and show cause. The main difference in the manner of initiating the contempt charges is that the defendant cannot be held in contempt for failing to appear in response to a motion and notice as opposed to an order.

### **Prosecution Bonds**

G.S. 1-109 requires a clerk, upon motion of the defendant, to set a bond of \$200 to be given by the plaintiff in a civil action or special proceeding for the payment of all costs if the defendant recovers costs against the plaintiff in the action. Failure to file the bond constitutes grounds for dismissal of the action. S.L. 1999-106 (S 693) modifies that statute to require the defendant who

seeks imposition of the bond to show good cause why the bond should be imposed and to give the clerk discretion whether to require the bond.

## **Matters of Particular Interest to Trial Judges**

### **Privileges and Admissibility of Documents**

Several bills dealt with the admissibility of evidence. The most interesting is S.L. 1999-267 (S 1009), which grants a qualified privilege to a journalist against disclosure in a legal proceeding of any information obtained while acting as a journalist. This statute follows a ruling by the court of appeals in *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592 (1998), in which the court said there is no common law privilege protecting a journalist from testifying about information gained as a journalist, nor is such a privilege constitutionally required. Thus the court left it to the legislature to decide whether to grant a privilege. This year the General Assembly did so. Under S.L. 1999-267, the journalist's privilege may be overcome by establishing that the testimony is relevant and material to the proper administration of justice; the evidence cannot be obtained from alternative sources; and the testimony is essential to the maintenance of a claim or defense of the person on whose behalf the testimony is sought. The privilege does not apply to disclosure of information obtained as a result of journalists' eyewitness observations of criminal or tortious conduct.

In S.L. 1999-374 (S 995), the General Assembly added a testimonial privilege for police peer support group counselors for any communication necessary to render counseling services unless the judge orders disclosure is necessary for the proper administration of justice. The privilege does not apply if the peer counselor was an initial responding officer, a witness, or a party to the incident that led to the peer counseling or to communications made to the peer counselor while the peer counselor was not acting in his or her official capacity. Nor does the privilege apply to communications related to a violation of criminal law.

Various provisions in chapters 8, 153A, and 160A of the General Statutes allow businesses and governmental agencies to destroy original documents after reproducing those documents by microfilm or by photographic or other processes that reproduce the original and also authorize admission of the reproduction into evidence in a court proceeding as if it were the original. S.L. 1999-131 (S 1021) modifies those statutes to conform to modern methods of copying documents. It specifies that the statutes cover records stored on any form of permanent, computer-readable media, such as CD-ROM, if the medium is not subject to erasure or alteration.

In order to encourage participation in a child fatality review so that the state has accurate and complete studies of child fatalities, S.L. 1999-190 (H 262) provides that the findings and recommendations by a State Child Fatality Review Team are not admissible in civil proceedings against individuals who participate in the review.

### **New Causes of Action**

This session of the General Assembly created several new causes of action to deal with current national issues. In response to several notable incidents of school violence, S.L. 1999-257 (H 517) makes a parent of a minor liable to the school for damages of up to \$25,000 if the child makes a bomb threat or brings a bomb or explosive device onto educational property and up to \$50,000 if the child discharges a firearm or detonates an explosive device on educational property. The school must prove that the parent knew or should have known of the minor's likelihood to commit such an act; that the parent had the opportunity and ability to control the minor; and that the parent made no reasonable effort to correct, restrain, or properly supervise the minor. A more detailed discussion of this law is in Chapter 9 (Elementary and Secondary Education).

S.L. 1999-295 (S 1005) is one of two bills that anticipate lawsuits arising out of Year 2000 (Y2K)-related problems. It provides that a defendant is not liable to third parties for delay or

interruption in the performance of a contract or in the delivery of goods if the delay or interruption was caused by another party's Y2K problem. It prohibits punitive or consequential damages and establishes a prima facie rule that due diligence is shown by compliance with directives by state or federal regulators. It also establishes a mandatory prelitigation mediation procedure similar to the procedure already existing for farm nuisance cases. S.L. 1999-308 (S 1074), the second bill dealing with Y2K litigation, establishes an affirmative defense to a lawsuit in which failure of the defendant to meet an obligation is caused by a Y2K problem on computing equipment not owned or controlled by the defendant. The granting of the affirmative defense does not impair, discharge, or otherwise affect the underlying obligation that is the basis of the claim against which the affirmative defense was asserted. However, the law provides that if the affirmative defense is established, the claim is dismissed without prejudice and may not be refiled for sixty days, which means that if the underlying obligation has not been satisfied, the lawsuit may be refiled after sixty days.

