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1999 SMALL CLAIMS AND MISCELLANEOUS LEGISLATION AFFECTING MAGISTRATES

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The major change in small claims legislation this year was an increase in the jurisdictional amount for cases that can be heard by a magistrate. The other area with major change is domestic violence. Most of the changes in domestic violence are criminal rather than civil but they will be discussed in this bulletin as well as in the Administration of Justice Bulletin on 1999 Legislation Affecting Criminal Law and Procedure. This bulletin also will discuss other noncriminal legislation affecting magistrates.

Small Claims Jurisdiction

As has been the customary practice since small claims courts were created in 1966, 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 in 1993. S.L. 1999-411 (H 939) amends G.S. 7A-210 to increase the small claim jurisdictional amount from $3,000 to $4,000. The new law takes effect October 1, 1999 and applies to "claims filed for causes of action arising on or after that date," which means the contract was breached or the tort occurred on or after October 1. It will be almost impossible to apply the statutory effective date because in most instances the complaint does not indicate when the cause of action arose. Therefore, it is likely that clerks will assign all complaints for $4,000 or less filed on or after October 1 to magistrates. If that happens a defendant may raise the issue of an improper assignment as a motion to dismiss, and magistrates will have to dismiss the case or return it to the clerk for assignment to district court. However, if no objection is raised and the magistrate issues a judgment,. the chief district judge could cure magistrates' judgments by specifying in his or her general order to the clerk regarding assignment of small claims cases to magistrates that the clerk shall assign to magistrates all cases filed on or after October 1, 1999 in which the amount in controversy is $4,000 or less and that otherwise are assignable. G.S. 7A-212 provides that if the chief district court judge assigns a case to a magistrate, once judgment is entered it may not be set aside for the reason that the action is not one properly assignable to the magistrate.

Summary Ejectment

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

General Landlord's Lien on Property Left By Tenant

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. (For the first ten days after eviction, the tenant has the right to have the property returned.) 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, including the tenant's mobile home when the tenant rented a mobile home space. Advocates argued that 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.

New Landlord's Lien on Mobile Homes and Property Within Mobile Home

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 the mobile home titled in the name of the tenant and all furniture, furnishings, and other personal property left in the mobile home 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 if the lessor has a lawful claim for damages against the tenant. The statute allows the landlord to move the property and store it after the writ of possession is executed rather than leaving it on the premises for the twenty-one days. Whether the property remains on the premises or is stored for the twenty-one day period, upon request the landlord must release it to the tenant during regular business hours or at a time mutually agreed upon. The lien is for rent due at the time the tenant vacated and for the time, up to sixty days, from vacating until to the date of sale.

The lien must be enforced by a public sale under G.S. 44A-4(e). The landlord is no longer allowed to throw away or dispose of the property, but must sell it. Because the mobile home is a motor vehicle under General Statutes Chapter 20, the landlord also must file a notice of intent to sell the mobile home to enforce the landlord's lien with the Division of Motor Vehicles and obtain permission to sell the mobile home from the Division. Although the sale may not begin until twenty-one days after the sheriff has served the writ of possession, the landlord may begin the advertisement under the sale process immediately upon execution of the writ of possession. This lien, like the general landlord's lien, does not take priority over other perfected security interests.

Mobile Homes With Value of $500 or Less

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 G.S. 42-25.9 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 the property left in the mobile home, and the landlord must sell the mobile home and contents 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. The new law does not indicate how the fair market value of the mobile home is determined, leaving it up to the landlord to make the determination. In a close case, the landlord might protect himself or herself from liability by receiving a written estimate of the value of the mobile home and its ability to be moved from a professional mobile home mover or dealer or by selling the mobile home under the provisions of the new law.

S.L. 1999-278 takes effect October 1, 1999.

Vacation Rental Contracts

S.L. 1999-420 (S 974) adds a new Chapter 42A to the General Statutes, effective for rental agreements entered into on or after January 1, 2000, setting out special rules for rentals of residential property for vacation purposes recognizing the unique

characteristics of these short-term agreements. The 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 ejectment procedure.

