
ADVANCED SMALL CLAIMS TRAINING FOR MAGISTRATES

June 4-6, 2012

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UNC SCHOOL OF GOVERNMENT

It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect....If we are able to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE.

--Judge Learned Hand

In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.

~Albert Einstein

Course Objectives

1. To provide magistrates experienced in conducting small claims court with an opportunity to talk with other similarly experienced magistrates in order to share ideas and information about holding small claims court.
2. To give students ample opportunity to find answers to questions about small claims law, whether simple or complex.
3. To facilitate students' exploration of ways to improve performance in a respectful positive atmosphere.
4. To provide specific instruction and resources about legal issues identified by the students as difficult or in need of clarification or review.
5. To offer an opportunity to students to step back from day-to-day concerns and become participants in "the great conversation" about the function and purpose of small claims court in our State and to identify best practices consistent with those aspirations.
6. To offer magistrates a chance to observe in a thoughtful, analytical way both other magistrates and themselves in the role of a small claims judge conducting court, and to give and receive constructive feedback on their performance.
7. To invite these public servants, who spend their professional lives in highly stressful demanding circumstances, often with little recognition or reward, to make use of their time in Chapel Hill to rest and replenish themselves, and to acknowledge and celebrate with each other the importance of their contributions and the significance of their achievements in performing the duties of the Office of Magistrate.

Course Schedule

Monday, June 4, 2012

9:00	Welcome & Introductions
9:30	Do You Look at the Pictures? The Rules of Evidence in Small Claims Court
10:30	Break
10:50	Evidence, Burden of Proof, and the Legal Process
12:15	Lunch at the SOG
1:00	What in the World is an LLC? What You Need to Know About Business Law
2:15	Break
2:30	Procedural Issues Related to Businesses
3:20	Stump the Teacher & Trial of the Day
4:15	Recess

Tuesday, June 5, 2012

9:00	Check-In
9:15	AM Trial
9:45	"I Stopped Paying Rent Because the Toilet Won't Flush"---The RRAA
10:45	Break
11:00	Other Defenses in Summary-Ejectment Actions
12:00	Lunch at the SOG
12:50	Landlord-Tenant Leftovers
1:45	Break
2:00	Small Group Discussion: Small Claims Practically Speaking
2:50	Stump the Teacher & PM Trial
4:00	Recess

Wednesday, June 6, 2012

9:00	Check-In
9:15	<i>Ubi Jus Ibi Remedium</i> ["There is no Right Without a Remedy" - - But What Should The Remedy Be?]
10:30	Break
10:45	AM Trial
11:15	Open Forum: What's Left to Talk About?
11:45	Evaluations & Presentation of Certificates
12:00	Adjourn

DAY 1

Schedule for Today

- 9:00 Welcome & Introductions
- 9:30 Do You Look at the Pictures? The Rules of Evidence in Small Claims Court
- 10:30 Break
- 10:50 Evidence, Burden of Proof, and the Legal Process
- 12:15 Lunch at the SOG
- 1:00 What in the World is an LLC? What You Need to Know About Business Law
- 2:15 Break
- 2:30 Procedural Issues Related to Businesses
- 3:20 Stump the Teacher & Trial of the Day
- 4:15 Recess

Objectives for Today

By the end of our time together today, you will

1. Have met and had an opportunity to discuss small claims issues with other small claims judges;
2. Have developed a draft written policy for handling evidence in your court based on the underlying goals and purposes of the law of evidence;
3. Be aware of the law pertaining to the Rules of Civil Procedure in small claims court;
4. Be acquainted with current law regarding errors in naming parties, and in the choice of parties themselves;
5. Become familiar with basic principles and vocabulary related to participation by business entities in small claims court;
6. Have observed another magistrate hear a mock small claims case and participated in an analysis of both the case and issues connected to the manner in which it was heard;
7. Leave class early enough to have time to rest, play, and read Small Claims Law.

♪ ♪ "Getting to Know You . . . Getting to Know All About You" ♪ ♪

Introduce yourself to the other magistrates sitting at your table, and write their names down below:

_____	_____
_____	_____
_____	_____

Think back to the first time you held small claims court. What was it like? How did you feel? Spend three minutes sharing something of that experience with your tablemates. Before you begin, select one person to make a brief report to the class as a whole.

Notes:

Pre-Test:

T F

1. In an action for money owed, the defendant claims to have paid the plaintiff, but is unable to produce a receipt. The magistrate must find for the plaintiff:

T F

2. In an action for money owed, the parties agree that defendant paid some portion of the debt, but they disagree about the amount of payment. Defendant is unable to produce a receipt, saying that he probably has it at home somewhere. The magistrate must find for the plaintiff:

T F

3. In an action for money owed, the defendant is not present. The plaintiff is present and testifies that he lent the defendant \$500 and has not been paid back. That is all of the evidence produced by the plaintiff. The magistrate must find for the plaintiff:

T F

4. In an action for conversion, the plaintiff testifies that he did not give defendant permission to take his car, and defendant testifies that plaintiff did give permission. There is no other evidence. The magistrate must find for defendant.

T F

5. When an attorney objects to evidence being introduced, the magistrate is not required to rule either way on the objection.

T F

6. If a plaintiff is able to establish a prima facie case on each essential element of a claim, the plaintiff is entitled to a judgment (unless a defense changes the picture).

T F

7. The belief that deception can be reliably detected by observing the direction of eye movement is a myth.

Rules of Evidence in Small Claims Court

"The rules of evidence applicable in the trial of civil actions generally are observed."

NCGS 7A-222

"In a trial before the judge, sitting without a jury, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent and consider that only which tends properly to prove the facts to be found."

Muirhead Const. Co. v. Housing Authority of Durham, 1 N.C.App. 181, 60 S.E.2d 542 (1968)

General Principles

Evidence may be admissible or inadmissible. Generally, evidence is admitted unless objected to by a party. Evidence deemed inadmissible must be ignored by the judge, and a party lacking any other proof of an essential element of the case will lose.

The general rule is that evidence is admissible if it is relevant, unless that evidence is excluded from consideration by a specific rule.

When a rule of evidence provides that evidence of a certain type is not admissible, the reason is usually that surrounding circumstances render the reliability of the evidence questionable.

A magistrate must consider the reliability of all evidence presented in a case. Thus even in a case in which evidence is admitted which might have been excluded had an objection been raised, a magistrate may deem that evidence unreliable and refuse to consider it.

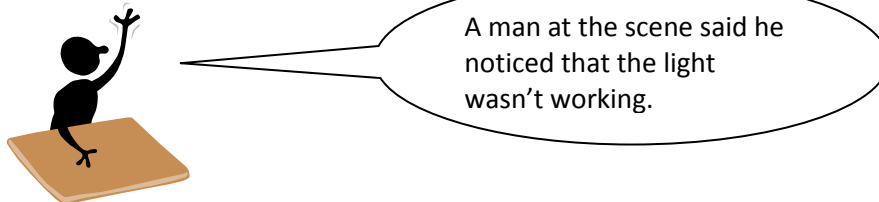
Evidence is relevant if it tends to prove that an important fact in a case is more or less likely. Small claims cases typically involve significant amounts of irrelevant evidence due to the parties' unfamiliarity with the law. For the purpose of making a decision, a magistrate merely ignores the surplus information provided by the parties. Frequent attempts to confine the testimony of a witness to material which is relevant often causes witnesses to feel intimidated and frustrated. It is generally more efficient to allow a

witness to present all the information s/he has to offer, and then for the magistrate to separate out the wheat from the chaff.

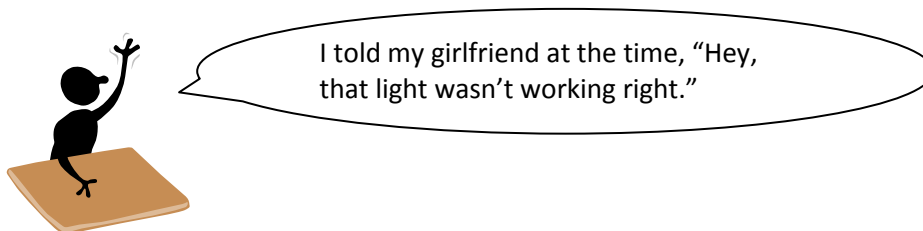
The following sorts of information may be of doubtful reliability. If a party objects to the admission of such evidence, a magistrate may choose to refuse to admit the evidence, or may instead assure the objecting party that the magistrate will accord unreliable evidence appropriate weight.

Hearsay Evidence

Hearsay is defined as a statement made outside of court which is offered to prove that the content of the statement is accurate.

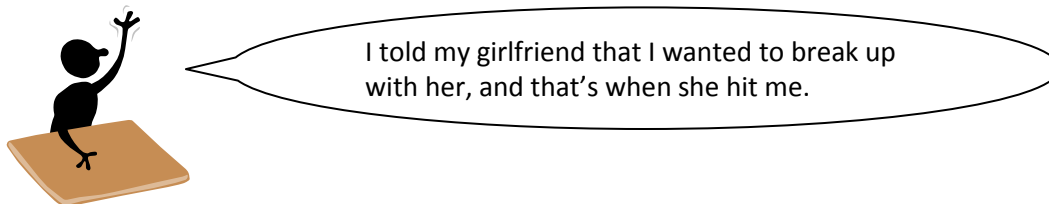


A statement doesn't have to be made by someone other than the witness to be hearsay.

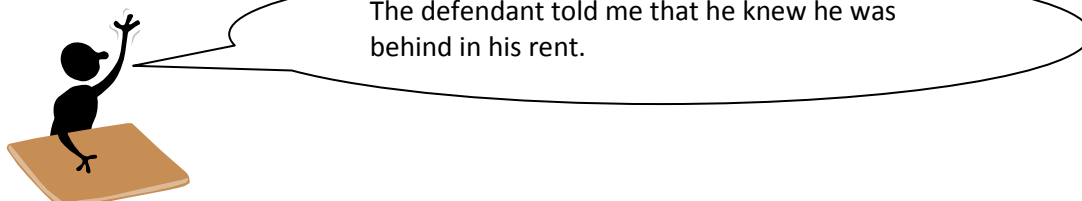


Exceptions to the hearsay rule:

1. A statement offered to prove something other than the truth of the statement itself is not hearsay.



2. Admissions



3. Excited utterances



Right after the accident, my girlfriend said, "My god, how fast was that guy going?"

4. Business records rule



I'd like to offer into evidence a copy of the police report, in which the officer states that the defendant was at fault.

Writings or records of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge are admissible if kept in the regular course of business and if it was the regular course of business to make that record, unless the source of information or circumstances of preparation indicate a lack of trustworthiness.

Best Evidence Rule

“To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided in these rules or by statute.” The Best Evidence Rule merely requires the exclusion of secondary evidence offered to prove the contents of a document whenever the original document itself is available. *See generally* N.C.Gen.Stat. § 8C-1, Rules 1002-1004 (1988).” *Investors Title Ins. Co. v. Herzig*, 413 S.E.2d 268, 275, 330 N.C. 681, 693 (N.C. Jan 27, 1992).

When the content of a writing is evidence of an essential element of plaintiff’s case or defendant’s defense, that writing is the best evidence of the content and must be produced or its absence adequately explained. Contrast the situation in which the writing itself is evidence of an act by one of the parties; in that case, the writing stands on the same footing as other evidence of the act, and the requirement does not apply.

Example: Plaintiff-landlord seeks summary ejectment based on breach of a condition of a lease for which forfeiture is specified. In this case, we are concerned with *what the lease says—its content*—and the lease is the best evidence of that.

On the other hand, if summary ejectment is based on failure to pay rent, the existence of a written lease is evidence of a landlord-tenant relationship between the parties, but no better evidence than testimony to that effect. For the same reason, a number of cases hold that a receipt is not required to prove payment by a party. If the fact of payment is undisputed, but the amount of payment IS disputed, then once again we are interested in the content of the writing, and it must be produced.

Question: What implications does the Best Evidence Rule have for your decisions in summary ejectment actions in which a written lease exists but is not offered into evidence by the landlord?

G.S. 8-45: Verified statement of account

In an action on an account for goods sold, rents, services rendered, or labor performed, or any oral contract for money loaned, a verified itemized statement of the account is admissible into evidence and is deemed correct unless disputed by the defendant.

“Itemized”: describes each item with price and item number, if there is one.

“Verified”: Accompanied by an affidavit from a person who (1) would be competent to testify at trial; (2) has personal knowledge of the particular account, or of the books and records of the business in general; and (3) swears that the account is correct and presently is owed by defendant to plaintiff.

Suggested Best Practices in Ruling on Evidentiary Issues in Small Claims Court

1. Unless evidence is objected to, admit all offered evidence, giving it appropriate weight in your decision based on its reliability.
2. If an objection is made to the admission of evidence, one of two responses is appropriate, depending on the circumstances:
 - If an attorney makes an evidentiary objection, and it seems likely that more will follow, consider instructing the attorney to hold all objections until the end of the evidentiary phase, indicating that you will hear and consider his or her arguments at that time.

Sample statement: As you know, we are about to conduct a trial before the judge without a jury, and one of the parties is not represented, which is frequently true in this court. My policy in such situations is to be lenient in allowing evidence to be offered, so that parties may testify without interruption. At the close of the evidence, I will hear any argument the parties would like to offer concerning evidence that you believe I should not consider. After hearing your argument, I will carefully consider all of the relevant admissible evidence and determine what weight I believe it deserves before arriving at my decision.

- When an objection to the admission of evidence is vigorous and appears to relate to an important or decisive issue in the case, you might choose to rule on the objection immediately.
3. It is always appropriate, if desired, to request a copy of the rule of evidence forming the basis of the objection, and to insist that the objecting party in the argument for exclusion address specifically the way in which THIS RULE applies to THIS EVIDENCE.
 4. The Rules of Evidence are technical and complex, and few attorneys are thoroughly conversant with this area of the law. If you believe that evidence is relevant to the issues before you and you are satisfied with your grasp of its reliability, be extremely reluctant to exclude it for technical reasons.

"I object, Your Honor. This trial is a travesty of a mockery of a sham of a travesty of two mockeries of a sham! "

Woody Allen as
Fielding Mellish
Bananas (1971)

5. Do not hesitate to take the position that the standard for admission of evidence is relaxed in small claims court, and that as the judge, you are capable of properly evaluating the reliability of evidence and the weight it should be given, in light of all circumstances, including factors argued by the attorney(s). This position is well supported by North Carolina law.

Evidence and the Burden of Proof

In order to be successful in a civil action, a plaintiff must meet two standards of proof.

First: the plaintiff must meet the *burden of production*: s/he must introduce sufficient evidence on each element of the claim *to permit but not require* a judgment in favor of the plaintiff. This is sometimes called a *prima facie* case.

In the space below, write an example of a fact situation in which plaintiff has failed to meet the burden of production:

GS 7A-222 provides “At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a *prima facie* case.” This rule means that defendant is not required to put on any evidence until plaintiff has introduced some evidence on every essential element of his claim.

Second: the plaintiff must meet *the burden of persuasion*: s/he must introduce sufficient evidence to persuade the magistrate that *each element of plaintiff's claim is probably true*.

In an action for conversion, the plaintiff must introduce evidence 1) that s/he is the owner or legal possessor of the property; 2) that the defendant either wrongfully took or wrongfully retained the property; and 3) of the fair market value of the property at the time and place of conversion. In the space below, briefly describe a “close-but-no-cigar” situation:

The Legal Process

Small claims judgments are typically recorded on AOC forms, and those forms don't spell out the court's findings and conclusions because appeal is *de novo* (and thus no reviewing court will examine them). The PROCESS of deciding a civil case, however, is exactly the same in same claims court:

First, the court determines the facts (called *findings of fact*).

Next, the court applies the relevant legal principles to the facts as determined by the court (called *conclusions of law*).

Finally, the court awards a remedy based on the findings and conclusions ("*the court hereby orders, adjudges, and decrees . . .*").

Assessing Credibility

It's easy to see that when the evidence in a case consists solely of the contradictory testimony of the plaintiff and defendant, the magistrate's findings of fact will depend on which party s/he finds to be credible. Contrary to what some magistrates think, a judgment for plaintiff is permissible—but not mandatory—even in a "he-said/she-said" if the magistrate determines the plaintiff to be a credible witness. Probably even less well-understood is the fact that a judgment for plaintiff is not required even when the evidence is uncontradicted and establishes a *prima facie* case. If the magistrate finds the plaintiff's credibility to be weak and simply is not persuaded that the facts are PROBABLY as plaintiff says, a judgment for the plaintiff is not appropriate.

Assessing Credibility:

Consider

Motive to lie
Opportunity to observe
Ability to provide details
Demeanor (careful here!)
Which version seems more believable?

Putting it All Together

Evidence: Polly has brought this action to recover personal property against Larry. She testifies that she and Larry lived together for almost a year, but decided to split up. When Larry left, he took Abe-the-Dog with him. Polly says that Larry gave her Abe for their 6-month anniversary, and that he has refused to return the dog despite her many requests that he do so.

Larry testifies that he never intended to make a gift of Abe-the-Dog to Polly. Because they were living together in the belief that they would stay together, it didn't occur to him to make a point of emphasizing that Abe was his dog. It's true that Abe was acquired on their anniversary, but he never told Polly Abe was a gift from him to her—in fact, to the extent Abe was a gift at all, the dog was a gift to himself! Larry wants to show you the bill of sale, showing that he paid \$650 for Abe, as well as his scrapbook with Abe's name engraved on it. Larry also offers into evidence his four other scrapbooks, each engraved with one of his pugs' names on them.

The Law: The essential elements of Polly's action to recover personal property are 1) that she is the lawful owner of the property; 2) that the property was wrongfully taken or wrongfully detained; and 3) that defendant is in possession of the property.

Your Rulings: Assume that Polly objects to the bill of sale, Abe's scrapbook, and the scrapbooks of the other dogs being admitted into evidence. She doesn't know what rule to cite, but essentially makes relevance argument: "That stuff doesn't have anything to do with him giving me Abe for our anniversary!" What do you do or say about her objections to each item?

Bill of sale?

Abe's Scrapbook?

Friends' Scrapbook?



Abe-the-Dog & Friends

The Nightmare: Imagine you woke up and found yourself a district court judge (which means no more AOC judgment forms for you!). Remember that you have to make findings of fact, and there are three factual questions that must be resolved in Polly's favor if she is to win (although it only takes one for her to lose). What would your judgment form look like? (Remember: no law! Just facts!) Take a shot:

The Court makes the following findings of fact:

1.