Finally, S.L. 1999-437 (S 830) requires automobile repair shops to provide written estimates of repairs over \$350. Further, it prohibits the following practices and provides a cause of action for violation with the relief being damages, attorney fees, and injunctive relief:

- charging more than 10 percent over the estimate without the consent of the customer,
- failure to return the vehicle because of failure to pay charges not agreed upon,
- charging for unauthorized repairs or repairs not actually done,
- representing that unneeded repairs are necessary,
- falsely suggesting that a vehicle is dangerous to operate,
- rebuilding a vehicle in a way that does not meet the manufacturer's specifications without consent of the owner,
- fraudulently misusing a customer's credit card.

The General Assembly also wanted to curb the practice of advertising a price for a vehicle service that is different from the price actually charged, that is, the \$19.95 oil change that actually costs \$25. The new law requires a business that services or repairs private passenger vehicles and advertises the cost of a specified service to disclose in the advertisement all additional charges routinely charged for that service. If the business fails to comply with the law, then upon written notice the customer is required to pay only those charges disclosed in the advertisement plus taxes required by law. Violation also constitutes an unfair trade practice. S.L. 1999-437 takes effect January 1, 2000.

### **Protecting Structured Settlement Transfers**

S.L. 1999-367 (S 746) reflects legislative concerns about businesses that purchase the rights to a structured settlement from the settlement recipients (payee) for a one-time cash payment. It prohibits the transfer of rights to receive structured settlement payments without court approval and requires that a "court of competent jurisdiction" determine that

- transfer of the rights to a structured settlement is in the best interest of the payee;
- the person to whom the structured settlement rights are being transferred has given the payee notice of the financial details of the transfer in compliance with the law;
- the payee has received independent professional advice regarding the legal, tax, and financial implications of the transfer;
- the discount rate used in determining the net amount does not exceed an annual percentage rate of prime plus five percentage points;
- the fees and commissions do not exceed 2 percent of the net amount payable to the payee; and
- the transfer is fair and reasonable.

If the structured settlement was entered into after a civil action was filed in North Carolina, the "court of competent jurisdiction" is the court in which the civil action was filed, and the matter is brought before a judge by a motion in the cause. If the settlement was entered into without the

commencement of litigation or as a result of litigation in another state, the “court of competent jurisdiction” is the superior court, and the matter is brought before the court by filing a special proceeding. However, unlike other special proceedings, the case goes directly to the superior court judge without the clerk ruling first. The provisions of the law may not be waived.

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

### **Civil Matters**

**Interest on Judgments.** In *Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995), the N.C. Supreme Court interpreted G.S. 24-5(b) regarding whether a judgment for money damages in an action not based on contract bears postjudgment interest. Based on the legislative history of the statute and an effective date provision in 1985 N.C. Sess. Laws Ch. 214, the court held that postjudgment interest applies to the entire judgment, not merely the compensatory damages portion of the judgment. S.L. 1999-384 (S 128), recommended by the General Statutes Commission, codifies the decision in *Custom Molders*. The General Assembly also resolves another ambiguity in G.S. 24-5. The language “in an action for breach of contract, except an action on a penal bond, the amount awarded . . . bears interest from the date of breach” raises the issue of whether an action on a penal bond draws postjudgment interest or no interest. An early court decision, *Moseley v. Johnson*, 144 N.C. 257 (1907), took the former position. S.L. 1999-384 provides that the amount of a judgment on a penal bond, except for costs, bears interest at the legal rate from the date of entry until paid.

**Letters of Credit as Security.** Sometimes clerks are asked to accept letters of credit as the security for a required bond in a civil action, special proceeding, or an estate matter. S.L. 1999-73 (S 245) revised Article 5 of the Uniform Commercial Code dealing with letters of credit. The new law makes numerous changes, but one provision is important for clerks in deciding whether to accept a letter of credit in lieu of a surety or cash bond. The new law provides that, if no expiration date is stated, a letter of credit expires one year after the date issued and a letter of credit that states it is perpetual expires five years after it is issued.