Vacation Rentals 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. It does not apply to lodging provided by hotels or motels; nor does it apply to rentals for which no more than nominal consideration is given. To be covered by the new law, a vacation rental agreement must be in writing, be signed by a landlord or real estate broker,[1] and the tenant must either have signed the agreement, paid monies after receiving the agreement, or taken possession of the property after receipt of the agreement.

The vacation rental agreement must include a notice that indicates it is a vacation rental agreement with an expedited eviction process and that the tenant's signature, payment of money after receipt of the agreement, or taking possession after receipt of the agreement constitute acceptance of the terms of the agreement. The agreement must describe the following:

- The manner in which funds will be charged, deposited, and disbursed before tenant's occupancy of the premises. (The landlord must deposit payments in a trust account.)
- Any processing fees that will be charged.
- The rights and obligations of the landlord and tenant regarding accounting and reimbursement.
- The applicability of the expedited eviction procedures.
- The rights and obligations of the landlord or real estate broker and the tenant upon transfer of the property (The new law specifies tenant's rights when the property is transferred.)
- The rights and obligations of the landlord and tenant regarding mandatory evacuations. (The new law gives the tenant a right to a refund when required to leave in order to comply with an evacuation order.)
- Any other obligations of the landlord and tenant.

[1] G.S. 93A-2(a) defines a real estate broker as a person or business entity who for compensation lists, sells, buys, auctions or negotiates the purchase or sale of real estate, or who leases or sells leases, or rents real estate for others. A real estate broker must be licensed.

S.L. 1999-420 sets out the same respective duties of the landlord and tenant with regard to the property that are found in General Statutes Chapter 42 for regular residential rentals.

The landlord may charge a security deposit subject to the provisions applicable to residential leases generally with two differences: The landlord may use the deposit for payments of telephone and cable television charges for which the tenant was responsible and the landlord has forty-five days instead of thirty after the conclusion of the tenancy to account to the tenant for the security deposit. Any provision in a vacation rental lease that provides for automatic forfeiture of the security deposit upon breach of the lease is void.

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.

Procedure in Initiating an Expedited Eviction

The landlord must give the tenant at least four hours notice to quit the premises before commencing a summary ejectment action. The notice may be given orally or in writing. If the landlord makes reasonable efforts to personally give oral or written notice, but is unsuccessful, the landlord may post the notice on the front door of the property. The procedure begins like any other eviction—the landlord must file a complaint for summary ejectment and a summons is issued. However, the new law specifically authorizes a landlord who wishes to begin the eviction proceeding while the clerk's office is closed to file the complaint that commences the action with a magistrate; moreover it specifically authorizes the magistrate to issue the summons. Thus, the law anticipates that magistrates normally assigned to hear criminal cases in the evenings and on weekends would essentially act as clerks of court in accepting complaints and in issuing summons. The magistrate must hold the trial between twelve and forty-eight hours after service of the summons on the tenant. In specifying the time for trial on the summons, the magistrate should assume that the summons would be served almost immediately and

schedule the trial no later than about forty-nine hours after issuance of the summons (and no earlier than thirteen hours after issuance of the summons).

Once the complaint is filed and the summons issued, any law enforcement officer, not just the sheriff, may serve the complaint and summons on the defendant. The purpose of the bill was to have more choices of service so that the very quick deadlines could be met, although it is probably going to be difficult to get a police officer to serve the process. The summons and complaint may be served on the tenant personally or posted on the front door of the property, and the officer serving the process must promptly file a return of process. The statute does not provide whether the return of process can be made to the magistrate if the clerk's office is closed, but it would certainly make sense to allow such return under the expedited procedure. In fact if the procedure is begun on a Friday evening, it is possible that the hearing will be held by the magistrate before the clerk's office opens on Monday morning. In counties where small claims court is not held every day, the chief district judge will have to designate all magistrates to take complaints, issue magistrates' summons, and try summary ejectments arising out of vacation rental agreements. In counties where small claims court is held every day, most of the trials can be before small claims magistrates, but even in those counties criminal magistrates will have to be designated to receive complaints, and issue summons during evenings, weekends, and holidays, and criminal magistrates will have to be designated to try cases that are filed when no civil magistrate will be available for forty-eight hours.