2.

3.

Time for conclusions of law (in which you state what all these facts add up to when you apply the law). Here's a hint: conclusions of law almost always involve an abstract legal term. "Mr. Smith did not make a rent payment on July 1" is a finding of fact. "Mr. Smith's failure to pay rent was a breach of the lease for which forfeiture was specified" is a conclusion of law.

Based on these findings [of fact], the Court makes the following conclusions of law:

1. _____
2. _____
3. _____

The Rule of Evidence That's Not Really A Rule of Evidence

The parol evidence rule is not so much about evidence as it is about contract law.

Contract law, of course, is focused for the most part on enforcing the intention of the parties as expressed through their agreement.

Most contracts are not required to be written, but if they ARE written, we accord that writing a great deal of weight as a formal expression of the parties' agreement.

When a party attempts to introduce evidence that contradicts or adds a term to the written agreement, that evidence is generally excluded from the court's consideration. The reasoning is that the parties would have incorporated that into the written contract if they had in fact agreed to it.

There are two exceptions to this general rule:

- Evidence is admissible to explain an ambiguous term in the written agreement, and
- Evidence of elaborations or modifications agreed to subsequent to execution of the written contract may be considered.

Evidence Policy

Every small claims judge should have a standard policy for admitting and considering evidence, so that the judge's rulings are consistent. If at all possible, small claims magistrates within a county should agree on a standard policy, because as much as possible the outcome of a case should not depend upon the particular judge who hears the case.

Your evidence policy should address the following issues:

What is your "default" position on allowing parties to present evidence to the court?

Does evidence come in unless objected to?

Does evidence come in even IF objected to?

Do you do your best to enforce the rules of evidence (and thus refuse to look at or listen to) evidence you believe is inadmissible even if there is no objection? Even if only the plaintiff appears for trial?

Are you generally lenient in admitting evidence, subject to a few specific kinds of evidence, which you exclude? If so, what kinds?

What is your specific policy, if any, about the following kinds of evidence?

- | | |
|---|--|
| <input type="checkbox"/> photographs to prove damage | <input type="checkbox"/> affidavits to prove damage |
| <input type="checkbox"/> written estimates for repair | <input type="checkbox"/> letters or emails to prove notice |
| <input type="checkbox"/> affidavits from witnesses to prove elements other than damages | |
| <input type="checkbox"/> web pages (e.g., Sec'y of State's Office) | <input type="checkbox"/> Wikipedia |
| <input type="checkbox"/> itemized bills prepared in the regular course of business | |
| <input type="checkbox"/> medical records | <input type="checkbox"/> police reports |

Other: _____

How do you deal with attorneys who make numerous objections?

Do you rule on each objection as it is made?

Do you instruct the attorney to hold objections until the end, and then allow argument in support of the contention that you should not consider the challenged evidence?

Do you tell the attorney that the rules of evidence are not strictly observed in small claims court and that you are capable of discerning the reliability of evidence and according it proper weight?

Do you either speak with attorneys beforehand, or make a statement in open court, explaining your evidence policy before trial begins?

Other: _____

Addressing evidence questions in your judgment:

When evidence has been admitted over objection, do you address the relevance of that evidence to your decision when you announce your judgment?

For example: *My judgment is for Mr. Smith, the plaintiff, in the amount of \$500. In determining the amount of damages, I considered the estimates provided by both parties, giving greatest weight to the estimate by Joe's Garage, based on its actual examination of the vehicle.*

When you announce your judgment in a case in which a critical issue turns on which party you believe, do you directly address how you resolved the question of credibility?

For example: *This case involved a sharp dispute in the evidence, with Plaintiff Polly contending that the defendant gave her the dog, and Defendant Larry testifying to the contrary. After listening carefully to the testimony, while I found both parties believable, I have concluded that the defendant's testimony is more credible than the plaintiff's testimony and I am thus ruling in favor of the defendant in this matter.*

What in the World is an LLC?

What You Need to Know About Businesses & Law

There are many reasons why people choose to create a corporation, partnership, or other business entity, and one of them is to limit risk of losing personal assets. In North Carolina, as in other states, there are several different kinds of business entities, and knowing what they are is a good place to start.

<i>Corporation</i>	GS Ch. 55	(Incorporated, Corporation, Limited, Company)
<i>Professional corporation</i>	GS Ch. 55B	(P.A., P.C.)
<i>Non-profit corporation</i>	GS Ch. 55A	(Incorporated, Corporation, Limited, Company)
Limited liability company	GS Ch. 57C	(LLC)
Limited liability limited partnership	GS Ch. 59	(LLLP, RLLLP)
Limited partnership	GS Ch. 59	(LP)

All of these entities are “artificial persons” under the law, meaning that they have the ability to contract, sue, and be sued (through their agents, of course). People who own part or all of these entities are not personally liable for debts incurred by the entity (with one exception, explained below).

All of them are required to register with the Secretary of State’s Office, and to maintain a registered agent for the purpose of receiving service.

If service of process is not accomplished by serving the registered agent, it must satisfy the alternative requirements set out in Rule 4(j) (6), (7), or (8). For entities other than partnerships, this means serving one of the following:

1. An officer of the company
2. A director of the company
3. A managing agent of the company

OR by leaving a copy in their office with a person apparently in charge of the office.
--

NOTE: GS 7A-217, which specifies specific rules for service of process in small claims actions, does not apply to artificial persons. The rules for serving them are set out in GS 1A-1, Rule 4. One significant difference is that service by Fed Ex or a similar delivery service is available as a means of serving these business entities.

Much useful information is available about business entities on the Secretary of State's website, located at www.secretary.state.nc.us.

Why do you need to know this?



Tom



Dick



Carl Corporation

Three things you need to know about corporations

1. *Corporations may represent themselves in small claims court.*

And in *Woods v. Billy's Automotive*, 174 N.C. App. 808 (2005), the appearance and participation at trial of the primary owner of Billy's Automotive Inc. was held to constitute a general appearance by the corporation and thus cure defects in service of process arising out of serving Billy—the owner—despite the fact that he was neither officer, director, or managing or registered agent!

2. *Corporations remain liable for their debts and the actions of their agents even if they are dissolved.*

GS Ch. 55 sets out a procedure by which creditors may assert claims against corporations even when the corporation is dissolved (whether voluntarily or administratively).

In the instance of known creditors, the corporation is required to notify them of the pending dissolution and the procedure and deadline for asserting claims. A creditor who receives notice and fails to assert a claim in a timely manner forfeits the right to collect on the debt. GS 55-14-06.

What if a creditor does not receive this notice or his properly-filed claim was never acted upon? What if the liability in question arose after the corporation was dissolved? GS 55-14-07 answers these questions; if a corporation publishes notice of its dissolution in accordance with the statute, claims not asserted within five years from date of publication are barred. GS 55-14-08 provides that undistributed corporate assets (including proceeds of insurance coverage relating to such claims) are available to pay claims against the dissolved corporation. In some situations, a claimant may be able to recover some portion of liquidated assets from a shareholder as well.

3. It is sometimes possible for a plaintiff in tort to demonstrate that the owner of a corporation should be personally liable for an obligation.

It is important to remember that “piercing the corporate veil” is an equitable doctrine, similar to unconscionability. The presence of three elements supports application of the doctrine:

- a. Control by the defendant of the corporate entity to such an extent as to amount to the entity having no independent will or existence of its own; complete domination of not only finances, but also of policy and business practices;
- b. This control was used by defendant to commit fraud or wrong, to violate a statutory or positive duty, or a dishonest and unjust act;
- c. This control and breach of duty proximately caused the injury or unjust loss complained of.

As an equitable doctrine, the decision whether to pierce the corporate veil varies with the circumstances of each case. Significant factors identified by the courts include: 1) undercapitalization of the corporation; 2) non-compliance with corporate formalities; 3) absence of corporate records; 4) non-payment of dividends; 5) siphoning of corporate funds by dominant shareholder; and 6) non-functioning of other officers and directors. *Glenn v. Wagner*, 313 N.C. 450 (1985).

Procedural Issues Related to Businesses

Service of process

As we have seen already, some special rules govern service of process on artificial persons. For the most part, small claims magistrates are somewhat removed from ruling on whether there were errors in serving the defendant, because of GS 7A-221's provision that objections to jurisdiction over the person (which is the essence of the argument that service of process was improper) be heard by a district court judge. The same statute also provides that the objection is waived if not made by motion or in the defendant's answer prior to date of trial. Nevertheless, there are times when a magistrate, in ruling on another issue, must have some understanding of whether proper service was accomplished. This typically comes up when it appears that plaintiff may not have properly named the defendant in the complaint and summons. See the discussion below, under *Amendments*.

Venue

GS 7A-221 also provides that objections to venue must be made before trial or waived, but magistrates nevertheless must make this determination because of the limited authority of the chief district court judge to assign cases to small claims court under GS 7A-211 (requiring at least one defendant to be a resident of the county). Even if no objection is made by the defendant to venue, a magistrate who hears a case not meeting the residency requirement has no authority to enter judgment.

What is the residency of a corporation?

A corporation either formed in North Carolina or formed elsewhere but maintaining a registered office in NC is a legal resident of the county in which

- a. its registered or principal office is located; or
- b. it maintains a place of business.

The "registered office" of a corporation is merely the office of the registered agent.

The “principal office” of a corporation is “the office (in or out of this State) where the principal executive offices of a domestic or foreign corporation are located, as designated in its most recent annual report filed with the Secretary of State.” GS 55-1-40(17).

If a corporation has no registered office, no principal office, and no place of business, its residence is any county in which it is regularly engaged in carrying on business.

Motions to amend

Amending the summons

GS 1A-1, Rule 4, provides that the court may allow “any process or proof of service thereof to be amended” . . . “[a]t any time, before or after judgment,” on whatever terms or conditions the court finds is just “unless it clearly appears that material prejudice would result to substantial rights of the [defendant].”

The key to solving the puzzle presented by many of these cases is determining whether plaintiff (1) sued and served the correct defendant, using the wrong name, or (2) sued the wrong defendant.

DAY 2

June 5, 2012

The Schedule for Today

9:00 Check-In
9:15 AM Trial
9:45 "I Stopped Paying Rent Because the Toilet Won't Flush"---The RRAA
10:45 Break
11:00 Other Defenses in Summary-Ejectment Actions
12:00 Lunch at the SOG
12:50 Landlord-Tenant Leftovers
1:45 Break
2:00 Small Group Discussion: Small Claims Practically Speaking
2:50 Stump the Teacher & PM Trial
4:00 Recess

Objectives for Today

By the end of our time together today, you will

1. Be able to respond appropriately to the various procedures with which tenants may present for consideration allegations of their landlord's violations of the RRAA.
2. Recognize the relevance of and correctly apply the law regarding violations of the RRAA to related legal issues such as tender and calculations connected to appeal bonds in SE cases.
3. Have examined some leases to identify provisions that are void or unenforceable based on consumer protection legislation and public policy.
4. Determine what facts may constitute the legal defense of waiver in SE cases.
5. Have studied and discussed a significant line of appellate cases concerning ejectment based on breach of lease conditions.
6. Identify what modifications, if any, are required in the manner in which you conduct hearings in public housing cases so as to be consistent with current law.
7. Have reviewed common trouble spots in conducting SE hearings.
8. Have discussed with other magistrates some of the most common practical challenges in conducting court.
9. Have had ample opportunity to ask questions about any area of small claims law.
10. Have observed, analyzed, and discussed with others at least two mock trials.

Checking In

Discuss with your tablemates what struck you most about our time together yesterday. Do you have questions about any of the material? Did you come across anything that prompted you to consider modifying your approach to conducting court or deciding cases?

Notes on AM Trial

The Residential Rental Agreements Act (and Other Tenants' Rights Statutes)

The Residential Rental Agreements Act is set out in G.S. Chapter 42, Sections 38 to 44. This law, which was passed in 1977, re-wrote the common law to provide that landlords must maintain residential rental premises to be fit to live in, and to make clear that a tenant's right to such housing cannot be waived. Prior law had followed the rule of *caveat emptor* ("let the buyer beware").

What Does the Law Provide?

The law imposes 8 distinct obligations on a landlord:

1. He must comply with building and housing codes.
2. He must keep premises in a fit and habitable condition.
3. He must keep common areas in safe condition
4. He must maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances.
5. He must install a smoke detector and keep it in good repair.
6. He must install a carbon monoxide detector and keep it in good repair.
7. He must notify the tenant if water the landlord charges to provide exceeds a certain contaminant level.
8. He must repair within a reasonable time any "imminently dangerous condition" listed in the statute:
 - a. Unsafe wiring.
 - b. Unsafe flooring or steps.
 - c. Unsafe ceilings or roofs.
 - d. Unsafe chimneys or flues.
 - e. Lack of potable water.
 - f. Lack of operable locks on all doors leading to the outside.
 - g. Broken windows or lack of operable locks on all windows on the ground level.
 - h. Lack of operable heating facilities capable of heating living areas to 65 degrees Fahrenheit when it is 20 degrees Fahrenheit outside from November 1 through March 31.
 - i. Lack of an operable toilet.
 - j. Lack of an operable bathtub or shower.
 - k. Rat infestation as a result of defects in the structure that make the premises not impervious to rodents.
 - l. Excessive standing water, sewage, or flooding problems caused by plumbing leaks or inadequate drainage that contribute to mosquito infestation or mold.

There is something a little confusing about this: some of these overlap. Rental premises might, for example, have a broken furnace that violates obligation #4 above, but the fact that it's below-freezing in the house also means the premises are not habitable. The reason it matters is that different rules apply as far as the notice that's required. Let's look at that more closely.

Notice Requirements

Only one of the obligations has a notice requirement written specifically into the statute: a landlord's obligations with regard to electrical, plumbing, and other "facilities and appliances" arise only if he has written notice that repair or maintenance is necessary. After receiving notice, the landlord is entitled to a "reasonable time" to make repairs. The exception to this requirement is when there is an emergency. If the shower handle breaks off and water is pouring out of the tub onto the floor, the law will not require the tenant to notify the landlord in writing and then wait a few days before imposing an obligation on the landlord to make a repair.

A common-sense rule applies to the other obligations: the tenant must give whatever notice is necessary to reasonably permit the landlord to fulfill his obligations. If there's a leak in the roof, for example, the tenant must notify the landlord before it's reasonable to expect the landlord to repair it. In that case, however, oral notice is acceptable. It may be that in some cases, no notice at all is required, when the evidence demonstrates that the landlord actually knew of the problem (for example, there were holes in the floor before the tenant moved in).

Waiver

The RRAA is a consumer-protection statute. Like other consumer protection legislation, the rights of the parties are not created by contract—or agreement—in these cases. Instead, the obligations of the landlord are imposed by law—even if the contract says nothing about them, **or even if the lease says the tenant waives those rights**. The statute is clear that a tenant doesn't waive his rights by signing a lease providing for waiver; nor does a tenant waive his rights to fit and habitable housing by agreeing to rent a place with obvious defects, even if the landlord specifically tells him about them. If a tenant rents a house without air conditioning, that's fine. But if a tenant rents a house with air conditioning and then the air conditioning tears up, the landlord has a statutory obligation to repair the air conditioning, even if the lease says otherwise.

Sometimes a landlord will say, “I know the house wasn’t up to code, but that’s why the rent was so low. I agreed to let him live in the house for low rent, and he agreed that he would do some work on the house for me.” The RRAA anticipated this, and sets out the following rule: An agreement between the landlord and tenant that the tenant will work on the house and be paid by the landlord is fine, so long as the agreement is entered into AFTER the lease agreement is complete, and the arrangement for payment by the landlord for the tenant’s work is separate from the rent payment.

Sometimes a landlord will say, “The reason the house isn’t up to code is that the tenant himself keeps damaging it.” This allegation, if true, is a valid defense to the landlord’s violation of the Act. The tenant also has obligations under the Act, including refraining from deliberately or negligently damaging any part of the premises. The obligations of the landlord and tenant are “mutually dependent”—that is, each of them is obligated only if the other keeps his part of the bargain. If a tenant violates his obligation to avoid damaging property, it relieves the landlord of his obligation to keep the property in good repair. Obviously, this rule makes good sense, but is a potential swamp, since each party may be in flagrant violation of the Act and point to the other’s violation as excusing their own.

Remedies: What Happens When a Landlord Fails to Meet His Responsibilities Under the Act?

At the outset, you are confronted with two apparently contradictory provisions of the Act that have worried commentators. On the one hand, the obligations of the landlord and the tenant under the Act are “mutually dependent”—that is, each of them is obligated only if the other keeps his part of the bargain. Based just on this provision, one might reasonably conclude that a tenant’s obligation to pay rent “depends” on the landlord’s provision of fit and habitable premises. But another section of the Act specifically says that a tenant may not “unilaterally withhold rent prior to a judicial determination of the tenant’s right to do so.” What does this mean?

No one is absolutely certain, because there have actually been only a few appellate cases interpreting the RRAA. It seems clear, though, that a tenant who withholds rent because the landlord violates the RRAA risks being evicted for failure to pay rent. A much safer course would be to pay rent and then bring an action in rent abatement; a tenant who prevails in this action will recover damages for the landlord’s past violation of the Act and may well also secure a “judicial determination of [his] right” to withhold future rent until the landlord complies with the law.

If a tenant does not adopt this safer course, but instead withholds rent, one leading commentator suggests the following approach:

First, determine the actual amount of rent owed, after factoring in the amount of offset to which the tenant is entitled due to the landlord’s breach of the RRAA. If that amount is zero, dismiss the action. If the amount is greater than zero, the next step depends on the specific basis for the action:

If the action is based on breach of a lease condition for which forfeiture is specified, the landlord is entitled to possession upon making the usual showing.

If the action is based on failure to pay rent, however, the tenant may successfully defend by tendering the amount which the magistrate has determined is actually owed.

Repair & Deduct?

Can a tenant hire someone to fix the roof, pay for it out of his own pocket, and then take that amount out of the rent? We don't know, and the commentators are divided in their predictions. Until North Carolina courts clarify the law, it seems likely that many courts will cautiously allow tenants to do this, with the facts of the individual case being important (a tenant who gives notice, waits a long time, and then spends a small amount of money being much more likely to prevail than a tenant who fails to give notice and makes major repairs, such as replacing a roof).

Other Questions About the RRAA

According to the statute, the owner of the property is not the only person that may be held liable for violating the landlord's responsibility under the RRAA. GS 42-40 (3) defines "landlord" as "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article.