**Lis Pendens for Abatement of Public Nuisance.** General Statutes Chapter 19 provides a procedure for abatement of nuisances for buildings used for certain illegal activities. S.L. 1999-371 (S 929) provides that a person filing a civil action to abate a nuisance may file a notice of lis pendens in the county where the property is located.

### **Foreclosures**

Frequently debtors appear at foreclosure hearings not to contest their default but rather to find out the amount owed on their note. They indicate to the clerk that they have been unable to get the precise amount owed from the noteholder. S.L. 1999-137 (H 226) was enacted to cure this problem. It requires the trustee to include, within the notice of a foreclosure hearing, which is the initiating document for the foreclosure, a statement that the noteholder has, within the past thirty days, mailed, by first-class mail, a notice to the debtor indicating the amount of principal and interest the debtor owes as of the date of the statement, a daily interest charge from that date until the note is paid, and the amount of other expenses the holder contends is owed. Any dispute concerning the mailing of the notice or the accuracy of the written statement cannot be considered by the clerk at the foreclosure hearing. S.L. 1999-137 is effective January 1, 2000.

### **Administration of Estates**

**Decedent’s Estates.** S.L. 1999-133 (S 525) amends G.S. 28A-4-2 to remove the automatic disqualification for service as a personal representative for “aliens disqualified by law.” The provision was subject to various interpretations since the statutes never explain what is meant by

“disqualified by law.” Effective for the estates of decedents whose deaths occur on or after January 1, 2000, the clerk may appoint a person who is not a citizen of the United States as a personal representative.

S.L. 1999-166 (S 871) deals with the problem of making the estate liable for the funeral expenses of the decedent when a family member must contract for the expenses before a personal representative is appointed. It amends G.S. 28A-19-8 to provide that a person authorized to dispose of a body may bind the decedent’s estate for funeral expenses. G.S. 130A-420 authorizes the following persons in the order listed to dispose of the body: surviving spouse, majority of the surviving children, surviving parents, majority of the persons in the class of next degree of kinship, and if no surviving kin then the person who took care of decedent. The estate is liable to pay these expenses to the funeral establishment, a third-party creditor that finances the payment of the expenses, or to a person authorized to dispose of the body who has paid for the funeral. The new law makes no change in the amount of funeral expenses that are paid as a first priority.

North Carolina’s lapse statute specifies how to apply a bequest in a will when the person to whom property is left (devisee) predeceases the testator. S.L. 1999-145 (S 329), effective January 1, 2000, rewrites the statute in an attempt to make it easier to apply and to expand persons entitled to take the devisee’s interest. It amends G.S. 31-42 to provide that if the devisee is the testator’s grandparent or a descendant of the testator’s grandparent, then the devisee’s issue (children, grandchildren, great-grandchildren) take in the place of the devisee. For example, a testator dies leaving two children; his will leaves \$10,000 to his favorite nephew and the remainder of the estate to the testator’s two children; the nephew predeceases the testator but left three children. The nephew’s three children divide the \$10,000 bequest to their father.

If the devisee has no issue, or if the devisee does not fall within the required categories of kinship, the property passes to the persons taking under the residuary clause in the testator’s will. If the deceased devisee is one of several residuary devisees, the deceased devisee’s interest augments the share of the other residuary devisees; if the devisee is the sole residuary devisee, the interest passes under the laws of intestate succession. For example, a testator dies leaving two children; his will leaves \$10,000 to his best friend and the remainder of his estate to his two children; the friend predeceased the testator but left three children. The friend does not fit within the category of covered kinship; therefore, the \$10,000 goes to the testator’s two children.

S.L. 1999-296 (S 176) amends G.S. 31A-4 to specify how property is distributed if the decedent is killed by a person who would have inherited the decedent’s property. If the decedent dies intestate and the slayer has living issue who would have been entitled to take if the slayer had predeceased the person killed, the issue take as if the slayer had predeceased the decedent. If there is no such issue, the property passes as if the slayer had predeceased the decedent. If the decedent dies with a will, the property passes as provided by the antilapse statute.