Trial of the Case

At the trial, the landlord must prove that

1. the parties entered into a vacation rental agreement for thirty days or less;
2. the vacation rental agreement conforms to the requirements of the law;
3. the landlord or real estate broker gave notice to the tenant to quit the premises at least four hours before filing the complaint;
4. the tenant (a) held over after the tenancy has expired; (b) committed a material breach of the terms of the vacation rental agreement, which the agreement specified results in the termination of the tenancy; (c) failed to pay rent as required by the agreement; or (d) obtained possession of the property by fraud or misrepresentation.

With regard to the first element to be proven, the parties have entered into a vacation rental agreement if the agreement specifies that it is a vacation rental agreement, the landlord or real estate broker has signed the agreement, and if the tenant has either signed the agreement, paid money to the landlord or broker after receiving a copy of the agreement, or taken possession of the premises after receipt of the agreement. Although a valid vacation rental may be for a period of time up to ninety days, if the agreement is for more than thirty days the landlord must use the regular summary ejectment procedure, not the expedited vacation rental law, to evict the tenant.

With regard to the third element, the landlord or broker must prove that he or she personally gave the tenant notice, either orally or in writing, or if that type of notice was unsuccessful, that he or she posted written notice on the front door of the property at least four hours before filing the complaint after making reasonable efforts to personally give oral or written notice.

With regard to the fourth element, only four types of breaches by the tenant may result in use of the expedited eviction process. (1) The tenant held over after the tenancy has expired; for example, the tenant leased the property for two weeks and did not leave at the end of that period. (2) The tenant committed a material breach of the terms of the agreement and the agreement specified that a breach of that condition would result in termination of the lease. A "material" breach is one that is important or essential to the agreement.[2] The agreement itself may declare that a breach of the provision constitutes a material breach, and if it does not specifically state that it is material, the fact that the breach creates a physical hazard, one that could create unsanitary conditions, frozen pipes, risk of fire, or uninsurability would be evidence of a material breach.[3]

Remember that the only issue is whether the landlord is entitled to possession; any request for back rent or monetary damages must be resolved in a separate lawsuit for money owed brought before a magistrate or district or superior court judge, depending on the amount of monetary damages sought. The rules of evidence do not apply to expedited eviction hearings, and the magistrate must allow any reasonably reliable and material statements, documents, or other exhibits to be admitted into evidence. The tenant may file an answer or counterclaim without regard to the amount in controversy, but the counterclaim cannot broaden the

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[2] Webster's New World Dictionary, 2nd College Edition,World Publishing Co., New York 1970.

[3] Long Drive Apts. v. Parker, 107 N.C. App. 724, 421 S.E.2d 631 (1992).

scope of the proceeding to issues other than the right to possession.

If the landlord prevails, the magistrate immediately must enter a written order granting possession to the landlord or the real estate broker and 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. Because the judgment must be entered immediately, the magistrate may not reserve judgment in these cases. The magistrate must serve the judgment by giving a copy to the tenant if the tenant is present at trial. Otherwise, any law enforcement officer may serve the judgment by delivering a copy to the tenant or by posting the order on the front door of the dwelling.

At the trial the magistrate also must determine the amount of appeal bond that the tenant would be required to post should the tenant seek to appeal the judgment. The magistrate must set an amount based on an estimate of the rent that will become due while the tenant is appealing the case and reasonable damages that the landlord might suffer, including damage to property and damages arising from the inability to honor other vacation rental agreements due to the tenant's possession of the property.

> **Example 1:** Tenant enters into a vacation rental agreement to rent a beach cottage for two weeks from June 1 through June 15 for $2,000 ($1,000 per week). He fails to leave on June 15. The real estate broker files a summary ejectment action and the magistrate hears the case on June 17. If the magistrate finds that the broker has proved the case by the greater weight of the evidence, the judgment will be for the tenant to be removed from possession and the landlord to be put in possession and will specify the exact time by which the tenant must be out. The magistrate also needs to determine the amount of the appeal bond. The magistrate believes it will be two months before the district court will hear the appeal. The landlord indicates that he has rented the land to others for $1,000 per week in June and $1,500 per week beginning July 1 because that begins the peak rental time. He also states that the tenant has been having large parties; he inspected the property and found trash and beer can littering the carpet; he will have to have all of the carpets cleaned and repaint one room at an estimated cost of $500. The bond the magistrate would set would be an amount equivalent to eight weeks rent ($1,000 for two weeks in June, and $1,500 for four weeks in July and two weeks in August), for a total of $11,000, plus $500 for physical damage to the property. Additionally, the damages by not being able to fulfill the contract with people renting during that eight-week period would be more than the lost rent because the landlord will be liable to those tenants for any damages they suffer by having to rent another beach cottage. Assume that the landlord tells the magistrate that he found alternative accomodations for the tenants who had contracts for July and August but at a rate of $2,000 per week. In that case the landlord will suffer an additional $500 per week damages for six weeks, for a total of $3,000. In this case the magistrate would set an amount of $14,500 as the bond that would have to be given if the tenant appeals the case.