What is the statute of limitations applicable to actions based on violations of the RRAA? 3 years.

Procedure:

The Act states that a tenant may enforce his rights under the Act by civil action, including "recoupment, counterclaim, defense, setoff, and any other proceeding, including an action for possession." Thus, a magistrate may be confronted with applying the Act in any of the following circumstances:

1. The landlord brings an action for possession and/or money damages, and the tenant defends by contending that the landlord violated the Act.
2. The landlord brings an action for possession and/or money damages, and the tenant brings a counterclaim for rent abatement based on the landlord's violation of the Act.
3. The landlord brings an action for money damages, and the tenant responds by arguing that the landlord's damages should be reduced ("set-off") because of his violation of the Act.
4. The tenant files an action for rent abatement.

Damages

The tenant is entitled to the difference between the FRV (fair rental value) of the property as warranted and the FRV of the property as it actually is, plus any incidental damages (for example, the tenant had to buy a space heater when the furnace stopped working). NOTE: A tenant may only recover up to the amount of rent he actually paid. If he lived in the property and paid no rent, for example, he is not entitled to also recover money damages.

How are damages proven? No expert testimony is required. Witnesses may offer their opinion about the FRV of property, and the magistrate may also rely on his own experience in determining reasonable damages.

Are punitive damages allowed? No, punitive damages are not authorized in actions for breach of contract. Treble damages under G.S. 75-1.1 (prohibiting unfair or deceptive acts or practices affecting commerce) are available, however, if the tenant is able to demonstrate the essential elements of that claim.

Retaliatory Eviction

G.S. 42-37.1 to 42-37.3: North Carolina has a strong public policy protecting tenants who exercise their rights to safe housing. When a landlord files an action for summary ejectment, a tenant may *defend* against ejectment by proving by the *greater weight of the evidence* that the landlord's action is *substantially in response* to one of several listed events that has occurred within the last 12 months.

What are those events?

1. Asking landlord to make repairs;
 2. Complaining to government agency about violation of law;
 3. Formal complaint lodged against landlord by government agency;
 4. Attempting to exercise legal rights under law or as provided in lease;
 5. Organizing or participating in tenants' rights organization.
-
-
-

Remedy

If a tenant successfully demonstrates retaliatory eviction, the magistrate must deny the landlord's request for possession (although the landlord is entitled to back rent in any case). Furthermore, a tenant may have an independent action for an unfair or deceptive act or practice (with treble damages) under G.S. 75-1.1.

Note that this law is based on public policy. It won't surprise you, then, to learn that the statute specifically provides that any attempted waiver by the tenant of his rights under this law is void. What's the obvious concern here? That a tenant will seek the protection of this law without really deserving it—in bad faith. If my lease has a forfeiture clause related to keep pets, and I get caught with my dog when the landlord drops by, I might quickly begin to organize a tenant's rights organization. That way, I think, if the landlord tries to evict me, I'll be able to claim it was because of my organizational efforts, and not the real reason—that I have a dog.

Rebuttal by the Landlord

When a tenant defends in an action for summary ejectment by asserting that the landlord is actually retaliating against him or her for an action protected under the statute, the landlord may rebut that argument by showing one of the following things:

1. Tenant failed to pay rent or otherwise broke the lease in a manner that allows eviction, and the violation of the lease is the reason for the eviction.
2. Tenant is holding over after termination of lease for definite period with no option to renew.
3. The violations the tenant complained about were caused by willful or negligent act of tenant.
4. Displacement of tenant is required in order to comply with housing code.

5. Landlord had given tenant a good-faith notice of termination before protected conduct occurred
6. Landlord plans in good faith to do one of the following after terminating tenancy:
 - 1) Live there himself;
 - 2) Demolish the premises, or make major alterations;
 - 3) Terminate use of premises as a dwelling for at least 6 months.

Note that all of these grounds actually relate to the showing required of the tenant: that he is being evicted “substantially in response” to his participation in one of the protected acts. If the landlord is able to demonstrate one of the above reasons for seeking summary ejectment, the conclusion must be that the action is not “substantially in response” to one of the prohibited reasons.

One question that has not yet been answered by North Carolina courts is whether, instead of seeking to evict a tenant, the landlord may retaliate for protected activity by increasing the rent. Other states have applied the same rationale to retaliatory rent increases as to retaliatory eviction, refusing to permit it on public policy grounds. This appears to be a permissible reading of the North Carolina statute, which provides:” It is the public policy of the State . . . to protect tenants and other persons . . . who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law. . . “The argument then would be that in raising the rent to a punitively high level, the landlord is accomplishing indirectly the same end as he would directly by eviction: termination of the tenancy. It seems probable that NC courts would refuse to allow this, but we don’t know for sure.

Self-Help Eviction

Back in the old days, a landlord who wished to evict a tenant simply changed the locks, or put their property out on the sidewalk. In 1981 the North Carolina General Assembly put G.S. 42-25.6 on the statute books:

“It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed, or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in [the remaining provisions of the statute].”

--Note: This rule applies only to *residential tenancies*. Self-help eviction is perfectly permissible in commercial lease situations.

--Note also the reference to “constructively . . . removed.” The law applies not only to actual removal of a tenant from rental premises, but also to actions taken by a landlord to make continued occupancy unpleasant: turning off utilities would be the most common example.

The General Assembly took aim at another common practice in 1981:

“It is the public policy of the State of North Carolina that distress and distraint are prohibited, and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with [other provisions of the statute].”

This law put an end to the practice of some landlords of either seizing property owned by the tenant to compensate for unpaid rent or refusing to release a tenant’s property until that tenant paid past-due rent. As you well know (since you get hundreds of questions a year about it), landlords are now required to comply with specific legal requirements in dealing with property left behind by tenants.

As is typical of laws based on public policy, the statute provides that any attempted waiver of the legal prohibition against self-help eviction is void.

Tenant’s Remedies

What remedies does a tenant have when a landlord violates the prohibition against self-help eviction? The law provides that a tenant in this circumstance is

“entitled to recover possession or to terminate his lease and the . . . landlord. . . . shall be liable to the tenant for damages caused by the tenant’s removal or attempted removal.”

Further, if a landlord takes possession of a tenant’s personal property, or interferes with a tenant’s access to his personal property, the statute provides that a tenant is entitled to recover possession of the property, or compensation for its value (as in an action for conversion). In addition, a landlord is liable for actual damages caused by his wrongful interference.

In addition to the actions authorized by this statute, our courts have held that a tenant may bring an action for unfair or deceptive acts or practices when a landlord violates these provisions.

Other Defenses in Summary Ejectment Actions

Waiver

“It is the settled law, no doubt, that the landlord who, with knowledge of the breach of the condition of a lease for which he has a right of reentry, receives rent which accrues subsequently, waives the breach, and cannot afterwards insist on the forfeiture.” Winder v. Martin, 183 N.C. 410 (1922).

Most recent case is Woodridge Homes Lmted. Partnership v. Gregory (filed July 20, 2010).

Facts: One-year written lease of apartment completely subsidized (both rent and utilities) by the Rural Development Service of the USDA. Lease provided that the landlord’s failure to terminate the lease when s/he would have a right to do so due to tenant’s breach “shall not destroy the right of the landlord to do so later for similar or other causes.” The lease also provided that nothing in the lease “shall be construed as waiving any of landlord’s or tenant’s rights” under state law.

The landlord notified the tenant on 26 December of its decision to terminate the lease due to tenant’s “repeated minor violations” of the agreement. The landlord received one check each month from the USDA for all of the subsidized rental units in the complex. In light of its intention to terminate defendant’s lease, the landlord placed the amount of rent received on behalf of defendant in a separate escrow account.

The first legal issue addressed by the court was the point at which defendant’s “repeated minor violations” amounted to breach authorizing termination. The Court rejected the argument that the landlord had waived the right to terminate the lease by accepting rent along the way, citing the anti-waiver clause in the lease.

A more serious argument involved acceptance of rent payments after sending the Notice-to-Terminate letter in December. The Court found that the subsidies paid by the USDA constituted “rent” for purposes of the waiver rule, but struggled with whether the landlord could be said to have accepted those payments, noting that quite possibly there is no mechanism for giving money back to the US government. If, said the court, a refund process was readily available, the plaintiff should have taken advantage of it. Because the evidence in the record was inadequate for the Court to make that determination, it remanded the case back to the trial court to take additional evidence on that point.

The general rule about waiver is stated in numerous appellate cases. In no case that I have found, however, has the fact situation involved acceptance by the landlord of rent paid after the complaint has been filed. Nor have any of the cases directly presented the typical case, in which the tenant pays and the landlord accepts rent not clearly intended to be either past due or future rent. If a general rule is to be extracted from the cases, it may be that payments made by a tenant are presumed to have been made with the belief that the tenant’s ability to continue residence in the rental property will be advanced—thus supporting the application of the waiver principle in ambiguous circumstances.

NOTES:

Special Rule for Breach-of-Lease-Condition Cases

“[T]he settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor applies with full force to stipulations for forfeitures found in leases; such stipulations are not looked upon with favor by the court, but on the contrary are strictly construed against the party seeking to invoke them. As has been said, the right to declare a forfeiture of a lease must be distinctly reserved; the proof of the happening of the event on which the right is to be exercised must be clear; the party entitled to do so must exercise his right promptly; and the result of enforcing the forfeiture must not be unconscionable.”

Morris v. Austraw, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967)

A number of North Carolina appellate cases have cited *Morris* in support of the rule that plaintiff is “put to his proof” in order to persuade a court to treat a lease as forfeited. A line of cases involving this issue—and also public housing law, although that factor varies in its importance in each case—are contained immediately following this page. For each case, spend a little bit of time becoming familiar with the facts and then read the court’s legal analysis. What rule do you think each case stands for?

This image shows a full page of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

DAY 3

June 6, 2012

The Schedule for Today

9:00 Check-In
9:15 *Ubi Jus Ibi Remedium*
[“There is no Right Without a Remedy”---But What Should The Remedy Be?]
10:30 Break
10:45 AM Trial
11:15 Open Forum: What’s Left to Talk About?
11:45 Evaluations & Presentation of Certificates
12:00 Adjourn

Objectives for Today

By the time you finish today, you will

1. Be familiar with the remedies and measures of damages most often used in small claims court.
2. Have had an opportunity to consider some of the theoretical underpinnings of choice of remedies, and thus be able to articulate why a particular measure of damages is more or less appropriate in a given case.
3. Be able to identify a liquidated damages clause and perform the correct legal analysis to determine whether to enforce the clause as written.
4. Have an opportunity to ask any remaining questions about small claims law and procedure.
5. Have a final opportunity to observe (or conduct) and analyze the legal issues presented in a breach of warranty action in a mock trial.

Checking In

Discuss with your tablemates what struck you most about our time together yesterday. Do you have questions about any of the material? Did you come across anything that prompted you to consider modifying your approach to conducting court or deciding cases?

IN-CLASS HANDOUTS

JUVENILE LAW BULLETIN

No. 2007/02 June 2007

MINORS AS PARTIES IN CIVIL ACTIONS

■ Janet Mason

People of any age may be parties in civil court actions and proceedings.¹ Particular rules come into play, however, when one or more of the parties are minors.² This bulletin will discuss the general rules that govern minor parties' participation in civil court actions, including the procedures for proper service of process on minor parties. Then it will discuss instances in which these rules are modified or superseded by procedures prescribed for specific actions.

Civil Actions and Proceedings Generally

Minors³ may be parties to many of the same kinds of civil action to which adults are parties. A child who was injured in an automobile accident might sue the driver of a vehicle to recover monetary damages for injuries caused by that person's negligence. A minor could file an action seeking damages for harm caused by another person's intentional conduct, such as assault. A teenager might seek a protective order

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1. All court actions are either civil or criminal. Depending on the nature of the remedy sought, some civil actions are called special proceedings. *See* Article 1 of Chapter 1 of the North Carolina General Statutes (hereinafter G.S.). For purposes of this bulletin, unless the context clearly indicates a different intent, *action* and *proceeding* are used interchangeably.

2. Special rules also apply when unborn persons are parties to civil actions. *See* G.S. 1A-1, Rule 17(b)(4).

3. *Minor* and *child* are used interchangeably throughout this bulletin to mean unemancipated minor—someone under the age of eighteen who is not married and has not been declared emancipated by a court. *See* Article 35 ("Emancipation") of G.S. Chapter 7B. *See also* G.S. 48A-2 ("A minor is any person who has not reached the age of 18 years."). The meaning of the term *juvenile* differs from that of *unemancipated minor* only in that it does not include an unemancipated minor who is in the armed services. *See* G.S. 7B-101(14) and 7B-1501(17).

under the state's domestic violence laws⁴ or a civil no-contact order against someone who has been stalking her.⁵ Minors frequently are parties to proceedings involving inheritance, estate, or other property issues.

In these and other civil actions a minor may be the plaintiff or petitioner who initiates the action, but a minor also may be the defendant or respondent in a case initiated by someone else.

Participation

Minors generally are considered to be legally incompetent to transact business or to participate on their own in legal proceedings.⁶ For that reason, Rule 17 of the North Carolina Rules of Civil Procedure says that a minor may initiate or defend a civil action only through (1) a general guardian, (2) a testamentary guardian, or (3) a guardian ad litem.⁷ In addition to enabling litigation involving a minor to move forward despite the child's legal incapacity, this representative serves to ensure the protection of the minor's rights throughout a proceeding—a role that is shared by the court.⁸

Although Rule 17 does not mention exceptions, all of the Rules of Civil Procedure are subject to being superseded by procedures prescribed by other statutes.⁹ One statute enacted more recently than the Rules of Civil Procedure provides that the guardian

of a minor's estate may sue or defend on behalf of the minor ward,¹⁰ and another says that a guardian of the child's person appointed in a juvenile proceeding may represent the ward in all legal actions.¹¹ In addition, statutes relating to specific types of civil actions sometimes prescribe procedures for representation of and participation by a minor party.

General guardian

A *general guardian* is an individual appointed by the court to serve as both *guardian of the person* and *guardian of the estate* of a minor.¹² Proceedings for the appointment of guardians for minors are before the clerk of superior court, who has jurisdiction to appoint a guardian of the estate for any minor who has property or assets that need to be managed.¹³ The clerk also has jurisdiction to appoint a guardian of the person to be responsible for the care, custody, and control of a minor, but only when the minor does not have a *natural guardian*.¹⁴ The law says that parents are the natural guardians of their minor children¹⁵ and, of course, most children do have a living parent. Because there are relatively few circumstances in which the clerk has jurisdiction to appoint a guardian of the person or a general guardian for a minor, few children in North Carolina have court-appointed general guardians through whom they can participate in civil litigation.¹⁶ Although the law does not say so explicitly, it seems clear that a parent's status as a

4. See G.S. Ch. 50B.

5. See G.S. Ch. 50C.

6. See G.S. 35A-1201(a)(6) ("Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled."). An emancipated minor, on the other hand, "has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if [the minor] were an adult." G.S. 7B-3507.

7. G.S. 1A-1, Rule 17(b)(1) and (2) provide that a minor plaintiff must appear and a minor defendant must defend "by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed" as provided in the rule.

8. "Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not." *Tart v. Register*, 257 N.C. 161, 171, 125 S.E.2d 754, 761 (1962).

9. G.S. 1A-1, Rule 1, states that the rules govern procedures in all civil actions and proceedings "except when a differing procedure is prescribed by statute."

10. G.S. 35A-1252.

11. G.S. 7B-600(a) and 7B-2001(2).

12. G.S. 35A-1202(7).

13. G.S. 35A-1203(a) and -1224(a).

14. *Id.* The district court in a juvenile proceeding may appoint a guardian of the person for any child who is the subject of an abuse, neglect, or dependency petition or who is alleged to be undisciplined or delinquent. The district court does not have authority to appoint a general guardian or a guardian of the estate. G.S. 7B-600 and -2001.

15. G.S. 35A-1201(a)(6).

16. When a minor is incompetent for reasons other than age and will need a guardian as an adult, the clerk has jurisdiction during the six months before the minor reaches age eighteen to conduct an incompetence proceeding and appoint a guardian, which could be a general guardian, for the minor. See G.S. 35A-1101(8) (definition of *incompetent child*), G.S. 35A-1202(11) (definition of *incompetent person*), and G.S. 35A-1203 (jurisdiction of the clerk).

child's natural guardian does not render the parent the child's general guardian as that term is most often used.¹⁷

Testamentary guardian

The only use of the term *testamentary guardian* in the North Carolina General Statutes is in Rule 17 of the Rules of Civil Procedure, which contains the requirement that a minor participate in a civil action through a general guardian, a testamentary guardian, or a guardian ad litem. Although the term might suggest that a parent in his or her will can appoint someone to serve as guardian for a surviving child after the parent's death, a parent is limited to making a testamentary recommendation with respect to guardianship of his or her children.¹⁸ The individual named in a parent's will does not become the child's guardian automatically if the parent dies; he or she assumes that role only if appointed by the clerk of superior court. The clerk must give the parent's recommendation substantial weight but is not bound by it.¹⁹

If both of a child's parents are deceased, the child might have a general guardian, as described above. If both parents are deceased and the clerk names a person recommended in the parent's will only as guardian of the child's person or guardian of the child's estate, that individual might be considered the child's testamentary guardian. Otherwise, the term really has no meaning unless it is in relation to a guardian appointed pursuant to the law of another state that gives it meaning.²⁰

17. The term *guardian* is almost always used to signify someone other than a parent. See, for example, G.S. 36C-3-303, which says in relation to trust matters, "A parent may represent and bind the parent's minor child if a general guardian, guardian of the estate, or guardian of the person for the child has not been appointed."

18. G.S. 35A-1225.

19. G.S. 35A-1224(d).

20. See, e.g., GA. CODE ANN., § 29-1-1(25) (definition) and § 29-2-4(b) ("Unless the minor has another living parent, upon probate of the parent's will, letters of guardianship shall be issued to the individual nominated in the will who shall serve as testamentary guardian without notice or hearing provided that the individual is willing to serve.")

Other guardians

Two statutes, which make no reference to Rule 17, give guardians other than general and testamentary guardians broad authority to bring and defend civil actions on behalf of minors.