**Gifts by Fiduciaries.** Two statutes modify the law regarding a fiduciary making gifts from the principal’s estate. Under current law a guardian can make a gift from income or principal of the incompetent’s estate for governmental or charitable purposes upon approval by a superior court judge. S.L. 1999-270 (S 1003) imposes a requirement that the judge find that the proposed gift is of a nature that the incompetent person would have approved before being declared incompetent. It also allows the guardian to make gifts, with approval by a resident superior court judge, to certain individuals, including beneficiaries under the incompetent’s will or trust, the incompetent’s parents or spouse, or a descendant of the incompetent or of the incompetent’s grandparent. If the guardian fits within one of these categories of individuals, the gift may be to the guardian. To approve a gift from income, the judge must find that, after making the gifts and paying taxes, the remaining income will be reasonable and adequate to provide for the support and maintenance of the incompetent in the manner to which the incompetent is accustomed. To approve a gift from principal, the judge must find that (1) the remaining principal will be sufficient to provide reasonable and adequate income for the support of the incompetent in the manner to which the incompetent is accustomed, (2) making the gift will not jeopardize any existing creditor of the incompetent, and (3) it is improbable that the incompetent will recover competency.

S.L. 1999-270 also authorizes the guardian of the estate of an incompetent to petition the court for approval to transfer the ward’s assets to a revocable trust executed by the ward before he

or she was declared incompetent if the ward's will provides that the assets are to be paid into the trust at death, if the trust has the same dispositive provisions as the will, or if the trust provides that the assets are to be distributed at the ward's death. The guardian may withdraw assets transferred to the trust upon thirty days notice to the trustee.

Under G.S. 32A-2 a person giving a power of attorney may specifically grant authority within that power of attorney for the attorney-in-fact to make gifts to himself or herself. S.L. 1999-385 (H 604) places a limitation on those gifts by providing that they must be made in accordance with the principal's personal history of making lifetime gifts.

**Trusts.** S.L. 1999-215 (S 178), the North Carolina Uniform Prudent Investor Act, sets out the standard of care for a trustee with regard to investment of funds. It applies to testamentary trusts but does not apply to guardianships or estates managed by personal representatives. S.L. 1999-215 takes effect January 1, 2000.

S.L. 1999-144 (S 1060) gives trustees the authority to sever trusts under certain circumstances. S.L. 1999-266 (S 526), effective January 1, 2000, for all trusts except certain spendthrift trusts created before October 1, 1991, adds a new Article 11A to G.S. Chapter 36A, replacing current Article 11, to provide for modification or termination of express, noncharitable trusts in the following situations:

- by the settlor (person who created the trust) if he or she is the sole beneficiary of the trust,
- by the settlor and all the beneficiaries if all consent,
- by the superior court if all the beneficiaries do not consent and the court finds that the modification or termination would not substantially impair the interest of the beneficiaries who do not consent or who are incompetent or are minors,
- by the superior court if the court determines that the fair market value of the assets is so low that continuance of the trust in relationship to the cost of its administration would defeat the purposes of the trust,
- by the superior court because of changed circumstances or if the purpose of the trust has been fulfilled or become impossible to fulfill.

It also allows the trustee to terminate a trust, without court approval, if the assets of the trust have a fair market value of \$50,000 or less and continuance of the trust in relation to the costs of its administration would defeat the purposes of the trust.

S.L. 1999-118 (H 201) makes technical changes to the statutes governing the appointment of successor trustees.

## Matters of Particular Interest to Magistrates

### Jurisdiction in Small Claims Court

As has been the customary practice since 1966, when small claim courts were created with a jurisdictional amount of \$300, every few years the North Carolina Merchants Association approaches the General Assembly about raising the jurisdictional amount for small claims court. The last time the jurisdictional amount was raised was 1993. S.L. 1999-411 (H 939) increases the small claim jurisdictional amount from \$3,000 to \$4,000.

### Vacation Rental Contracts

S.L. 1999-420 (S 974) adds a new Chapter 42A to the General Statutes setting out special rules for rentals of residential property for vacation purposes because those rentals have unique requirements not found in traditional, long-term leases of primary residences. This act specifies the rights of landlords and tenants in vacation rental leases and enacts an eviction procedure that is even more expeditious than the traditional summary ejection procedure.