Appeal

The new law provides that a tenant or landlord may appeal a court order issued by a magistrate to district court for a trial de novo. The statute provides that the tenant may "petition the district court to stay the eviction order and shall post a cash or secured bond with the court" in the amount determined by the magistrate. The language seems to indicate that only a district court judge may stay the order, and that a stay may not be automatic upon the posting of the bond. As mentioned above the amount of the bond is determined by the magistrate at the hearing.

Enforcement of the Order

If the tenant fails to quit the premises when ordered to do so by the magistrate, the landlord may follow the regular enforcement procedure for summary ejectment cases. However, the automatic stay provision of Rule 62 of the Rules of Civil Procedure would prohibit the issuance of the writ of possession for ten days and once the writ was issued the sheriff would have seven days to carry it out; thus, it would take a minimum of seventeen days to remove the tenant. S.L. 1999-420 provides a much quicker way for the landlord to remove the tenant and any guests of the tenant by stating that failure to vacate constitutes criminal trespass. Therefore, if the tenant does not leave when ordered, the landlord may seek the issuance of an arrest warrant for criminal trespass against the tenant and any other person who is on the premises with the consent of the tenant, and those persons will be physically removed when arrested by a law enforcement officer. With regard to the tenant's personal property, the landlord or real estate broker has the same rights as provided in G.S. 42-36.2(b) as if the sheriff had not removed the tenant's property, which

means that after the time set for the tenant to vacate the premises, the landlord may remove and store the property or may leave it on the premises, and after ten days may throw it away, dispose of it, or sell the property. During the ten-day period the tenant has a right to recover the personal property left on the premises.

Tenant's Remedies

The statute provides several remedies for the tenant if the landlord or real estate broker violate provisions of the statute. It is both an unfair trade practice and a Class 1 misdemeanor for a landlord or real estate broker to try to evict a tenant under the expedited eviction procedure without a good faith belief that grounds for eviction exist. A landlord who fails to comply with the statutory provisions regarding transfer of property subject to a vacation rental agreement commits an unfair trade practice. Any real estate broker (but not landlord) who executes a vacation rental agreement that does not conform to the provisions of the new law or who fails to execute a vacation rental agreement is guilty of an unfair trade practice and is prohibited from using the expedited eviction process.

Heat in Residential Rental Units

S.L. 1999-14 (S 41) adds a new G.S. 160A-443A allowing cities with a population of at least 200,000 to require leased dwellings to have a central or electric heating system or sufficient chimneys, flues, or gas vents with heating appliances connected to heat at least one habitable room, excluding the kitchen, to a minimum temperature of 68 degrees Fahrenheit. Portable kerosene heaters do not meet the requirement. Some cities already have more stringent heating requirements and this new law does not override those requirements. If a city with a population of more than 200,000 adopts an ordinance under this statute, the landlord will be required under G.S. 42-42 to maintain the heating system in good and safe working order. Failure to do so will constitute a violation of the landlord's duties under the Residential Rental Agreements Act. Although the new law took effect April 1, 1999, it specifies that an ordinance adopted under it may require landlords to comply by January 1, 2000.

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% 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 September's rent and then 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 is not paid in October). A self-service storage business that violates the late fee provisions may not recover any late fee. S.L. 1999-416 applies to rental contracts for self-storage facilities entered into on or after October 1, 1999.