- The North Carolina guardianship law states that either a general guardian *or* a guardian of the estate appointed by the clerk of superior court for a minor ward is authorized to "maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward."²¹ This authority is couched in terms of the guardian's power to collect, preserve, manage, or administer the ward's estate. It probably does not extend to matters that cannot be tied in any way to the ward's financial or property interests.
- The Juvenile Code, on the other hand, states that a guardian of the person appointed for a minor in a juvenile proceeding may "represent the juvenile in legal actions before any court."²² A district court judge may appoint a guardian of the person for a juvenile at any stage of a proceeding in which the juvenile has been alleged or adjudicated to be abused, neglected, dependent, undisciplined, or delinquent, after finding that the appointment would be in the juvenile's best interest. A guardian of the person appointed for a minor by the clerk of superior court is not authorized to represent the minor in legal actions.²³

Guardian ad litem

Because few children have court-appointed guardians of any type, most minors are required to participate in civil actions or proceedings through a person the court appoints as the minor's guardian ad litem. The

21. G.S. 35A-1252.

22. G.S. 7B-600(a) and 7B-2001(2).

23. See G.S. 35A-1241. The clerk may appoint a guardian of the person only for a minor who has no parents. G.S. 35A-1224(a).

authority and duties of a guardian ad litem—unlike the authority and duties of other types of guardians that may be appointed for minors—are confined to the particular civil action in which he or she is appointed.²⁴ Rule 17 places no limitations on whom the court may appoint as guardian ad litem, except that it be “some discreet person.” The court may appoint a parent, another relative, an attorney, or any other responsible adult whose interests do not conflict with those of the minor. When the minor is the defendant, the court can assess a fee for the guardian ad litem as part of the costs of the action.²⁵

When the minor is the party initiating the civil action, the court may appoint a guardian ad litem for the minor before or at the time the action is filed, on written motion of a relative or friend or on the court’s own motion. When the minor is a defendant or respondent, if no parent or friend of the child files a written motion for appointment of a guardian ad litem for the minor within ten days after the minor is personally served, the court may appoint a guardian ad litem on written motion by any party to the action or on the court’s own motion.²⁶ Although a court generally would defer to a guardian with legal authority to sue or defend on a minor’s behalf, the court may appoint a guardian ad litem even for a child who has a guardian.²⁷ The court should do so any time the interests of the minor and the guardian may be in conflict.

Rule 17 says remarkably little about the role and duties of the guardian ad litem. He or she is required to “file and serve such pleadings as may be required within the times specified by [the] rules, unless extension of time is obtained.” When the minor is the defendant, the guardian ad litem is “to defend” in behalf of the minor.²⁸ The appellate courts have not

added a great deal, but they have stated that “the guardian ad litem is considered an officer of the court” and “has a duty to represent the party he is appointed to represent to the fullest extent feasible and to do all things necessary to secure a judgment favorable to such party.”²⁹

Addressing the role of a guardian ad litem appointed pursuant to Rule 17 for an adult party who is or may be incompetent, the court of appeals stated that “Rule 17 and the case law . . . suggest the role of the [guardian ad litem] as a guardian of procedural due process for [the party], to assist in explaining and executing her rights” and that “beyond this due process protection, there are no specifics as to the proper conduct of the [guardian ad litem].”³⁰

Service of Process

Proper service of process, unless waived, is an essential precedent to a court’s exercise of personal jurisdiction over a defendant or respondent in a civil action. When that party is a minor, Rule 4(j) of the North Carolina Rules of Civil Procedure requires that the minor be served with the initial pleading and summons just as an adult party would be.³¹ Methods for doing that include

- personal delivery to the party by someone authorized to serve process;
- leaving copies at the party’s dwelling house or usual place of abode with someone of suitable age and discretion who resides there;
- registered or certified mail, with return receipt;
- deposit with a designated delivery service, followed by a delivery receipt;
- mail by signature confirmation followed by delivery to the party to be served; and

24. *See, e.g., In re L.A.B.*, ___ N.C. App. ___, 631 S.E.2d 61 (2006).

25. G.S. 1A-1, Rule 17(b)(2).

26. G.S. 1A-1, Rule 17(c).

27. G.S. 1A-1, Rule 17(b)(3).

28. G.S. 1A-1, Rule 17(b) and (e). This minimal description of the responsibilities of a guardian ad litem appointed pursuant to G.S. 1A-1, Rule 17, contrasts sharply with the description in G.S. 7B-601 of the duties of a guardian ad litem appointed for a child in a juvenile abuse, neglect, or dependency proceeding. The potential for confusion resulting from the use of the term to describe both roles probably accounts for the fact that many other states assign a different title, such as *court-appointed special advocate*, to the child’s court-appointed representative in a juvenile proceeding.

29. Alan D. Woodlief, Jr., SHUFORD NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 17:20 (6th ed. 2003) (citing *Carraway v. Lassiter*, 139 N.C. 145, 51 S.E. 968 (1905) and *Teele v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964)). Also see *In re Shepard*, 162 N.C. App. 215, 591 S.E.2d 1, *review denied*, *In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004), in which the court said, “North Carolina case law offers little guidance as to our reading of Rule 17 and any specific duties of a [guardian ad litem].”

30. *In re Shepard*, 162 N.C. App. at 227–228, 591 S.E.2d at 9–10.

31. G.S. 1A-1, Rule 4(j)(2).

- delivery to an authorized agent.³²

Because a minor party is under a legal disability, the rule requires, in addition, that service by one of those authorized methods be made on a parent or guardian who has custody of the minor; or, if there is no such person, on someone else who has care and control of the minor; or, if there is no such person, on a guardian ad litem appointed for the minor pursuant to Rule 17 of the Rules of Civil Procedure.³³

Some states require only substituted service—that is, service on a parent or other specified person but not directly on the minor party.³⁴ Other states require service directly on a minor only if he or she is above a certain age.³⁵ And others, including North Carolina, require service on both the minor, regardless of his or her age, and another designated person.³⁶ The sheriff's delivering a summons and complaint to a four-year-old child, although it might be legally sufficient to meet the requirement that the minor be served, would be nonsensical. Delivery to a person "of suitable age and discretion" with whom the child lives, however, is almost always feasible. Often that will be the same person likely to be served to satisfy the second prong of the service requirement—a parent or other person who has custody of the child.

Insufficient process, insufficient service of process, or lack of personal jurisdiction for any other reason is waived if the minor, through an appropriate representative, appears and participates in the case without making a timely objection.³⁷ In addition,

32. G.S. 1A-1, Rule 4(j)(1).

33. G.S. 1A-1, Rule 4(j)(2)a.

34. *See, e.g.*, Rules of Civil Procedure for the Superior Court of the State of Delaware, Rule 4(f)(1)(II)(b) (minor party served by serving guardian, if there is one, or adult with whom the minor lives); Michigan Rules of Civil Procedure, Rule 2.105 (service of process on a minor may be made by serving summons and complaint on person having care and control of the minor and with whom the minor resides).

35. *See, e.g.*, California Code of Civil Procedure, § 416.60 (only on minor who is at least twelve); Colorado Court Rules, Rule 4(e)(1) (only on minor who is thirteen or older); Hawaii Rules of Civil Procedure, Rule 4(d)(2) (only on minor who is sixteen or older).

36. *See, e.g.*, 2006–2007 Alaska Rules of Civil Procedure, Rule 4(d)(2); GA. CODE ANN., § 9-11-4(e)(3).

37. G.S. 1A-1, Rule 12(h). *See In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005). The court of

only the minor—the party potentially prejudiced by a defect in service of process—has standing to assert that defect as error on appeal.³⁸

Summary

Minors are considered legally incompetent to represent their own interests in court. Therefore, when a minor is a party to a civil court action, special rules require that the minor participate through a guardian and that documents required to be served on the minor also be served on an appropriate adult.

- Unless some other statute changes the general rule, the Rules of Civil Procedure provide that a minor may participate as a party in a civil action only through a general guardian, testamentary guardian, or guardian ad litem.
- Other statutes, however, provide that a guardian of the minor's estate appointed by the clerk or a guardian of the minor's person appointed in a juvenile case may sue or defend on the minor's behalf.
- Because few children have guardians of any kind, almost all children who are parties to civil actions in this state must appear and participate through court-appointed guardians ad litem.
- If a minor is the defendant or respondent in a civil action, effective service of process on the minor consists of service on both the minor, regardless of the minor's age, and another specified individual pursuant to Rule 4(j) of the Rules of Civil Procedure.

appeals has held, however, that the failure to even issue a summons when one is required deprives the court of subject matter jurisdiction, at least in a juvenile court proceeding, and an absence of subject matter jurisdiction may not be waived. *In re C.T. and R.S.*, ___ N.C. App. ___, 643 S.E.2d 23 (2007).

38. *See In re J.B.*, 172 N.C. App. 1, 616 S.E.2d 264 (2005), in which the court of appeals rejected the parent's argument that failure to serve the child was reversible error.

Specific Actions and Proceedings: The Minor as Respondent or Defendant

The Rules of Civil Procedure—including those discussed above relating to participation of and service of process on minor parties—apply to all civil actions unless a specific statute provides a different procedure.³⁹ A number of statutes that refer to minor parties do provide special procedures that supersede those in the Rules of Civil Procedure. Several others are less explicit but raise questions about whether the rules apply in every respect.

Juvenile Abuse, Neglect, and Dependency Proceedings

Participation

A juvenile court proceeding involving a child who is alleged to be abused, neglected, or dependent⁴⁰ is a civil action that focuses on the protection and welfare of the child. Only a county director of social services

39. G.S. 1A-1, Rule 1. *See also, e.g., In re L.O.K.*, 174 N.C. App. 426, 621 S.E.2d 236 (2005); *In re J.N.S.*, 165 N.C. App. 536, 598 S.E.2d 649 (2004).

40. These terms are defined in G.S. 7B-101(1), (15), and (9), respectively. An *abused juvenile* is one whose parent or other care provider inflicts or allows someone else to inflict a serious physical injury on the juvenile; creates or allows someone else to create a substantial risk of such an injury; uses or allows cruel or grossly inappropriate devices or procedures to modify the child's behavior; commits or permits a criminal sex offense against the child; creates or allows serious emotional damage to the child; or encourages, directs, or approves the juvenile's commission of delinquent acts that involve moral turpitude. A *neglected juvenile* is one who does not receive proper care from the juvenile's parent or other care provider, has been abandoned, is not provided necessary medical or remedial care, lives in an injurious environment, or has been placed illegally for care or adoption. A child is a *dependent juvenile* if (1) the child needs assistance or placement because he or she does not have a parent or other care provider responsible for the child's care or supervision or (2) the child's parent or other care provider is incapable of providing for the child's care or supervision and does not have an appropriate alternative child care arrangement.

may initiate the proceeding,⁴¹ and the child's parents, guardians, custodians, or caretakers are respondents. The litigation between these parties is about the child. If the court finds that the child has been harmed or is at risk of harm and needs services, the court may enter orders to protect the child, including orders that change custody of the child. Unlike the child in a private custody action between parents, however, the child in a juvenile proceeding is a party to the proceeding.⁴² Because the child clearly is not the petitioner, presumably he or she should be considered a respondent.

Since 1980 the Juvenile Code has required the court to appoint a guardian ad litem to represent a child who is alleged to be abused or neglected.⁴³ The original guardian ad litem statute required that the guardian ad litem be an attorney. Now, the guardian ad litem generally is a trained volunteer and, if the guardian ad litem is not an attorney, the court also must appoint an attorney advocate "to assure protection of the juvenile's legal rights."⁴⁴ The court also has discretion to appoint a guardian ad litem and attorney advocate for a juvenile who is alleged only to be dependent.⁴⁵

When a parent who is a respondent in an abuse, neglect, or dependency case is a minor, a guardian ad litem must be appointed for the minor parent pursuant to Rule 17 of the Rules of Civil Procedure, just as in any other civil action in which a minor

41. Usually the petition is signed by a social worker or social work supervisor acting as the director's authorized agent. *See* G.S. 7B-101(10), 7B-302(d), and 108A-14(b).

42. G.S. 7B-601(a). Only since 1999 has the Juvenile Code stated explicitly that the child is a party to these juvenile proceedings. S.L. 1999-432 added that provision to G.S. 7B-601(a), effective August 10, 1999. The legislation did not address the purpose or effects of stating that the child is a party, and it did not amend any other parts of the Juvenile Code to conform to or shed light on the change.

43. Chapter 815 of the 1979 Session Laws included this provision in the Juvenile Code that became effective January 1, 1980. In 1983 the General Assembly established the Office of Guardian ad Litem Services in the Administrative Office of the Courts and authorized establishment of the first eight local district programs. For a description of these early guardian ad litem services in North Carolina, see Virginia G. Weisz, *Advocating for Children: North Carolina's Guardian Ad Litem Program*, POPULAR GOV'T, Summer 1985, 16-19.

44. G.S. 7B-601.

45. *Id.*

party does not have a general or testamentary guardian.⁴⁶ The Juvenile Code says only slightly more than is said in Rule 17 about this guardian ad litem's role, but it does specifically authorize the guardian ad litem for a minor parent in a juvenile proceeding to

- help the parent enter appropriate consent orders;
- facilitate service of process on the parent;
- assure that necessary pleadings are filed; and
- assist the parent and the parent's attorney, if asked by the attorney, to "ensure that the parent's procedural due process requirements are met."⁴⁷

The role of a guardian ad litem appointed pursuant to G.S. 7B-601 for a child who is alleged to be an abused, neglected, or dependent juvenile is somewhat different from that of a guardian ad litem appointed pursuant to Rule 17. It also is described in substantially more detail. The services of most of the guardians ad litem and attorney advocates appointed for children in juvenile cases are provided through district programs that are part of the Office of Guardian ad Litem Services in the state Administrative Office of the Courts.⁴⁸ The Juvenile Code describes the role of the child's guardian ad litem, the attorney advocate, and the guardian ad litem program as follows:

46. G.S. 7B-602(b).

47. G.S. 7B-602(e). Every parent in an abuse, neglect, or dependency proceeding has a right to be represented by counsel and to appointed counsel if the parent is indigent. That right is in addition to any requirement that a guardian ad litem be appointed for a parent. It is not necessary that the guardian ad litem be an attorney, but the court usually does appoint an attorney because of the lack of other obvious, available candidates. G.S. 7B-602(c), which addresses the appointment of a guardian ad litem because a parent in a juvenile proceeding is incompetent or has diminished capacity rather than because the parent is a minor, states that one individual may not serve as both attorney and guardian ad litem for the parent. Although that restriction does not appear in G.S. 7B-602(b), which addresses guardians ad litem for minor parents, it is quite possible that the legislature intended for the restriction to apply in those cases as well.

48. The present statutory basis for the program is Article 12 of G.S. Chapter 7B (G.S. 7B-1200 through 7B-1204). The guardian ad litem program does not provide these services when doing so would create a conflict of interest.

- When a petition alleges that a juvenile is abused or neglected, the court must appoint a guardian ad litem "to represent the juvenile." When a petition alleges only dependency, the court may appoint a guardian ad litem "to represent the juvenile."
- If the court appoints a guardian ad litem who is not an attorney, the court must also appoint an attorney advocate "to assure protection of the juvenile's legal rights throughout the proceeding."
- The guardian ad litem and attorney advocate "have standing to represent the juvenile" in all actions under Subchapter I of the Juvenile Code in which they are appointed.
- The duties of the guardian ad litem program are to
 - investigate to determine the facts, the juvenile's needs, and resources available in the family and community to meet those needs;
 - when appropriate, facilitate the settlement of disputed issues;
 - offer evidence and examine witnesses at the adjudicatory hearing;
 - explore options with the court at the dispositional hearing;
 - conduct follow-up investigations to ensure that the court's orders are executed properly;
 - report to the court when the juvenile's needs are not being met; and
 - protect and promote the juvenile's best interests until the court formally relieves the program of responsibility.⁴⁹

No one is charged with these responsibilities on behalf of a child who is alleged only to be dependent if the court in its discretion does not appoint a

49. G.S. 7B-601. The appropriate distribution of roles and authority among the guardian ad litem, the attorney advocate, and the guardian ad litem program is not always clear, although that does not appear to generate much conflict. In 2006 the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act, responding in part to similar confusion and debate in many states about the roles of children's lawyers and guardians ad litem in civil actions. The act and other information about NCCUSL can be found at <http://www.nccusl.org/Update/>.

guardian ad litem for the child.⁵⁰ The potential impact of a juvenile court proceeding on a dependent juvenile is virtually identical to the impact on an abused or neglected juvenile,⁵¹ and a dependent juvenile has rights that most children are able to exercise only through an attorney or other authorized representative. For example, the juvenile has a right to demand that a hearing in juvenile court be open to the public⁵² and a right to appeal any final order in the case.⁵³ The statute acknowledges the difficulty a child would have in exercising the right to appeal by providing that if “an appeal is made” by a juvenile for whom no guardian ad litem has been appointed, the court must appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, for purposes of the appeal.⁵⁴ There is no provision, though, for assistance in assessing whether the juvenile has grounds for appeal or ensuring that proper notice of appeal is given.

Guardians ad litem and attorney advocates appointed for children in abuse, neglect, and dependency proceedings represent the juvenile until they are relieved by the court, the permanent plan for the juvenile is accomplished, or the court’s jurisdiction ends.⁵⁵

Service of Process

Even though juveniles are parties in juvenile court actions, provisions in various parts of the Juvenile Code for service of process on juveniles are not consistent.

In relation to abuse, neglect, and dependency cases, the code addresses

- persons for whom copies of the petition must be prepared,

50. See G.S. 7B-601(a).

51. See G.S. 7B-903 (“Dispositional alternatives for abused, neglected, or dependent juvenile.”).

52. G.S. 7B-801(b).

53. G.S. 7B-1002. In addition, the court is precluded from entering a consent order if the juvenile is not present and represented by counsel. G.S. 7B-902.

54. G.S. 7B-1002. This provision would be unnecessary if the legislature had intended to require the appointment of a Rule 17 guardian ad litem earlier in the proceeding for a dependent juvenile for whom the court does not appoint a guardian ad litem pursuant to G.S. 7B-601.

55. The court may terminate its jurisdiction at any time by court order. The court’s jurisdiction ends automatically when the child reaches age eighteen or is married or otherwise emancipated. See G.S. 7B-201.

- persons to whom summonses must be issued, and
- persons on whom summonses must be served.