**Vacation Rental Agreements.** A *vacation rental* is defined as the rental of residential property for vacation, leisure, or recreation purposes for fewer than ninety days by a person who

has a place of permanent residence to which he or she intends to return. To be covered by the new law, a vacation rental agreement must be in writing and be signed by a landlord or real estate broker. In addition the tenant must either have signed the agreement, paid moneys after receiving the agreement, or taken possession of the property after receipt of the agreement. S.L. 1999-420 regulates the handling of and accounting for advance funds paid for vacation rentals and security deposits and specifies the rights of tenants when the real property is transferred. It also sets out the same respective duties of the landlord and tenant with regard to the property that are found in the law for regular residential rentals and grants the tenant a right to a refund when the tenant is required to leave in order to comply with an evacuation order.

**Expedited Eviction.** The new law creates a special expedited eviction procedure for a vacation rental agreement for thirty days or less if the tenant holds over after the tenancy has expired; commits a material breach of the lease, which according to the lease results in termination; fails to pay rent; or has obtained the property by fraud or misrepresentation. The expedited procedure applies to an action for possession of the premises only; the landlord must bring a separate civil action for any monetary damages. A landlord who wishes to begin the eviction proceeding while the clerk's office is closed may file the complaint that commences the action with a magistrate, and the magistrate is authorized to issue the summons. The landlord must give the tenant at least four hours notice before commencing the action; any law enforcement officer, not just the sheriff, may serve the complaint and summons. The magistrate must hold the trial between twelve and forty-eight hours after service of the summons on the tenant; if the landlord prevails, the magistrate must enter an order specifying when the tenant must vacate the property, which must be no less than two hours nor more than eight hours after the order is served on the tenant; failure to vacate constitutes criminal trespass. A tenant may appeal for a trial *de novo*, but only the district court judge may stay the eviction upon the posting of a bond. S.L. 1999-420 takes effect January 1, 2000.

### **Landlord's Rights with Regard to Tenant's Mobile Home**

In 1995 the legislature created a new landlord's lien in tenant's personal property left on the landlord's premises after eviction. The law was written to make it easier for landlords to dispose of property left by tenants and allows landlords to throw away, dispose of, or sell the property if left on the premises more than ten days after the writ of possession was executed by the sheriff. Legal Services attorneys and other advocates for tenants expressed concern to the General Assembly because the new lien law applied to all personal property left on the premises, which included the tenant's mobile home when the tenant rented a mobile home space. They thought such rapid disposal of the tenant's mobile home was unfair to the tenant and recommended that a different procedure be enacted for the disposal of mobile homes. S.L. 1999-278 (S 654) creates a new landlord's lien for a lessor of a space for a mobile home in G.S. 44A-2(e2). It provides that a landlord has a lien on all furniture, furnishings, and other personal property, including the mobile home titled in the name of the tenant if the mobile home remains on the rented premises twenty-one days after the lessor is placed in lawful possession by a writ of possession and the lessor has a lawful claim for damages against the tenant. The lien must be enforced by a public sale under G.S. 44A-4(e). The landlord may no longer throw away or dispose of the property but must sell it. A controversy arose in the General Assembly about fairly balancing the needs of the tenant with those of the landlord. In particular members of the General Assembly were concerned about requiring the landlord to use the longer and more complicated procedure when the tenant has abandoned a worthless mobile home or one in such poor condition that it could not even be moved without destroying it. They reached a compromise by making this new lien provision apply only if the mobile home has a current value of more than \$500. If the value of the mobile home is \$500 or less, the general landlord's lien under General Statutes Chapter 42 applies. Thus for a mobile home worth more than \$500, the landlord must wait twenty-one days before he or she has a lien in the mobile home and property left in the mobile home, and the landlord must sell the mobile home at a public sale. For mobile homes worth \$500 or less, the landlord may dispose of the mobile

home and its contents after ten days, and disposal includes throwing away the property or otherwise disposing of it as well as selling it.

### **Self-Service Storage Late Fees**

S.L. 1999-416 (H 885) regulates late fees in self-service storage contracts. It requires a self-storage contract to include a conspicuous statement regarding the imposition of late fees and other associated costs for late payment. It limits the maximum late fee that a self-service storage facility may assess to 15 percent of the rental payment and prohibits the late fee from being imposed until the rental payment is five days or more late. A late fee may be imposed only one time for each late rental payment. (In other words, if a person fails to pay in September and fails to pay October's rent, a late fee may be imposed for September's rent and for October's rent, but a second late fee for September's rent may not be imposed when it still is not paid in October). A self-service storage business that violates the late fee provisions may not recover any late fee.

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