Interest on Judgments

In *Custom Molders, Inc. v. American Yard Products, Inc.*[4] the 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 S.L. 1985, 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*,[5] 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.

The amendment regarding interest in tort cases applies to actions filed on or after October 1, 1999, while the penal bond provision applies to bonds filed or posted on or after that date.

[4] 342 N.C. 133, 463 S.E.2d 199 (1995).
[5] 144 N.C. 257, 56 S.E. 922 (1907).

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. Sometimes attorneys for defendants in small claims cases ask the clerk to make the plaintiff post the prosecution bond. 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. It applies to causes of action commenced on or after October 1, 1999.

New Causes of Action

Parental Liability for Child's Acts

This session of the General Assembly created several new causes of action to deal with current national issues. In the aftermath of Columbine High School (in Littleton, Colorado) and other 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.

Y2K Litigation

S.L. 1999-295 (S 1005) is one of two bills anticipating lawsuits arising out of Y2K problems. It provides that a defendant who has acted with due diligence 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. The defendant is liable to a person when the defendant is under a contractual obligation to the person if the Y2K problem is caused by the defendant, but only actual damages that are the direct result of the Y2K problem may be awarded and no punitive or consequential damages are allowed. The new law 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 the defendant's default, failure to pay, breach or other violation is caused by a Y2K problem on computing equipment not owned or controlled by the defendant and were it not for the Y2K problem the defendant would have been able to satisfy the obligation that is the basis of the claim. The granting of the affirmative defense does not discharge 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 during that period, the lawsuit may be refiled after sixty days to recover based on the underlying obligation, not on the delay caused by the Y2K problem.

Motor Vehicle Repair Shop Practices

S.L. 1999-437 (S 830) requires automobile repair shops to provide written estimates of repairs over $350 and prohibits the following practices:

- Charging more than 10% over the estimate without the consent of the customer.
- Failure to return the vehicle because owner refuses to pay charges that were 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.

It provides a civil cause of action for violation and allows the court to award damages, attorney fees, and injunctive relief. (A magistrate culd not award injunctive relief.)

The General Assembly also wanted to curb the practice of advertising a price for vehicle service that was different from the price actually charged, i.e., that $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 and provides that 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.

Domestic Violence

In October 1998 Governor Hunt convened a task force to study North Carolina's response to domestic violence. That Task Force made forty-four recommendations, most dealing with changes that do not require legislative action, such as collection of domestic violence statistics, training of governmental officials who deal with domestic violence, and increasing public awareness. Of the eleven Task Force recommendations that required legislative action, eight were enacted.

Domestic Violence Commission

Sec. 24.2 of S.L. 1999-237 (H 168) establishes a permanent Domestic Violence Commission of thirty-nine members to assess statewide needs related to domestic violence; to assure that necessary services, policies, and programs are provided; and to coordinate and collaborate with the North Carolina Council for Women in strengthening domestic violence programs. The membership includes the heads of various state departments that have some connection to domestic violence issues, court officials who handle domestic violence cases, law enforcement officers, representatives from victims' assistance programs, representatives from offender treatment programs, a member of the medical community, attorneys representing the private bar and legal services, a member of NC Coalition Against Domestic Violence, a former victim of domestic violence, and members of the General Assembly. Government-sponsored commissions exist in twenty-nine states and the Governor's Domestic Violence Task Force recommended creating a commission in this state to serve as the over-arching agency in developing a statewide approach to domestic violence issues.

> Currently in North Carolina many different state agencies have responsibility for disbursing federal domestic violence funds and additional agencies incorporate domestic violence policy and programmatic initiatives into their work. … In addition, our state has a history of local control over how each county responds to domestic violence. Although this diversity at both the state and local levels is a strength of our state's response, it has the potential to lead to gaps in services, duplication of services, and unmet needs. The existence of a statewide commission as proposed here, that includes representation from the diverse individuals, agencies and communities involved in this work, would build on this existing statewide capacity and add to our state's ability to respond by providing a needed forum for the exchange of knowledge and information that can minimize gaps, duplications and maximize a consistent and effective statewide approach. [6]

The Commission is charged with specific responsibilities including encouraging adequate funding to promote victim safety and accountability of perpetrators; developing and recommending training initiatives for law enforcement, judicial officials, and persons who provide treatment and services to domestic violence victims; designing a statewide public awareness program; and designing and coordinating improved data collection efforts for criminal domestic violence charges.