The petitioner—the county director of social services—must prepare enough copies of the petition so that copies are “available” to each of the child’s parents if they are living separately; any guardian, custodian, or caretaker of the child; the guardian ad litem; the social worker; and anyone the court determines to be a necessary party.⁵⁶ Whenever an abuse, neglect, or dependency petition is filed, the clerk of superior court must issue a summons to, and the summons must be served on, the child’s parent, guardian, custodian, or caretaker.⁵⁷ If the petition alleges abuse or neglect, as soon as it is filed the clerk must “provide a copy” of the petition and any notices of hearings to the local guardian ad litem office.⁵⁸ It appears, then, that the child and his or her guardian ad litem, when there is one, are entitled to copies of the petition, but that it is not necessary that a summons be issued to or served on them.

Summary

The Juvenile Code includes specific provisions relating to appointment of guardians ad litem and issuance and service of summonses in abuse, neglect, and dependency proceedings. To the extent that those provisions differ from the Rules of Civil Procedure, the Juvenile Code controls. The effect is that

- guardians ad litem and attorney advocates (except when the guardian ad litem is an attorney) always will be appointed for children who are alleged to be abused or neglected. Whether a guardian ad litem is appointed for a child who is alleged only to be dependent is in the court’s discretion.
- if the petition alleges abuse or neglect the clerk automatically will provide a copy of the petition and any notices of hearing to the guardian ad litem program. Presumably the clerk also would do so when the court appoints a guardian ad litem and attorney advocate for a child in a dependency-only proceeding.
- apparently it is not necessary that a summons be issued to the child or the

56. G.S. 7B-402.

57. G.S. 7B-406(a) and G.S. 7B-407.

58. G.S. 7B-408.

child's guardian ad litem, and formal service of process on them is not required.

- only the juvenile's parent, guardian, custodian, or caretaker must be served pursuant to G.S. 1A-1, Rule 4(j), with a summons and a copy of the petition.

Termination of Parental Rights Proceedings

Participation

A proceeding in juvenile court to terminate a parent's rights involves two stages. In the first, the court determines whether one or more statutory grounds for termination exist.⁵⁹ In the second, if the court has found one or more grounds, the court determines whether termination of the parent's rights is in the child's best interest. The court is never required to terminate parental rights just because a ground exists.

Both the parent and the child have substantial rights at stake in a termination proceeding. An order terminating a parent's rights renders the parent and child legal strangers and makes the child eligible for adoption without that parent's consent. For that reason, an indigent parent has a right to appointed counsel at state expense.⁶⁰ If the parent is a minor, the court also must appoint a guardian ad litem for the minor parent pursuant to Rule 17 of the Rules of Civil Procedure.⁶¹

59. The grounds for terminating a parent's rights are listed in G.S. 7B-1111(a). The person or agency bringing the proceeding has the burden of proving at least one ground by clear and convincing evidence. G.S. 7B-1111(b).

60. G.S. 7B-1101.1(a). The North Carolina General Assembly has provided a broader right to counsel than is constitutionally required. In *Lassiter v. Department of Social Services of Durham*, 452 U.S. 18, 101 S. Ct. 2153, 68 L.Ed.2d 640 (1981), the U.S. Supreme Court held that whether due process requires the appointment of counsel for an indigent parent in a termination of parental rights proceeding must be determined on a case-by-case basis.

61. G.S. 7B-1101.1(b). The statute authorizes the guardian ad litem to help the minor parent enter consent orders when appropriate; facilitate service of process on the parent; assure that necessary pleadings are filed; and, if asked by the parent's attorney, assist the parent and the attorney to ensure that procedural due process requirements are met. Similar provisions apply with respect to a parent when the court has a

When the child in a termination of parental rights proceeding has been the subject of a juvenile abuse, neglect, or dependency proceeding, any guardian ad litem or attorney advocate appointed for the child in that proceeding who has not been relieved by the court is required to continue representing the child through the termination proceeding unless the court orders otherwise.⁶² If the child does not already have a guardian ad litem, the court may appoint a guardian ad litem to represent the child's best interest in any termination proceeding. The court is required to do so, however, only if the parent contests the action.⁶³ Failure to appoint a guardian ad litem for the child when the statute requires one is reversible error, and a parent may raise that issue on appeal even if he or she did not object at trial.⁶⁴ If the guardian ad litem is not an attorney, the court also must appoint an attorney advocate to protect the child's legal rights.

In termination of parental rights cases, the local guardian ad litem program provides guardian ad litem and attorney advocate services for the child when the child has been the subject of an abuse, neglect, or

reasonable basis to believe the parent is incompetent or has diminished capacity and is unable to act in his or her own interest. G.S. 7B-1101.1(c) and (e).

62. G.S. 7B-1108(d).

63. G.S. 7B-1108(b). If the child's guardian ad litem initiates the termination proceeding, the court is not required to appoint another guardian ad litem for the child even if the action is contested. Before July 1990, North Carolina courts had held on several occasions that Rule 17 of the Rules of Civil Procedure required appointment of a guardian ad litem for the child in every termination of parental rights case despite the more limited provisions in the Juvenile Code about when such appointments were required. *See In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981); *In the Matter of Baby Boy Scarce*, 81 N.C. App. 531, 345 S.E.2d 404, *review denied*, 318 N.C. 415, 349 S.E.2d 589 (1986); *In re Barnes*, 97 N.C. App. 325, 388 S.E.2d 237 (1990). The legislature negated those holdings by amending former G.S. 7A-289.29 (now G.S. 7B-1108) to state explicitly that appointment of a guardian ad litem for the child is not required unless an answer is filed denying material allegations. 1989 N.C. SESS. LAWS ch. 851. (*Barnes* was decided in February 1990; the legislation amending the statute was enacted July 6, 1990, which was during the 1989 Session of the General Assembly.) That provision has not been changed.

64. *See In re R.A.H.*, 171 N.C. App. 427, 614 S.E.2d 382 (2005); *In re J.L.S.*, 168 N.C. App. 721, 608 S.E.2d 823 (2005); *In re Fuller*, 144 N.C. App. 620, 548 S.E.2d 569 (2001).

dependency petition. In other cases, such as those in which one parent seeks to terminate the rights of the other parent, the court may appoint a guardian ad litem trained through that program only if the local program, for good cause, consents to the appointment. Otherwise, in a contested case that was not preceded by an abuse, neglect, or dependency proceeding, the court must appoint some other individual as the child's guardian ad litem. As a practical matter, the court is likely to appoint an attorney.

A proceeding in juvenile court to terminate a parent's rights may be initiated in two ways: (1) by motion in a pending abuse, neglect, or dependency proceeding or (2) by petition.⁶⁵ Regardless of which way the proceeding is initiated, any guardian ad litem and attorney advocate appointed for the child in a pending abuse, neglect, or dependency case must continue representing the child in the termination proceeding unless he or she has been relieved or the court orders otherwise.⁶⁶ When the action is started by a motion, the same is true with respect to an attorney who was appointed to represent a parent or a guardian ad litem who was appointed for a minor or incompetent parent in the pending case.⁶⁷ When the action is initiated by petition, however, any attorney or guardian ad litem appointed previously for a minor parent continues to represent the parent only if appointed again by the court.⁶⁸

The role of a guardian ad litem or attorney advocate appointed for a child in a termination of parental rights proceeding is governed by G.S. 7B-601, the same statute that prescribes the duties of the child's guardian ad litem, the attorney advocate, and the guardian ad litem program in an abuse, neglect, or dependency case.

Service of Process

The service of process requirements for a termination of parental rights proceeding depend on whether the action is initiated by motion or by petition. A motion must be served with a notice, and a petition, because it begins a new action, must be served with a summons. The contents of the summons and the notice are prescribed by statute and are very similar.⁶⁹

65. G.S. 7B-1102. See also G.S. 7B-1103, which specifies who has standing to file a motion or petition for termination of parental rights.

66. G.S. 7B-1108(d).

67. See G.S. 7B-1106.1(b)(3).

68. G.S. 7B-1106(b)(4).

69. See G.S. 7B-1106(b) and 7B-1106.1(b). The summons and notice differ primarily in that a

When a petition initiates the case, a summons must be issued to and served with the petition on all the following respondents who are not the petitioner:

- The juvenile's parents
- Any court-appointed custodian or guardian of the person of the juvenile
- Any county department of social services or licensed child-placing agency to which a court has given placement responsibility for the child or to which one parent has relinquished the child for adoption
- The juvenile, regardless of the juvenile's age⁷⁰

If a guardian ad litem has been appointed for the juvenile, service on the minor of the summons, petition, and any other document directed to the juvenile is accomplished by service on the juvenile's guardian ad litem. When no guardian ad litem has been appointed for the juvenile, the general rules for service of process on a minor party pursuant to Rule 4(j) apply. That is, there must be service on the juvenile himself or herself, although that may consist of leaving the documents at the juvenile's home with a person of suitable age and discretion who lives there. In addition, there must be service on (1) a parent or guardian who has custody of the minor; or (2) if there is no such person, on someone else who has care and control of the minor; or (3) if there is no such person, on a guardian ad litem appointed for the minor pursuant to Rule 17 of the Rules of Civil Procedure.⁷¹ As in any case in which service pursuant to Rule 4 is required, a lack of service or a defect in service or process is waived if a party participates in the proceeding without making a timely objection.⁷²

summons states that a new action has been filed and that an attorney appointed for the parent in another proceeding is not involved in the termination proceeding unless appointed again by the court, while a notice states in effect that termination of parental rights is being sought in a pending case and that any attorney appointed previously for the parent in that case continues to represent the parent unless the court orders otherwise.

70. G.S. 7B-1106(a). Before January 1, 2002, the statute required that the juvenile be named as a respondent and served with the petition and summons only if the juvenile was twelve years of age or older when the petition was filed. See S.L. 2001-208, sec. 28.

71. G.S. 1A-1, Rule 4(j)(2)a.

72. See *supra* note 37.

When a proceeding to terminate parental rights is initiated by motion, a notice must be issued to and served with the motion on all the same parties who must be served with a summons (except someone who is the movant). The requirements for service on the minor, however, are somewhat different. Like a petition and summons, the motion and notice must be served on the juvenile's guardian ad litem if one has been appointed in the underlying abuse, neglect, or dependency proceeding and the court has not relieved that person of responsibility. However, regardless of whether a guardian ad litem has been appointed for the juvenile, the notice and motion must be served on the juvenile if the juvenile is twelve years of age or older when the motion is filed.⁷³ This means that when the termination is initiated by motion,

- if the juvenile has a guardian ad litem and is twelve or older, both the guardian ad litem and the juvenile must be served.
- if the juvenile has a guardian ad litem and is younger than twelve, only the guardian ad litem must be served.
- if the juvenile does not have a guardian ad litem and is twelve or older, the juvenile must be served.
- if the juvenile does not have a guardian ad litem and is younger than twelve, no service of process with respect to the juvenile is required.

Service of the motion and notice must be pursuant to Rule 4(j), just like service of a petition and summons, any time

1. the person to be served was not served with a summons in the underlying action; or
2. the person to be served was served by publication in the underlying action, and the published notice did not state that the parent's rights could be terminated in the proceeding; or
3. the underlying abuse, neglect, or dependency proceeding was initiated more than two years ago; or
4. the court, for any reason, orders that service of the motion and notice be in accordance with Rule 4(j).⁷⁴

If, as stated above, it is not necessary that a summons be issued to or served on the child in the underlying abuse, neglect, or dependency action, it would appear that service of a motion and notice on

the child in a termination of parental rights case would almost always have to be pursuant to Rule 4. When the child has a guardian ad litem in the termination case, however, it is likely that the guardian ad litem would accept or waive service of process on the child's behalf even when service was not made pursuant to Rule 4.

These circumstances in which service pursuant to Rule 4 is required comprise exceptions to the general rule that the motion and notice may be served by the less formal methods set out in G.S. 1A-1, Rule 5. Service on a party pursuant to Rule 5 may be accomplished by serving the party, or the party's attorney of record unless the court orders that the party be served,

1. by delivering a copy of the document to be served to the party. For purposes of this provision, *delivering* means
 - a. handing it to the attorney or to the party,
 - b. leaving it at the attorney's office with a partner or employee, or
 - c. sending it to the attorney's office by confirmed telefacsimile transmittal;
2. by mailing it to the party at the party's last known address; or
3. if no address is known, by filing it with the clerk of court.⁷⁵

A party also may accept service or waive service. Regardless of the method used, for each person served, a return or certificate of service must be filed showing the date and method of service.

When the child in a termination proceeding is represented by a guardian ad litem appointed pursuant to G.S. 7B-601 and service under Rule 5 is permissible, the motion and notice must be served on the child's guardian ad litem by one of the methods listed above. Regardless of whether the child has a guardian ad litem, if the child is twelve or older when the motion for termination of parental rights is filed, the child himself or herself must be served with the motion and notice. When the child has an attorney or attorney advocate, service on the child may consist of delivery of the papers to that attorney. In other cases, apparently, it would consist of delivering or mailing them to the child.

73. G.S. 7B-1106.1(a).

74. G.S. 7B-1102(b).

75. Even when service pursuant to Rule 5 is permissible, a party may elect to use the more rigorous method set out in Rule 4(j).

Summary

An action to terminate a parent's rights may be a new action, initiated by the filing of a petition, or it may be a continuation of a pending abuse, neglect, or dependency case, initiated by the filing of a motion. The rules for the appointment of a guardian ad litem for the child and service of process on the child depend to some extent on which way the case begins.

- Regardless of how a proceeding to terminate parental rights is initiated, if the juvenile has a guardian ad litem in a pending abuse, neglect, or dependency case, that guardian ad litem continues to represent the juvenile in the termination case unless the court orders otherwise.
- If the juvenile does not already have a guardian ad litem, the court is required to appoint one only when a parent files an answer or response denying material allegations in the petition or motion.⁷⁶ The court always has discretion to appoint a guardian ad litem for the juvenile.
- When the action is initiated by petition, service of process on the juvenile pursuant to Rule 4(j) is mandatory, unless waived. If the juvenile has a guardian ad litem, however, service on the juvenile consists of service on the juvenile's guardian ad litem.
- When the action is brought as a motion in the cause of a pending abuse, neglect, or dependency case, (1) if the juvenile has a guardian ad litem appointed in the pending case, that person must be served; (2) regardless of whether there is service on a guardian ad litem, if the child is twelve or older, service on the juvenile is required; and (3) in some circumstances service must be in accordance with Rule 4(j), and in others service pursuant to Rule 5 is allowed.

Delinquency Proceedings

A delinquent juvenile is an unemancipated minor who, while at least six years of age and not yet sixteen years of age, commits an act that would be a crime or infraction if committed by an adult.⁷⁷ Delinquency cases are civil proceedings⁷⁸ in juvenile

(district) court, although juveniles in these cases have most of the same rights that an adult criminal defendant would have.⁷⁹

Participation

When a petition is filed alleging that a juvenile is delinquent, the juvenile respondent⁸⁰ is automatically entitled to appointed counsel at state expense unless someone has retained counsel for the juvenile.⁸¹ Given the civil nature of delinquency proceedings and the fact that the Juvenile Code includes no provision to the contrary, Rule 17 of the Rules of Civil Procedure would appear to require the appointment of a guardian ad litem for the juvenile. The law, however, has not been interpreted or applied to require that one be appointed.

The juvenile's attorney might request appointment of a guardian ad litem if the attorney believed the juvenile had diminished capacity to the extent that the juvenile could not "make adequately

proceedings under the Juvenile Code are governed by the Rules of Civil Procedure," citing *In re Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)); *In re Allison*, 143 N.C. App. 586, 547 S.E.2d 169 (2001).

79. See G.S. 7B-2405. A number of minors actually are criminal defendants, subject to the same procedures and punishments that apply to adult defendants. Unlike most states, North Carolina prosecutes young people as adults for offenses they commit after they reach age sixteen or after they marry or are otherwise emancipated. G.S. 7B-1604(a). In addition, the juvenile court can transfer to superior (adult criminal) court the case of a juvenile as young as thirteen if the court finds probable cause to believe the juvenile committed a felony. The court must transfer the case if the felony is first-degree murder. G.S. 7B-2200. Once a juvenile is convicted in superior court, he or she is prosecuted as an adult for any offense committed after that conviction. G.S. 7B-1604(b).

80. Delinquency proceedings are addressed in Subchapter II of G.S. Chapter 7B. The statutes relating to delinquency do not use the term *respondent*, but instead refer to the juvenile as *the juvenile*, *a juvenile in custody*, *a juvenile who has been adjudicated delinquent*, and similar terms.

The juvenile's parents also are parties to the delinquency proceeding, usually as respondents, although a parent could be the petitioner. See G.S. 7B-1501(20) and 7B-1600(c).

81. Juveniles are conclusively presumed to be indigent and may not waive the right to be represented. G.S. 7B-2000 and 7B-2405(6).

76. G.S. 7B-1108(c).

77. G.S. 7B-1501(7).

78. See, e.g., *In re D.S.B.*, ___ N.C. App. ___, 634 S.E.2d 633, 634 (2006) ("[D]elinquency

considered decisions” or “adequately act in [the juvenile’s] own interest.”⁸² However, an attorney in that circumstance would be more likely to involve the juvenile’s parent or guardian or to ask the court to determine that the juvenile client lacked the capacity to proceed in the delinquency matter.⁸³

A rarely used section of the Juvenile Code authorizes the court to appoint a guardian of the person for the juvenile in a delinquency case if (1) no parent, guardian, or custodian appears in court with the juvenile or (2) the court finds that appointment of a guardian would be in the juvenile’s best interest.⁸⁴ The authority and responsibilities of this type of guardian are similar to those of a parent or legal custodian, not a guardian ad litem, although a guardian appointed pursuant to this provision “may represent the juvenile in legal actions before any court.”⁸⁵

Service of Process

A delinquency petition and a summons must be served personally on the juvenile and the juvenile’s parent, guardian, or custodian.⁸⁶ Thus, unlike other civil process, service on a juvenile who is alleged to be delinquent may not be effected by leaving the documents at the juvenile’s home with a person of suitable age and discretion who lives there. The juvenile as well as a parent, guardian, or custodian may waive the sufficiency of service or process by participating in the proceeding without making a timely objection.⁸⁷

82. North Carolina Revised Rules of Professional Conduct, Rule 1.14.

83. *Id.*; G.S. 7B-2401.

84. G.S. 7B-2001.

85. *Id.*

86. G.S. 7B-1806. If the parent, guardian, or custodian cannot be found, the court may authorize service on that person, but not on the juvenile, by mail or publication.