Enforcement of Protective Orders

S.L. 1999-23 (S 197) includes seven substantive law changes recommended by the Task Force. The Task Force concluded that no changes needed to be made regarding persons eligible for domestic violence protective orders or the procedure for getting an order. What was needed was clarification of the manner in which North Carolina would treat protective orders issued by other states and strengthening of the enforcement of protective orders.

Old Law

S.L. 1999-23 makes several changes intended to simplify and strenthen enforcement of protective orders. A history of the law is instructive to understand the new law. G.S. 50B-4 provided that a civil protective order may be enforced in two ways: First, the plaintiff in the case may file a motion with the clerk of superior court for the defendant to be held in contempt for a violation of the order. If the clerk finds

[6] *Governor's Task Force on Domestic Violence: Final Report*, January 1999, p. 26.

probable cause from the motion that a violation occurred, the clerk sets the date for a contempt hearing before a district court judge and issues to the defendant an order to appear at the hearing and show cause why he or she should not be held in contempt. This procedure is the normal procedure for holding a defendant in contempt for violation of a civil order. Because of the concern about certain potentially violent acts, the original domestic violence law provided a second, unique method of enforcement for contempt. It required a law enforcement officer to arrest a defendant without a warrant and to take the defendant into custody if the officer had probable cause to believe the defendant violated a protective order excluding the defendant from the residence occupied by the victim or directing the defendant to refrain from threatening, abusing, following, harassing, or otherwise interfering with the other party. The officer was required to take the person arrested before a magistrate who would set a hearing date for a contempt hearing before the district court judge and issue a show cause order to the defendant to appear at that contempt hearing. The magistrate issued the form entitled "Domestic Violence Order to Appear and Show Cause for Violation of Court Order After Arrest By Officer" AOC-CV-310. Conditions of pretrial release must be set for the defendant, but only a judge may set those conditions for the first forty-eight hours after arrest. In 1997 the General Assembly added G.S. 50B-4.1 making it a crime to violate a protective order entered by a North Carolina court. Thus, a third mechanism for enforcing the order was created—charging the defendant with the crime of violating a protective order. Many law enforcement officers were uncomfortable with the requirement for mandatory arrest for contempt rather than charging a crime and were not sure of the procedure to follow. With the enactment of the crime of violating the protective order, the unique provision of arrest for contempt hearing was no longer necessary to take the defendant into custody, and, in practice, most officers began charging the crime.

New Law

S.L. 1999-23, effective February 1, 2000 repeals the provision in G.S. 50B-4(b) requiring officers to arrest for the purpose of setting up a contempt hearing and leaves two methods of enforcement of protective orders. No longer will an officer be required to make a mandatory arrest to bring the defendant before a magistrate for a show cause order for contempt. (In other words, AOC-CV-310 will be obsolete after February 1.) The two methods of enforcement will be: (1) If the person protected by the order wishes to have the defendant held in contempt for violating the order, that person must file a motion with the clerk of superior court who will then send a notice to the defendant to appear at a contempt hearing. No pre-hearing arrest will be made, nor conditions of pretrial release set. (2) The second method of enforcement for a violation will be to charge the defendant with the crime of violating the protective order. G.S. 50B-4.1 makes it a Class A1 misdemeanor for a person to knowingly violate any provision of a valid protective order.

The new law strengthens a law enforcement officer's responsibilities with regard to enforcing the crime of violating the protective order. It *requires* an officer to arrest the defendant without a warrant if the officer has probable cause to believe the defendant has knowingly violated a valid protective order by returning to the victim's residence or by threatening, abusing, following, harassing, or otherwise interfering with the other party. In effect the new law transfers the mandatory arrest provisions that previously applied to the arrest for contempt to the crime of violating the order. If the violation is not one that mandates arrest, the new law *allows* an officer to make an arrest without a warrant if the officer has probable cause to believe the defendant has violated any provision of the order. When authorized but not required to make an arrest without a warrant, the officer can seek criminal process before making an arrest or leave it up the victim or someone else to seek criminal process for the violation.