87. G.S. 1A-1, Rule 12(h). *See also In re D.S.B.*, ___ N.C. App. ___, 634 S.E.2d 633, 634 (2006) (“Neither Juvenile nor his counsel contested service of process or personal jurisdiction at any of the numerous hearings they participated in, and his participation in the hearings without objection constituted a general appearance for purposes of waiving any defect in service.”); *In re Hodge*, 153 N.C. App. 102, 106, 568 S.E.2d 878, 880, *disc. rev. denied*, 356 N.C. 613, 574 S.E.2d 681 (2002) (“[R]espondent’s and his parents’ presence in the courtroom during the hearing on the simple assault

For purposes of delinquency proceedings, the legislature has incorporated into the Juvenile Code some of the requirements that apply to criminal process.⁸⁸ Not all of the incorporated provisions convert well to the juvenile context, but they relate primarily to the duties of the clerk and the law enforcement officer serving process. They provide, among other things, that

1. The clerk must maintain a record of all process issued in a juvenile case.
2. A copy of the process must be delivered to the person served.
3. If the summons is not served within thirty days, the officer must note on it the reason it was not served and return it to the clerk in the county in which it was issued. However, failure to return the process to the clerk as required invalidates neither the process nor service made after the thirty-day period.
4. The clerk may reissue a summons that is returned unserved, for further attempts at service, after changing any date specified for a court appearance if appropriate.
5. The clerk may make a certified copy of any process when the original process has been lost or returned unserved, and the copy may be served as effectively as the original.
6. Upon the request of a juvenile (or the juvenile’s attorney), the clerk must make and furnish to the juvenile without charge one copy of every juvenile process filed against the juvenile.

Summary

A delinquency proceeding is a civil action in district (juvenile) court. It involves conduct that would be a crime if the juvenile were an adult, and a juvenile who is adjudicated delinquent may be deprived of his or her liberty. For those reasons, these actions have some characteristics in common with criminal court proceedings and do not follow some of the rules that generally apply to minor parties in civil actions.

petition, respondent’s denial of the allegations contained in [the] petition, and his participation in the hearing on [the] petition without objection constitute a general appearance for purposes of waiving any defect in service.”).

88. G.S. 7B-1806 states that G.S. 15A-301(a), (c), (d), and (e), relating to criminal process, apply to juvenile process when a child is alleged to be delinquent or undisciplined.

- In every delinquency proceeding the juvenile who is alleged to be delinquent will be represented by counsel. Appointment of a guardian ad litem for a juvenile in a delinquency case occurs rarely if ever.
- The juvenile must be served personally with a summons and a copy of the petition. Other service methods allowed by G.S. 1A-1, Rule 4(j), are not sufficient.
- The juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.
- A juvenile or other party waives any insufficiency of service or process when the party participates in the proceeding without making a timely objection.

Undisciplined Juvenile Proceedings

An undisciplined juvenile is an unemancipated minor who, while at least six years of age and not yet eighteen years of age (1) is regularly disobedient to and beyond the disciplinary control of the juvenile's parent, guardian, or custodian; (2) is found regularly in places it is unlawful for a minor to be; (3) runs away from home for longer than twenty-four hours; or (4) is under age sixteen and is unlawfully absent from school.⁸⁹

Participation

A juvenile who is alleged to be undisciplined has a right to be represented by counsel at the juvenile's or another person's expense but is not entitled to court-appointed counsel.⁹⁰ In 1972 the North Carolina Supreme Court held under a former version of the Juvenile Code that neither the statute nor the Due Process Clause of the Constitution mandated that counsel be appointed for a juvenile at the initial stage of a proceeding in which the juvenile was alleged to be undisciplined.⁹¹ The court relied primarily on the

fact that the proceeding was not criminal and could not result at that stage in the juvenile's commitment to an institution in which the juvenile's freedom would be curtailed. Then Chief Justice Bobbitt dissented, stating, "Here a fourteen-year-old girl was brought before the juvenile court upon the complaint of her mother. Absent counsel, she stood alone before the court. . . . [I]t is my opinion that due process required that counsel be assigned to represent her at any hearing which might result in an adjudication prejudicial to her."⁹²

The appellate courts appear to have revisited the issue only once. In 2005, in an unpublished opinion, the court of appeals relied on the Supreme Court's 1972 holding and rejected an undisciplined juvenile's contention that her due process rights were violated because the trial court heard the undisciplined petition without her having counsel present.⁹³ The potential consequences to a juvenile of being adjudicated undisciplined are less severe under current law than they were in 1972. Under the Juvenile Code in effect at that time, an undisciplined juvenile could be placed on probation and later adjudicated delinquent and committed to an institution on the basis of a violation of probation. Now, an undisciplined juvenile may be placed on protective supervision for a maximum period of six months. A violation of the terms of protective supervision does not result in an adjudication of delinquency, but it may result in a finding of contempt and a short period of detention.⁹⁴ Although the statute does not require appointment of counsel earlier in the case, it does require that counsel be appointed for an undisciplined juvenile who is alleged to be in contempt.⁹⁵

Given the civil nature of the proceeding and the fact that the Juvenile Code includes no provision to the contrary, one might expect that Rule 17 of the Rules of Civil Procedure would require a juvenile alleged to be undisciplined to participate in the proceeding through a court-appointed guardian ad litem. That expectation might be even higher than in a delinquency case, both because the juvenile does

89. G.S. 7B-1501(27). Proceedings relating to undisciplined juveniles are addressed in Subchapter II of G.S. Chapter 7B. As in the case of a delinquent juvenile, these statutes do not use the term *respondent*. Instead, they refer to the juvenile as *the juvenile*, *a juvenile who has been adjudicated undisciplined*, and similar terms.

90. G.S. 7B-2000.

91. *In re Walker*, 282 N.C. 28, 191 S.E.2d 702 (1972).

92. 282 N.C. 28, 44, 191 S.E.2d 702, 712.

93. *In re B.A.T.*, 174 N.C. App. 365, 620 S.E.2d 735 (2005) (Table), *cert. denied*, 360 N.C. 480, 630 S.E.2d 923 (2006).

94. The maximum period of detention for a first finding of contempt is twenty-four hours; for a second finding, three days; and for a third finding, five days—with a maximum of fourteen days for any twelve-month period. G.S. 7B-2505.

95. G.S. 7B-2000.

not have the right to appointed counsel and because the parent who ordinarily would be expected to guard the juvenile's rights often is the person who initiated the proceeding. As in delinquency cases, however, the law has not been interpreted or applied to require appointment of a guardian ad litem for a juvenile who is alleged to be undisciplined.

Most likely, because the Juvenile Code sets out other procedures for cases involving delinquent and undisciplined juveniles and addresses the appointment of guardians ad litem expressly with regard to some juvenile cases, its silence with respect to guardians ad litem for delinquent and undisciplined juveniles is assumed to supersede the requirements of Rule 17. That, however, seems to directly contradict this statement in G.S. 1A-1, Rule 1: "These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute."

Service of Process

The Juvenile Code provisions for service of process in delinquency cases, described above, also apply to cases in which a juvenile is alleged to be undisciplined. A minor who is alleged in a juvenile proceeding to be an undisciplined juvenile must be served personally with the petition and a summons, and the juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.⁹⁶

Summary

A proceeding in which a juvenile is alleged to be undisciplined is a civil action in district (juvenile) court. It involves conduct that is not criminal and that is legally significant only because the juvenile is a minor. Although the consequences may be serious for the minor, he or she is guaranteed neither an attorney nor a guardian ad litem.

- A juvenile who is alleged to be undisciplined is not entitled to court-appointed counsel. Counsel must be appointed, however, for a juvenile who has been alleged or adjudicated to be undisciplined and is alleged to be in contempt.
- The Juvenile Code does not require appointment of a guardian ad litem for a

juvenile alleged to be undisciplined, and although Rule 17 of the Rules of Civil Procedure appears to require appointment of a guardian ad litem, that has not been the practice in the state's juvenile courts.

- The juvenile must be served personally with a summons and copy of the petition.
- The juvenile's parent, guardian, or custodian also must be served personally unless the court authorizes service by mail or publication.
- A juvenile or other party waives any insufficiency of service or process when the party participates in the proceeding without making a timely objection.

Parental Control Actions

Under G.S. 7B-3404 a child's parent, guardian, or custodian, or a person who has assumed the status and obligations of a parent without having legal custody of the child, may file a civil action in district court against a minor defendant to enforce that adult's parental or custodial authority over the minor.⁹⁷ If the verified complaint alleges that the juvenile has left home and refuses to return and comply with the responsible adult's direction or control, the court may issue an ex parte order directing the juvenile to appear before the court, ordering the juvenile to comply with further court orders, and authorizing the sheriff to enter a home or other

97. G.S. 7B-3404. The statute provides that any defendant's failure to comply with the court's order in such an action is punishable "as for contempt." In 1998 the North Carolina Court of Appeals held that the contempt remedy—committing the minor defendant to detention for willfully violating the court's order—was available only for minor defendants who were sixteen or seventeen years of age, because the Juvenile Code provided the exclusive procedures applicable to undisciplined behavior by children younger than sixteen. *Taylor v. Robinson*, 131 N.C. App. 337, 508 S.E.2d 289 (1998). Enactment of the current Juvenile Code, G.S. Chapter 7B, effective July 1, 1999, cast doubt on the continued validity of that holding by (1) incorporating the provisions for a civil action to enforce parental authority as part (Article 34) of the Juvenile Code and (2) expanding the definition of *undisciplined juvenile* to include sixteen- and seventeen-year-olds rather than just minors younger than sixteen.

96. G.S. 7B-1806.

location to look for the juvenile, serve the order, or take custody of the juvenile.

Participation

The statute is silent regarding representation of the minor or appointment of a guardian ad litem. It does state that “the juvenile, or anyone acting in the juvenile’s behalf,” may file an answer to the complaint.⁹⁸

That language might suggest that the juvenile may participate in the action on his or her own. On the other hand, the statute creates a civil action and does not prescribe a procedure that explicitly contradicts or supersedes Rule 17 of the Rules of Civil Procedure. Therefore, the better assumption is that Rule 17 requires that the juvenile participate in the case through a general or testamentary guardian or a court-appointed guardian ad litem.

Service of Process

The statute’s only reference to service of process is a requirement that any ex parte order the court issues when the action is filed “be served by the sheriff upon the juvenile.” Because the statute does not provide different procedures, the general rules set out in the Rules of Civil Procedure should be followed with respect to process and services of process—the complaint and summons should be served on the juvenile and on a custodial parent or guardian, another person who has custody and control of the juvenile, or, if there is no such person, on a guardian ad litem appointed pursuant to Rule 17. The fact that the plaintiff usually is a custodial parent or guardian or another person entitled to exercise care and control of the juvenile reinforces the notion that a guardian ad litem should be appointed for the juvenile pursuant to G.S. 1A-1, Rule 17.

Legitimation Proceedings

Two statutes provide judicial procedures through which a putative father can seek to legitimate his child. One applies when the mother was unmarried when the child was born.⁹⁹ The other, a more recent statute, applies when someone other than the petitioner is legally presumed to be the child’s father

because of his marriage to the child’s mother.¹⁰⁰ The child is a necessary party in every legitimation proceeding.

Participation

Only the newer legitimation statute, for cases in which there is a presumptive father, includes an explicit requirement that a guardian ad litem be appointed to represent the child if the child is a minor. The same requirement applies in proceedings under the older statute, at least when the child does not have a general or testamentary guardian. In a case decided in 1985, the North Carolina Supreme Court said, “We also note that G.S. 49-10 provides that the child is a necessary party to the proceeding. Rule 17 of the North Carolina Rules of Civil Procedure requires that a minor defend only by general or testamentary guardian or by guardian ad litem. Rule 17 also gives the court authority to appoint a guardian ad litem for the minor notwithstanding the existence of a general or testamentary guardian”¹⁰¹

Service of Process

Because the statute is silent about service of process on the child in a legitimation proceeding, service is pursuant to G.S. 1A-1, Rule 4(j), as in other civil actions.

Note on Paternity Actions

Only a putative father may initiate a legitimation proceeding, which is a special proceeding before the clerk of superior court. A civil district court action to establish paternity, on the other hand, may be brought by the mother, the father, the child, the personal representative of the mother or child, or, in some circumstances, the director of the county department of social services.¹⁰² The effect of a determination of paternity in a civil action is almost indistinguishable from that of a legitimation.¹⁰³ Nevertheless, although the child may initiate a civil paternity action, the

100. G.S. 49-12.1. The presumed father is a necessary party to the proceeding.

101. In the Matter of the Legitimation of Locklear, 314 N.C. 412, 421, 334 S.E.2d 46, 52 (1985).

102. G.S. 49-16.

103. See G.S. 49-11 and 49-15. See also Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004).

98. G.S. 7B-3404.

99. G.S. 49-10.

child is not a necessary party when the action is initiated by someone else.¹⁰⁴

Summary

In any legitimization proceeding,

- the child must be named as a respondent.
- the child must be served as required by the generally applicable provisions of G.S. 1A-1, Rule 4(j).
- if the proceeding is brought under G.S. 49-12.1, the court must appoint a guardian ad litem for the child pursuant to G.S. 1A-1, Rule 17.
- if the proceeding is brought under G.S. 49-10, the court must appoint a guardian ad litem for the child pursuant to G.S. 1A-1, Rule 17, unless the child has a general or testamentary guardian, and in that circumstance the court has the option of appointing a guardian ad litem for the child.

Specific Actions and Proceedings: The Minor as Petitioner or Plaintiff

Some statutes specifically authorize minors to initiate civil court actions. The general rules governing participation and service of process discussed above apply when the statute does not prescribe another procedure. The general rules apply, for example, in

- civil actions to establish paternity,¹⁰⁵
- civil actions for child support, and¹⁰⁶
- special proceedings to change the child's name.¹⁰⁷

104. *Smith v. Bumgarner*, 115 N.C. App. 149, 443 S.E.2d 744 (1994) ("If the legislature had intended to require the child to be joined as a necessary party in an action under G.S. § 49-14, then it would have specifically stated such, as it did in G.S. § 49-10.").

105. *See* G.S. 49-14 through 49-16. The last section also authorizes "the personal representative of the . . . child" to bring the action.

106. G.S. 50-13.4(a) states that "a minor child by his guardian may institute an action" for the child's support.

107. G.S. 101-2 describes when an application to change a child's name may be filed by the child's parent, guardian, or guardian ad litem.

Other statutes carve substantial exceptions into the general rules governing how minor parties participate in civil litigation that they initiate.

Emancipation

A minor who is sixteen or seventeen years of age may petition the court in a juvenile proceeding for a decree of emancipation.¹⁰⁸ The minor is not entitled to court-appointed counsel, and the Juvenile Code is silent with respect to the need for a guardian ad litem to be appointed for the minor.

Although the legislature might have reasoned that a minor seeking emancipation should be expected to participate in the proceeding as if he or she were already emancipated, there is no indication in the statute that the provisions of G.S. 1A-1, Rule 17, do not apply. In addition, the statute provides that "as of entry of the final decree of emancipation," the minor "has the same right to . . . sue and to be sued . . . as if the petitioner were an adult."¹⁰⁹ Therefore, until entry of a final decree, the better assumption is that even in an emancipation proceeding the minor should participate through a general or testamentary guardian or a guardian ad litem appointed pursuant to Rule 17.

Waiver of Parental Consent to Minor's Abortion

A minor female who is pregnant may petition the court in a confidential juvenile proceeding for an order allowing her to obtain an abortion without parental consent.¹¹⁰ Specific provisions in the statute clearly supersede the requirements in G.S. 1A-1, Rule 17. The minor petitioner, regardless of her age, may choose whether to participate in the proceeding by herself or through a guardian ad litem.¹¹¹ In addition, she has a right to appointed counsel without regard to her financial means, but she is not required

108. G.S. 7B-3500 through 7B-3509.

109. G.S. 7B-3507.

110. *See* G.S. 90-21.6 through 90-21.10. The minor in effect seeks an order emancipating her for the sole purpose of consenting to an abortion.

111. G.S. 90-21.8(b). The court is required to "ensure that the minor or her guardian ad litem is given assistance in preparing and filing the petition."

to be represented by counsel.¹¹² No one other than the minor petitioner is a necessary party to the proceeding, and she has a right to require that her parents, guardian, or custodian not be notified of the proceeding.

Marriage

In North Carolina, the county register of deeds may issue a marriage license to an unemancipated minor who is fourteen or fifteen years of age only if the minor has obtained a court order authorizing him or her to marry.¹¹³ The minor may obtain such an order only if the couple seeking to marry are the parents of a child, whether the child has been born or is in utero. A fourteen- or fifteen-year-old female who wants to marry the father of her child (whether born or unborn), or a fourteen- or fifteen-year-old male who wants to marry the mother of his child (whether born or unborn), may file a civil action in district court seeking judicial authorization to marry.¹¹⁴ The minor plaintiff may be represented by counsel but is not entitled to court-appointed counsel.¹¹⁵ The minor is responsible for paying the filing fees for a civil action and for ensuring that the complaint and summons are served on his or her parents, the person the minor wants to marry, and any other necessary parties.

In an interesting and unique mix of provisions, the statute (1) specifically authorizes the minor to participate in the court action on his or her own behalf; (2) requires the court to appoint a guardian ad litem for the minor pursuant to G.S. 1A-1, Rule 17; (3) requires that the guardian ad litem be an attorney; (4) makes clear that the guardian ad litem's role is to represent the minor's best interest, not the minor's wishes; (5) describes the guardian ad litem's authority and responsibility in terms similar to those of a guardian ad litem appointed for a child in an abuse or neglect proceeding; and (6) requires the minor petitioner to serve a copy of the complaint on

the attorney the court appoints as the minor's guardian ad litem.¹¹⁶

Proceeding for Approval of a Minor's Contract

Article 2 of Chapter 48A of the General Statutes establishes a procedure for obtaining court approval of certain contracts entered into by unemancipated minors. After approval of the contract by the superior court, the minor cannot disaffirm the contract on the basis of his or her minority if the contract is valid in other respects. Any party to the contract may initiate the action in superior court. For purposes of this type of proceeding, the statute says that the minor's custodial parent or guardian "shall be considered the minor's guardian ad litem," unless the court finds that the minor's interests require that someone else be appointed as the guardian ad litem.¹¹⁷

Specific Actions and Proceedings: When the Minor is Not a Party

Sometimes, even when the child is not a party to the civil action, the child's interests in the proceeding may be represented by an attorney or guardian ad litem. Some of the proceedings for which the General Assembly has either required such representation or given courts authority to require it are described below.