The bill also eliminates the provision in G.S. 50B-5 that permits a law enforcement agency not to respond to a domestic violence call if the agency has already responded multiple times in the previous forty-eight-hour period. Law enforcement officers must respond to any request for assistance from a domestic violence victim as soon as practicable.

Full Faith and Credit for Out-of-State Orders

In accordance with the federal requirements that North Carolina give full faith and credit to out-of-state protective orders (Violence Against Women Act, 18 U.S.C. § 2265), G.S. 50B-4(d) has provided that "protective orders entered by the courts of another state or an Indian tribe shall be accorded full faith and credit by the courts of North Carolina and shall be enforced by the law-enforcement agencies of North Carolina." States are permitted to determine the procedure they will apply to give out-of-state

judgments full faith and credit. The problem in North Carolina has been that the domestic violence law itself set no specific procedure for granting full faith and credit and the general law for granting full faith and credit to out-of-state judgments, G.S. 1C-1701 et. seq., requires judgments to be registered with the clerk of superior court, notice to be given to the defendant, and prohibits enforcement until thirty days after notice is given. Thus, there was considerable confusion in North Carolina about whether an out-of-state domestic violence protective order could be enforced in North Carolina without compliance with the registration provisions of G.S. Chapter 1C. As a policy matter, many domestic violence advocates were concerned about victims of domestic violence having to comply with the registration requirements. The major concerns were that a victim who frequently would have fled to North Carolina to avoid being found would have to notify the defendant of her whereabouts in order to register the order in North Carolina and that a victim (who had given the defendant due process notice and an opportunity to be heard in the state where the protective order was issued) would not be protected in North Carolina from a defendant who violates the order until thirty days after the order was registered in this state. Also the intention of the Violence Against Women Act was to make it easy to enforce protective orders anywhere in the United States. S.L. 1999-23 provides that, effective December 1, 1999, the Foreign Judgment Enforcement Act of Chapter 1C does not apply to domestic violence protective orders. Effective February 1, 2000, it provides that out-of-state protective orders must be accorded "full faith and credit by the courts of North Carolina whether or not the order has been registered and … enforced by the law enforcement agencies of North Carolina as if it were an order issued by a North Carolina court."

Even though registration is not required, S.L. 1999-23 allows a protective order to be registered in North Carolina if the person protected by the order wishes to register it. The order is registered by filing with the clerk of superior court a copy of the protective order and an affidavit by a person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Notice of registration is not given to the defendant. The clerk will set up a district court case file and will charge the person who wishes to register the judgment the district court costs, except if the person filing alleges in an affidavit that he or she is unable to advance the required court costs, the person must be allowed to register the order as an indigent.[7] Upon registration the clerk must forward a copy of the order to the sheriff for entry into the domestic violence registry.

Whether an out-of-state order is registered in North Carolina or not, effective February 1, 2000, it must be enforced in this state. And enforcement of the out-of-state order is identical to enforcement of an order issued by a North Carolina judge or magistrate. (1) The person protected under the order may file a motion with a clerk of superior court in North Carolina for a show cause order for contempt if the defendant has violated the order in North Carolina. (2) Criminal process may be issued against the defendant for the crime of violating the protective order. S.L. 1999-23 amends G.S. 50B-4.1, effective December 1, 1999, to extend the crime of violating a protective order to violations of protective orders entered by the courts of another state or of an Indian tribe as well as to orders entered by North Carolina courts.[8] The mandatory arrest without a warrant provisions apply to out-of-state orders when a law enforcement officer has probable cause to believe that the defendant has violated the protective order excluding the defendant from the plaintiff's residence or directing the defendant to refrain from threatening, abusing, following, harassing or otherwise interfering with the plaintiff. The law specifies that a law enforcement officer, in determining whether an outstanding protective order is valid, may rely on a copy of the protective order that is provided to the officer and a statement of the person protected that the order remains in effect. Thus, under the new law a defendant who, in North Carolina, violates a protective order entered in another state commits a crime in North Carolina.

Conflicting Effective Dates

One of the confusing parts of S.L. 1999-23 is the different effective dates for various portions of the bill. The provisions repealing G.S. 50B-4(b), regarding mandatory arrest for contempt, and the provisions regarding registration of out-of-state orders take effect February 1, 2000, while the provisions exempting

[7] G.S. 1-110. Although the statute applies to filing a complaint for a domestic violence protective order under G.S. 50B-2, it should apply to the equivalent act of registering an out-of-state order.

[8] Effective December 1, 1999, G.S. 50B-4.1 will provide: "A person who knowingly violates a valid protective order entered pursuant to this Chapter or by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor."

domestic violence orders from the registration provisions of G.S. Chapter 1C, making the crime of violating a protective order apply to out-of-state orders, and the provisions regarding mandatory warrantless arrests and discretionary warrantless arrests for the crime of violating a protective order take effect December 1, 1999.

What does that mean for law enforcement officers and courts regarding the enforcement of in-state and out-of-state protective orders from December 1 until February 1? For in-state protective orders, law enforcement officers will continue to use the criminal violation set out in G.S. 50B-4.1. The only change is that the officer has a mandatory duty to arrest without a warrant if the officer has probable cause to believe the defendant violated the provision excluding him or her from the plaintiff's residence or ordering him or her to refrain from threatening, abusing, following, harassing, or otherwise interfering with the plaintiff. Although the officer could also make a warrantless arrest for the defendant to be given a hearing for contempt of the order, most officers will use only the criminal charge and not contempt.

The major change is in the enforcement of out-of-state protective orders. Because, effective December 1, domestic violence orders will not be covered by the registration provisions of G.S. Chapter 1C, there will be no statutory procedure for registering out-of-state protective orders between December 1 and February 1. However, during that period G.S. 50B-4(d) will provide "valid protective orders entered by the courts of another state or Indian tribe shall be accorded full faith and credit by the courts of North Carolina and shall be enforced by the law enforcement agencies of North Carolina." Therefore, officers who are not now enforcing out-of-state protective orders should begin to enforce them on December 1. Officers will enforce them in exactly the same way they enforce in-state protective orders, by arresting the defendant for the crime of violating the protective order (G.S. 50B-4.1).

Judicial Council

In 1996, the Futures Commission made numerous recommendations to the General Assembly for changes to the court system to enable it to be an efficient and fair system into the 21st century. Many of the Commission's recommendations were intended to allow the judicial branch of government a more direct role in its governance, and among the suggestions in that area was the creation of a judicial council. The Commission's recommendations have not been enacted as an entire package, but they have formed the basis of several changes in the structure of the courts that have been adopted. Among them this year is S.L. 1999-390 (H 1222), which establishes a 17-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 they serve as a representative of their peer group, may serve on the council. Terms are for four years, although initial terms of several members are shorter to insure that future terms will be staggered. The appointing authorities must confer with each other before making appointments to maximize the extent to which appointments will fairly represent 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 most discussion and concern among court officials is the duty to recommend performance standards for all courts and judicial officials and 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 is not a 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.
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> …
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> 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.[9]

Budget

The budget (S.L. 1999-237, H 168) allocated to the court system for the 1999-2001 biennium 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 fund the pay raise for all court officials and employees. The funds for new activities were substantially greater than that figure, but there were corresponding cuts in items like salary reserve funds, equipment and operating reserves, software maintenance agreements, out-of-state travel and a reduction in the amount of increase suggested by the Governor to provide indigent defense. The indigent defense cuts did 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 judges. The budget adds four special superior court judges, one new resident judge in district 22, and nine new district court judges. They are added in districts 2, 5, 13, 15A, 18, 19A, 26, 27A and 30. In addition, the budget includes eight new court reporter positions and seven new judges' support positions. The budget adds three magistrates' positions, one each in Camden, Cumberland, and Union counties. 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. An additional twenty-five victim witness/legal assistant positions were also added in district attorneys 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 are also 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. (Family courts are currently operating in Districts 14, 20, and 26.)

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

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 for the public to court records. The Administrative Office of the Courts have entered into contracts with two private agencies to give the agencies computerized access to court records and those agencies then will provide statewide record searches to the public for a fee.

In two superior court 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 the use of more resources. This 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

[9] "*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.

reform of the 1960's that the legislature has explicitly authorized local governments to use local tax revenues to fund the operation of state court system.

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