1. In an adoption proceeding, the court has discretion to appoint either an attorney or a guardian ad litem to represent "the interests of the adoptee" if the adoption is contested.¹¹⁸
2. If an adoption proceeding involves a parent who has been adjudicated incompetent, the court is required to appoint a guardian ad litem for the child unless the child already has a guardian.¹¹⁹ The child's guardian ad litem is responsible for evaluating the

112. G.S. 90-21.8(c).

113. G.S. 51-1 and 51-2.1. A minor who is sixteen or seventeen years of age may marry only with the consent of a parent who has full or joint legal custody of the minor or the minor's legal guardian or custodian. A minor who is younger than fourteen may not marry in North Carolina.

114. G.S. 51-2.1.

115. G.S. 51-2.1(c).

116. G.S. 51-2.1. The procedures for compensation of the guardian ad litem are determined by the rules of the Office of Indigent Defense Services. *See* G.S. 7A-451(f).

117. G.S. 48A-12(d).

118. G.S. 48-2-201.

119. G.S. 48-3-602. This requirement is in addition to the requirement that the court appoint a guardian ad litem for the incompetent parent.

incompetent parent's condition, the likelihood that the parent will be restored to competency, the relationship between the child and the parent, alternatives to adoption, and other facts and circumstances relevant to whether the adoption should proceed.¹²⁰

3. Article 21 of G.S. Chapter 35A establishes procedures through which a parent who suffers from a progressive chronic illness or an irreversible fatal illness may designate a standby guardian to be responsible for the parent's child when the parent becomes incapacitated or debilitated or when the parent consents. In a proceeding for the appointment of a standby guardian for a child, the clerk "may appoint a volunteer guardian ad litem," if one is available, to
 - represent the child's best interests;
 - where appropriate, express the child's wishes;
 - conduct an investigation to determine the facts, the child's needs, and available resources within the family;
 - protect and promote the child's best interests until relieved of responsibility by the clerk; and
 - if directed by the clerk to do so, conduct an investigation to determine the fitness of the proposed standby guardian to perform the duties that role entails.¹²¹
4. When the court awards custody of a child to a party in a domestic violence action, the court may consider "ordering . . . appointment of a guardian ad litem or attorney for the minor child."¹²²
5. The North Carolina Uniform Trust Code, G.S. Chapter 36C, provides for only limited application of G.S. 1A-1, Rule 17.¹²³ Absent a conflict of interest, the code allows a parent to represent the parent's child if the

120. G.S. 48-3-602. After a hearing, the court may order the parent's guardian ad litem to execute a consent to the adoption on behalf of the incompetent parent.

121. G.S. 35A-1379. The statute is silent with respect to who might serve as a volunteer guardian ad litem.

122. G.S. 50B-3(a1)(3)h.

123. G.S. 36C-2-205(e) ("[N]othing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305.").

child does not have a general guardian, guardian of the estate, or guardian of the person.¹²⁴ If the court finds that a child's interest is not represented or that available representation might be inadequate, the court may appoint a guardian ad litem for the child. The guardian ad litem is authorized to give consent and otherwise act on the child's behalf in any matter under the chapter, even if no court action is pending.¹²⁵

Conclusion

Many people go through their entire lives having no involvement with the courts. No one, however, is too young to be the defendant or respondent in a civil court action or to initiate a civil action. The Rules of Civil Procedure address the means by which an unemancipated minor must participate in a civil action and the steps another party must take to properly serve a minor party. Those rules apply in every civil action unless another statute prescribes a different procedure for a particular type of action.

These generally applicable procedures, in Rules 4(j) and 17 of the Rules of Civil Procedure, could be improved by

1. clarification of the types of guardian through which a minor may initiate or defend a civil action and consistency with other statutes in that regard;
2. more detailed articulation of the role of a guardian ad litem appointed for a minor party pursuant to Rule 17 of the Rules of Civil Procedure;
3. establishment of a minimum age at which service of process on the minor party himself or herself is required;
4. clarification of the kinds of substituted service that are appropriate for minors below the minimum age; and
5. creation of exceptions or alternative procedures for serving children when the contents of the pleadings or other materials to be served are inappropriate for viewing by the minor party.

A number of statutes refer specifically to children as parties, as potential parties, or as persons

124. G.S. 36C-3-303(6).

125. G.S. 36C-3-305.

whose interests in an action may need to be protected even when they are not parties. Several of these statutes give the term guardian ad litem unique meanings that differ from each other as well as from the meaning of that term in Rule 17. In a few instances, statutes are not clear with respect to whether a guardian ad litem should be appointed for a minor party. In one type of juvenile proceeding—when a child is alleged to be dependent—the law leaves the appointment of a guardian ad litem for the child in the court’s discretion. And in another type of juvenile proceeding—when a child is alleged to be undisciplined—the law has never been interpreted or applied to require the appointment of a guardian ad litem or other representative for the minor party.

The variety of actions that involve minor parties or a child’s interests dictates some of these differences. Others, however, have merely persisted over time without scrutiny or have been enacted in one context without regard to whether they are consistent with the ways minor parties are treated in other contexts. This mix of provisions increases the risk that a guardian ad litem for a child will not be appointed when one is required or that a minor party will not be properly served—failings that can deprive a court of jurisdiction. The rules, whatever they are, should minimize those risks and give individuals who are appointed as guardians ad litem or attorneys for minor parties in civil actions clear guidance about their roles and responsibilities.

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Printed in the United States of America

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NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

AOC-E-850, April 2010

Estate Procedure

Executor | Administrator | Collector By Affidavit | Summary Administration



North Carolina Estate Procedure Pamphlet

*for
Executor
Administrator
Collector By Affidavit*

IMPORTANT

- The clerk of superior court in all 100 counties serves as the judge of probate and cannot practice law or give legal advice. Therefore, you should not ask the clerk or the clerk's staff to prepare your accounts or to advise you on the completion of forms or any legal issue.
- **You should consult an attorney**, especially regarding disbursement of any funds, any questions about handling insolvent estates, or concerning federal and state taxes payable by the estate.
- You must keep accurate records and file accurate accounts.
- Court costs and fees must be paid to the clerk of superior court. You will be informed about the amounts by the clerk's office.

Published by
N.C. Administrative Office of the Courts
Judge John W. Smith, Director
PO Box 2448
Raleigh, NC 27602
April 2010

For copies of this pamphlet or forms, please contact your local clerk of superior court or obtain on-line at: **www.nccourts.org/Forms/Documents/735.pdf**

REGULAR ADMINISTRATION OF AN ESTATE

1. Will, Letters, Executor, Administrator, Personal Representative

- (a) When a person dies with a will, the person is said to have died “testate.” When a person dies without a will, the person has died “intestate.”
- (b) When a person has died, a search should be made to see if that person (the decedent) left a will. If there is a will, the clerk of superior court, upon application, [*Application For Probate And Letters*, AOC-E-201] issues “letters” to the person who qualifies as executor of the will. “Letters Testamentary” [*Letters*, AOC-E-403] are the official written authorization for a person to carry out the responsibilities of executor of a will.
- (c) A search should also be made to determine if the decedent had a safe deposit box, since the will and other valuable papers or items may be in the safe deposit box. If a will is discovered in the safe deposit box it **must** be filed with the clerk of superior court. [G.S.28A-15-13(d)].
- (d) If the decedent dies intestate, that is without leaving a will, “letters” are issued by the clerk of superior court, upon application, [*Application For Letters Of Administration*, AOC-E-202] to the person who qualifies as administrator of the estate. “Letters” [AOC-E-403] are the official written authorization for a person to carry out the responsibilities of administrator of an estate. [G.S. 28A-4-1(b)].
- (e) The term “personal representative” is used to refer to either an executor or an administrator.

2. Qualification As Personal Representative

- (a) *Application to Qualify* [*Application For Probate And Letters*, AOC-E-201, or *Application For Letters Of Administration*, AOC-E-202]

A person who seeks to qualify as a personal representative must apply to the clerk of superior court on a form provided by the clerk’s office. The form calls for a preliminary inventory of all assets of the decedent **as of the date of death**. Therefore, the applicant will need to have a general knowledge of the decedent’s real estate, bank accounts, stocks, bonds, motor vehicles, and other personal property, and an estimated value of these assets, to complete the application. The instructions for that form assist you in completing the form. [G.S. 28A-6-1(a)].

- (b) *Qualified Persons*

If the decedent did not name an executor in the will or dies intestate (without a will), the clerk of superior court will grant letters of

administration to a person(s) who applies and is qualified to serve, in the following order:

- (1) The surviving spouse of the decedent;
- (2) Anyone who is to receive property as indicated by the will of the decedent;
- (3) Anyone who is entitled to receive property of the decedent by law in the absence of a will;
- (4) Any next of kin;
- (5) Any creditor to whom the decedent became obligated prior to death;
- (6) Any person of good character residing in the county who applies with the clerk of superior court.

(c) Disqualified persons

No person may serve as a personal representative who:

- (1) Is under 18 years of age;
- (2) Has been adjudged incompetent by the court and remains under such disability;
- (3) Is a convicted felon whose citizenship has not been restored;
- (4) Is a nonresident of this state who has not appointed a resident of the state to accept service of process in all actions or proceedings with respect to the estate;
- (5) Is a corporation not authorized to act as a personal representative in this state;
- (6) Repealed by Session Laws 1999-133, s.1, effective January 1, 2000;
- (7) Has committed acts which by law constitute a forfeiture of the right to serve;
- (8) Is illiterate;
- (9) Is a person whom the clerk of superior court finds otherwise unsuitable;
- (10) Was previously designated as executor of the estate but has renounced that office or otherwise chose not to carry out the duties of the personal representative [GS. 28A-4-2]

(d) Oath/Affirmation [Oath, AOC-E-400]

A person qualifying as personal representative must take an oath or make an affirmation to carry out the duties faithfully and honestly. [G.S. 28A-7-1].

(e) *Bond* [Bond, AOC-E-401].

Generally, an executor of a will who is a North Carolina resident is not required to furnish a bond before being authorized to act as executor, unless the will expressly requires that bond be furnished. However, there are exceptions, and the clerk of superior court always has the discretion to require a bond. An administrator of an estate is required to furnish a bond unless all the heirs are 18 years of age or older, of sound mind and have filed written waivers [*Waiver Of Personal Representative's Bond*, AOC-E-404] of the bond requirement. However, no bond is required of an administrator, if the administrator is the sole heir. If the sole purpose of the appointment is to bring a wrongful death lawsuit, a bond is not required until immediately prior to the receipt of the wrongful death funds. [G.S. 28A-8-1].

3. **Authority of Personal Representative** – A personal representative is authorized to collect assets, pay claims, and make all disbursements necessary to settle an estate and to distribute the assets in an orderly, accurate and timely manner. Before the personal representative can sell any real property of the decedent's estate to generate cash with which to pay debts of the estate, the personal representative must petition the clerk of superior court for permission to sell such real estate. However, the clerk's approval is not needed if the will expressly directs the executor to sell the real property. [G.S. 28A-13-3, G.S. 28A-15-1, G.S. 28A-17-1].
4. **Notice To Creditors** [*Affidavit Of Notice To Creditors*, AOC-E-307] – After letters are issued, a personal representative must advertise for creditor's claims against the estate in a newspaper "qualified to publish legal advertisements" which is published in the county where the estate is being administered. If there is no newspaper printed in the county then: (1) the notice must be published in a newspaper of general circulation in the county and posted at the courthouse or (2) a copy of the notice must also be posted at the courthouse and in four (4) other public places in the county. The advertisement must be published once a week for four consecutive weeks, and should state that claims must be filed by a date certain, which is at least three months from the date of first publication or the posting of the notice. Within seventy-five (75) days after the granting of letters, and prior to filing proof of publication with the clerk of superior court's office, the personal representative must also personally deliver or send by first class mail a notice about how, when, and where to file claims against the estate to all creditors who are actually known, or can be discovered upon reasonable investigation. However, no notice need be delivered or mailed with respect to any claim that the personal representative already recognizes as valid and has or will pay the claim. Following publication, a copy of the notice, an affidavit from the newspaper attesting to publication, and as applicable, an affidavit from the personal representative attesting that he or she has mailed or personally delivered the notice, must be filed with the clerk of superior court. [G.S. 28A-14-1, G.S. 28A-14-2].

5. **Filing An Inventory** [*Inventory For Decedent's Estate*, AOC-E-505] – Within three (3) months from the date of qualification, the personal representative must file with the clerk of superior court's office an accurate inventory of the estate, giving descriptions and values of all real and personal property of the decedent as of the date of death. The personal representative should obtain copies of signature cards and deposit contracts associated with any joint accounts from the depository financial institution and submit them with the inventory. Property discovered later must be reported on a supplemental inventory. [G.S. 28A-20-1, G.S. 28A-20-3]. Income of the estate, property acquired by the estate after the decedent's death, or asset conversions (e.g. sale of real estate or stock, foreclosure of deed of trust, etc.) must be reported on the next accounting. [G.S. 28A-21-1].

6. **Year's Allowance** [*Application And Assignment Year's Allowance*, AOC-E-100] – An application for a year's allowance for the surviving spouse and/or dependent child(ren) may be filed with the clerk at any time within one year of the decedent's death. The clerk or magistrate will hold a hearing on the application. The allowance will be entered on the application form by the clerk or magistrate. The allowance will be from cash or personal property or a combination of both, but does not include real estate. The allowance should be paid as a priority claim before any other claims against the estate are paid. The amount of allowance is \$10,000 for a surviving spouse, where the decedent died on or before 12/31/09 (\$20,000 where the decedent died on or after 1/1/10) and \$2,000 for each surviving child of the decedent under eighteen (18) years of age or as otherwise qualified by statute. [G.S. 30-15, G.S. 30-17].

- 7A. **Real Property – Rents, Expenses** – Unless real property is willed directly to the estate, title to the land vests in the heirs, and passes outside the administered estate. Accordingly, rents from those properties are not income to the estate, and estate funds may not be used to pay real estate expenses, such as mortgages, taxes, insurance or utilities.

If real property not willed to the estate is needed to pay claims, it can be brought into the estate by filing a special proceeding before the Clerk. [G.S. 28A-17-2].

- 7B. **Encumbered/Mortgaged Property** - When items of real personal property are specifically willed to an heir, that heir takes the property subject to any encumbrances thereon, and without a right to have assets of the estate discharge the secured obligation. [G.S. 28A-15-3]. This does not limit the remedies of a secured creditor against the heir or the estate if the heir or estate fails to make payment on the encumbrances.

If items of real or personal property are assets of (titled to) the administered estate and subject to encumbrances, the personal representative may pay the encumbrance, if that is in the best interests of the estate. However, payment of the encumbrance must be taken into account in calculating the division of the estate, and does not increase the share of the distributee of that asset. [G.S. 28A-15-4].

8. **Claims** – All claims against the decedent’s estate, which arose before the death of the decedent, other than taxes and claims covered by insurance, must be presented to the personal representative by the date specified in the notice to creditors, or forever be barred. [G.S.28A-19-3]

(a) *Insufficient Funds To Pay All Claims*

In order to determine if there will be sufficient funds with which to pay claims, the personal representative should not pay any claims until after the time for filing claims has expired.

If the estate is not sufficient to pay all of the creditors in every class, the personal representative should pay in full those classes of creditors for which there is sufficient money, starting with those at the top of the priority list as listed in paragraph 8(b). Then the personal representative should distribute the remaining money proportionally among each creditor of the next highest class. [G.S. 28A-19-6].

(b) *Order Of Priority Of Claims*

After payment of the costs and expenses of administration, *including the year’s allowance*, the personal representative must pay claims against the estate in the following order: [G.S. 28A-19-6].

- (1) Claims which by law have specific lien on property up to the amount of the value of such property.
- (2) Funeral Expenses. For the estates of decedents dying on or before 9/30/09, funeral expenses up to \$2,500 (not including a cemetery lot or gravestone). For the estates of decedents dying on or after 10/1/09, funeral expenses of up to \$3,500. For the estates of decedents dying on or after 10/1/09, the funeral expense priority is immediately followed by a new priority of up to \$1,500 for cost associated with the purchase of a burial site and gravestone. (The balance of funeral expenses, above the level of the preferences set in this paragraph, has no preference, and should be paid as all other claims in #8 below.)
- (3) All dues, taxes and other claims with preference under federal law.
- (4) All dues, taxes and other claims with preference under the laws of the State of North Carolina or under the laws of local governments in North Carolina.
- (5) Judgments of any court of competent jurisdiction within the state, docketed and in force, to the extent to which the judgments were liens on the property of the decedent at the time of death, and Medicaid claims filed under G.S. 108A-70.5.
- (6) Wages due any employee of the decedent for a period of not more than twelve (12) months immediately preceding the death of the decedent; the cost of any medical services received during the twelve (12) months preceding the death of the decedent; and the cost of necessary drugs and all other medical supplies incurred during the **last** illness of the decedent (not to exceed 12 months).
- (7a) Claim for equitable distribution.
- (7b) Farm operation expenses through harvest under G.S. 28A-13-4
- (8) All other claims (for example, credit card debt).

9. **Filing Individual And Estate Tax Returns** – Income tax returns for the decedent must be filed for the year in which the death occurred. Both North Carolina [GS 105-32.5] and the federal government impose an estate tax on other estates although there may be exceptions during portions of 2010.

If the estate is of sufficient value under federal tax law, the personal representative must file a federal estate tax return within nine (9) months after the date of death, regardless of the time of qualification. In addition, state estate taxes may be due and state and federal fiduciary income tax returns may also be required. Following qualification, the personal representative should promptly contact state and federal tax offices or a tax professional to determine what tax information should be filed with those offices. Relevant tax forms used in settlement of the estate may be obtained from the North Carolina Department of Revenue at 1-877-252-3052 [G.S. 105-23]. If estate tax returns are filed, the personal representative should obtain closing letters from the taxing authorities and file copies with the clerk.

If no federal or state taxes are due, the personal representative must provide the clerk of court with a certification that estate or inheritance taxes are not due [*Estate Tax Certification (For Decedents Dying On Or After 1/1/99, AOC-E-212 or Inheritance Estate Tax Certification (For Decedents Dying Prior to 1/1/99, AOC E-207)*] or a certificate furnished by the North Carolina Secretary of Revenue, stating the estate tax liability has been satisfied in full.

10. **Commissions** – The personal representative may receive a commission for handling the estate. If the will does not establish the amount or method of compensation, or if there is no will, the clerk of superior court may, in his discretion, allow a commission of **up to** five percent (5%) of the estate receipts and disbursements. The clerk will consider the time, responsibility, trouble and skill involved in the management of the estate. Commissions to personal representatives are accounted for as costs and expenses of administration. The personal representative should petition the clerk for approval of a commission before making distribution. [G.S. 28A-23-3].
11. **Attorney's Fees** – The personal representative may choose to hire an attorney to represent the estate. However, the funds of the estate may not be used to pay the attorney's fees unless the clerk finds that the fee is reasonable. Unless the attorney's services are beyond the normal scope of estate administration, the attorney's fees allowed may reduce the amount of the personal representative's commission. *Not all attorney's fees may be approved by the clerk and if not allowed, the personal representative will be personally responsible for the attorney's fees.*
12. **Distribution Of Assets** – After paying the costs of administration, taxes and other valid claims against the estate, the personal representative must distribute the remaining assets of the estate in accordance with the will, or, if none, in accordance with the Intestate Succession Act, (Chapter 29 of the General Statutes).

If general bequests of money (those not payable out of a specified fund) are set forth in the will, yet there is not enough cash within the administered estate to pay all such bequests, the personal representative should prorate the amount available among all similarly situated recipients of general bequests [G.S. 28A-15-5]. The personal representative should obtain receipts from all distributees. [G.S. 28A-22-1].

13. Accounting:

(a) Inventory

See page 5, paragraph 5.

(b) Final Accounting

The personal representative may file a final accounting after the date specified in the notice to creditors if all claims have been paid or otherwise satisfied. [G.S. 28A-21-2(b)]. The personal representative must file a final accounting within one year of the date on which he or she qualified to serve unless the clerk of superior court has granted an extension of time for good cause. [G.S. 28A-21-2(a)]. If an extension has been granted, an annual accounting must be filed within one year of the date of qualification.

(c) Annual Accounting

The personal representative must file annual accounting no later than one year from the date on which he or she qualified to serve. If the estate is not finalized within one year, then an annual accounting must be filed every year thereafter until the final accounting is filed. [G.S. 28A-21-1]. The personal representative must file a request for the estate to remain open and file an annual account.

(d) Proof

All accountings must be accompanied by cancelled or imaged checks or other proof satisfactory to the clerk for all disbursements and distributions, and for all balances held or invested. (Example, detailed bank statements showing balance held.) [G.S. 28A-21-1].

(e) Contents Of Accountings

Accountings filed with the clerk of superior court must be signed under oath and contain:

- (1) The period which the account covers and whether it is an annual accounting or final accounting;
- (2) The amount and value of the property of the estate according to the inventory and appraisal, or according to the previous accounting; the manner and nature of any investments; the amount of income and additional property received during the accounting period; and all gains or losses from the sale of any property or otherwise;
- (3) All payments, charges, losses, and distributions;

- (4) The property on hand constituting the balance of the estate, if any;
- (5) Any other facts and information determined by the clerk to be necessary to an understanding of the account. [G.S. 28A-21-3, G.S. 8A-21-1].

(f) Accounting for Wrongful Death Proceeds

After the completion of a wrongful death lawsuit, the personal representative must be bonded before receiving the wrongful death proceeds and must file a separate accounting concerning the wrongful death proceeds. [In re: Estate of Parish 143 N.C. App 244 (2001). Under G.S. 28A-18-2, the proceeds may only be used to pay certain designated expenses, and the balance may only be distributed to heirs of the decedent under the Intestate Succession Act (Chapter 29 of the General Statutes), regardless of whether or not there is a will. The authorized expenses are:

- Reasonable and necessary expenses of bringing the suit, and attorney fees
- Burial expenses of the deceased
- Medicare reimbursement [*Cox v. Shalala*, 112 F. 3rd 151(4th Cir., 1997)]
- Reasonable hospital and medical expenses (not exceeding \$4,500) incurred as a result of the injury resulting in death. (**Note:** The amount applied to hospital and medical expenses may not exceed 50% of the total recovery, less attorney fees). (**Note:** This amount is separate and in addition to any Medicaid reimbursement.)

- 14. **Discharge Of The Personal Representative** – When the clerk of superior court approves the final account, the clerk will enter an order discharging the personal representative from further liability in the estate. [G.S. 28A-23-1].
- 15. **Removal, Contempt, Jail** – If the personal representative fails to account as required, or if he or she renders an unsatisfactory account, the Clerk of Superior Court may issue an order for the personal representative to appear and show cause as to why he or she failed to file an inventory or account. If, within 20 days after service of such an order, he or she does not make the required filing, the clerk may have the sheriff serve the personal representative with an order of contempt and commitment, and the sheriff will place the personal representative in the county jail until he or she complies with the order. The personal representative shall be personally liable for all costs associated with such proceedings. The clerk may also remove the personal representative and appoint someone else to complete the administration of the estate. [G. S. 28A-21-4, G. S. 28A-9-1].

SMALL ESTATES – COLLECTION BY AFFIDAVIT

The following simplified procedure may be used after thirty (30) days from the decedent's death if the decedent died on or before 9/30/09, and if the value of the decedent's personal property, less liens and

encumbrances, does not exceed ten thousand dollars (\$10,000) for decedents dying on or before 9/30/09 and \$20,000 per decedents dying on or after 10/01/09. **[NOTE: If the surviving spouse is the collector and the sole heir or devisee, \$20,000 for decedents dying on or before 9/30/09 and \$30,000 for decedents dying on or after 10/01/09]** (regardless of the value of any real property), **and** if no application for appointment of a personal representative is pending or has been granted. For the estates of decedents dying on or after 10/1/09, the value of the decedent's personal property less liens and encumbrances may not exceed \$20,000. **[NOTE: \$30,000 if the spouse is the collector and the sole heir or devisee. [G.S. 28A-25-1].**

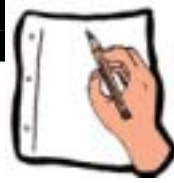
1. **Affidavit For Collection** [*Affidavit For Collection Of Personal Property Of Decedent*, AOC-E-203] – An executor, heir, or creditor of the decedent, or the public administrator of the county, may file an affidavit with the clerk of superior court on a form provided by the clerk's office, requesting authorization to proceed with collection and administration of the estate. [G.S. 28A-25-1(a), G.S. 28A-25-1.1(a)] **NOTE:** If a sale of real estate by the heirs is foreseeably necessary or desirable, a formal administration with notice to creditors is probably necessary.
2. **Distribution Of Assets And Payment Of Claims** – Upon filing the affidavit with the clerk of superior court, the person making the affidavit is authorized to proceed with collection of the decedent's personal property and with distribution of the property in the following order of priority:
 - (1) Payment of the year's allowance of the surviving spouse and child(ren), if any;
 - (2) Payment of debts and claims against the estate in the order set out in paragraph 8(b) of the section of this pamphlet dealing with Regular Administration Of An Estate;
 - (3) Distribution of the remainder of the personal property, if any, to the persons entitled to it by the will, or, if no will exists, to the persons specified by the Intestate Succession Act (Chapter 29 of the General Statutes) [G.S. 28A-25-3(a)(1)].
3. **Closing Affidavit** [*Affidavit Of Collection, Disbursement And Distribution*, AOC-E-204] – After the distribution has been completed, an affidavit must be filed with the clerk of superior court showing collection, disbursement and distribution of the personal property. This closing affidavit must be filed within ninety (90) days after the date of filing of the qualifying affidavit, unless the clerk has granted an extension of time [G.S. 28A-25-3(a)(2)].

SUMMARY ADMINISTRATION

The surviving spouse of a decedent who died with or without a will may petition the clerk of superior court for an order of summary administration if the spouse is the sole heir or devisee of the decedent. An order of summary administration will permit the spouse to proceed with the collection and distribution of the decedent's property without the formality of regular administration. By obtaining the order, the *surviving spouse assumes all liabilities* of the decedent to the extent of the value of the property received. **NOTE:** Fees are collected when the petition is filed. If a sale of real estate by the surviving spouse is foreseeably necessary or desirable, a formal administration with notice to creditors is probably necessary. [Article 28 of Chapter 28A of the General Statutes.]

<i>Name Of Decedent</i>		<i>Social Security Number</i>	
<i>File No.</i>		<i>Date Of Death</i>	
<i>Name Of Executor-Administrator</i>		<i>Date Qualified</i>	
<i>Name Of Attorney</i>		<i>Telephone No.</i>	
<i>Bond</i> \$	<i>Name Of Surety (Bonding Company, etc.)</i>		
<i>Date Inventory Due</i>	<i>Date Inventory Filed</i>	<i>Date Of Annual Account(s)</i>	
<i>Date Final Account Due</i>		<i>Date Final Account Filed</i>	
<div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <p><input type="checkbox"/> Will probated</p> <p><input type="checkbox"/> Lock box searched</p> <p><input type="checkbox"/> Estate bank account opened</p> <p><input type="checkbox"/> Bank _____ No. _____</p> <p><input type="checkbox"/> Signature cards on bank accounts of decedent delivered to clerk</p> <p><input type="checkbox"/> Application for spouse's and child(ren)'s allowance(s) filed</p> <p><input type="checkbox"/> Motor vehicle titles transferred</p> <p><input type="checkbox"/> Stock certificates and other titles transferred</p> <p><input type="checkbox"/> Insurance, retirement, I.R.A funds, etc., if payable to the estate, collected</p> <p>Other: <input type="checkbox"/> _____ _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> </div> <div style="width: 48%;"> <p><input type="checkbox"/> Notice to creditors published and mailed, and affidavits of publication and mailing filed</p> <p><input type="checkbox"/> Funeral expenses, medical expenses and other claims paid</p> <p><input type="checkbox"/> Court's approval, if required, obtained to sell real property to create assets with which to pay claims</p> <p>Federal and State Income tax returns <input type="checkbox"/> filed for decedent and for the estate</p> <p>Estate tax certification (AOC-E-212 or <input type="checkbox"/> 207) filed with the Clerk; or Federal and State estate tax returns filed, closing letter received and a copy filed with the clerk.</p> <p>Remaining assets distributed to heirs <input type="checkbox"/> and receipts obtained</p> <p>Accounting of wrongful death proceeds <input type="checkbox"/> filed</p> <p>Other: <input type="checkbox"/> _____ _____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> <p>_____</p> </div> </div>			

(NOTES AND CHECKLIST)



AOC-SP-850, April 2010



NORTH CAROLINA
ADMINISTRATIVE OFFICE
of the COURTS

Responsibilities of Guardians in North Carolina



GUARDIANSHIP LAW IN NORTH CAROLINA
for
General Guardians - Guardians of the Person-Guardians of the Estate

IMPORTANT

- The Clerk of Superior Court in all 100 counties in North Carolina serves as the judge of probate and cannot practice law or give legal advice. Therefore, you should not ask the clerk or the clerk's staff to prepare your petitions, orders or accounts or to advise you on the completion of forms or any legal issue.
- You must keep accurate records of the ward's accounts and investments.
- You must file timely and accurate accountings.
- You must use the ward's money for his or her own needs and not for yourself or anyone else.
- Court costs and fees must be paid to the Clerk of Superior Court. You will be informed about the amounts by the clerk's office.

DEFINITIONS

1. **Guardian** is the person (or corporation) who has the fiduciary duty and responsibility for caring for the ward's person and/or estate. Also, state agencies may be appointed as a disinterested public agent guardian.
2. **Guardian *ad litem*** is a person appointed by the Clerk of Superior Court to represent the ward if the ward does not have an attorney. The Guardian *ad litem* must be an attorney.
3. **Fiduciary** is a person who has a duty to act primarily for another person's benefit.
4. **Fiduciary duty** is like a trust (promise), in which the fiduciary is to protect the interest of ward, by managing the ward's estate, preserving the ward's assets in secure investments, or providing for the ward's shelter, food and health care. A fiduciary may not do anything which could appear to be for the fiduciary's own interest.
5. **Law** regarding guardians is found in Chapter 35A of the North Carolina General Statutes. The North Carolina General Statutes can be found at most public libraries, law schools and on-line at www.ncleg.net.
6. **Ward** is the person who has been declared incompetent (or a minor). [G.S. §35A-1202(15)] The ward is called the respondent at the incompetency proceeding stage.
7. **Clerk** means the clerk of superior court.

This pamphlet is provided as a public service to assist persons who have been or are about to be appointed guardians in understanding their duties, responsibilities and role. **It is not meant as substitute for legal advice. You should contact an attorney should you have any legal questions about the role of a guardian.**

PRINCIPLES FOR THE GUARDIAN

The Guardian must:

1. Ensure that the loyalty and duty of the guardian are to the “actual” needs of the ward.
2. Make decisions that ensure the health and well being of the ward.
3. Involve the person in all decision-making to the extent possible, consistent with the ward’s ability.
4. Ensure that the need for guardianship is periodically reviewed and alternatives, including restoration to competency or limited guardianship, are considered.

PRINCIPLES FOR THE WARD

1. The Ward should be involved in all decision making to the extent possible, consistent with the ward’s ability.
2. The Ward has the right to petition the court for periodic review of the guardianship, including restoration to competency,
3. The Ward is entitled to a guardian *ad litem* who represents the expressed interest of the Ward in the guardianships proceedings, and may make recommendations to the clerk concerning the best interests of the Ward, if those interests differ from the expressed interests. [G.S. 35A-1107]

TYPES OF GUARDIANS

1. **Guardian of the Estate:** A guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward. [G.S. 35A-1202(9)]

2. **Guardian of the Person:** A guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward. The guardian of the person does not handle any of the ward's money or property. [G.S. 35A-1202(10)]
3. **General Guardian:** A guardian of both the estate and the person. [G.S. 35A-1202(7)]
4. **NOTE:** The powers and duties of the guardian may be limited by the order of appointment. See 'Powers and Duties of the Guardian'.

SPECIAL CONSIDERATIONS – GUARDIANS FOR MINORS

1. Children under the age of 18 are presumed to be incompetent by law, so there is no need for an incompetency proceeding before appointing a guardian. However, a hearing is required. A parent or other person may be appointed guardian of the estate of the minor.
2. A guardian of the person may be appointed only if the minor has no living parents, or the rights of the parents have been terminated. [G.S. 35A-1224(a)]
3. A minor's funds **SHOULD NOT** be used by the minor's parents (acting as appointed guardians) for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent/guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The Clerk, however, has total discretion in determining whether the request should be granted. See "Prohibited Acts Of All Guardians".
4. A minor's real property may not be sold unless the guardian of the estate or the general guardian petitions the court in advance, and a court order is entered approving the sale. A guardian of the estate or general guardian, without court order, may sell up to \$5,000 of the ward's personal property in any one accounting period and report the sale and the use of the proceeds on the next annual accounting. A guardian of the estate or general guardian may not sell more than \$5,000 of the ward's personal property in any one accounting period without petitioning the court in advance and obtaining a court order approving the sale. See 'Property, Investments and Verifications.'
5. There are special duties and limitations on the types of property or investments that a guardian may make on behalf of a minor. See "Property, Investment and Verification".

6. There are special requirements regarding the duty of a guardian to file an inventory of the minor's property with the court, and to file annual accountings regarding all income, disbursements, distributions, investments and/or balances or property held or invested on behalf of the minor. See "Accountings".
7. When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship. See "Termination of Guardianship".

APPOINTMENT AND DUTIES OF GUARDIANS

All guardians are bound by the law and must abide by their fiduciary duties to protect the interests of the ward. Specific duties of a guardian depend on what type of guardianship (i.e., estate, person or general) was created.

1. Qualification As Guardian

(a) Application to Qualify

A person who seeks to serve as a guardian for an incompetent or a minor must apply to the Clerk of Superior Court of the county of residence of the minor or incompetent, or where the incompetent is an inpatient, on a form provided by the clerk's office. The form calls for a preliminary inventory of all assets and liabilities of the ward. Therefore, the applicant will need to have a general knowledge of the ward's real estate, bank accounts, stocks, bonds, motor vehicles, and other personal property, an estimated value of these assets, and estimated amount of the ward's debts (mortgages, taxes, credit cards, etc.) to complete the application. The instructions for that form should assist you in completing the form. [G.S. 35A-1210, 1251 (incompetents); 35A-1221, 1225 (minors)]. [*Forms -Application for Letters of Guardianship of the Estate, Guardianship of the Person, General Guardianship for an Incompetent Person, AOC-E-206 or Application for Appointment of Guardianship of the Estate, Guardianship of the Person, General Guardianship for a Minor, AOC-E-208.*]

(b) *Qualified Persons (to serve as guardian for an incompetent)*

The Clerk of Superior Court will grant letters of guardianship to a person(s) or corporation who applies and is qualified to serve, in the following order:

(1) An adult individual

If the individual is not a North Carolina resident, he or she must agree to submit to the jurisdiction of North Carolina courts and appoint a resident process agent.

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities;

(3) A disinterested public agent (Director of the local Social Services, Health or Mental Health Departments, etc.).
[G.S. 35A-1213,1214]

(c) *Qualified Persons (to serve as guardian for a minor)*

(1) An adult individual

a. must appoint a resident process agent if serving as General Guardian or Guardian of the Estate and is not a resident of North Carolina. [G.S. 35A-1230]

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities.
[G.S. 35A-1224]

(d) *Disqualified persons*

No person may serve as a guardian who in the opinion of the clerk would not look out for the best interest of the ward. [G.S. 35A-1214]

(e) *Oath (Affirmation)*

All guardians must take an oath (or affirmation) in which the guardian swears (or affirms) to faithfully and honestly discharge the duties of the guardian to the best of the guardian's ability and according to law. [Forms-Oath, AOC-E-400]

(f) *Bond*

When serving as a General Guardian or Guardian of the Estate, the guardian must post a bond, approved by the clerk, to secure the faithful performance of the guardian's duties. There are some limited circumstances in which a bond may be reduced based on a dispositive agreement approved by the clerk. The Clerk of Superior Court also has the discretion to require a bond for non-resident guardian of the person. [G.S. 35A-1230]. [Forms-Bond, AOC-E-401]

(g) *Orders*

The clerk may, with or without a hearing, authorize letters of guardianship to be issued to the named fiduciary (guardian). [G.S. 35A-1213, 1214, 1215, 1226]. [*Forms-Order on Application for Appointment of Guardian, AOC-E-406; Order Authorizing Issuance of Letters, AOC-E-402*]

(h) *Letters*

The clerk will issue letters to the person who is appointed guardian. The letters are the guardian's proof of authority to act on behalf of the ward. (See above for definitions of different types of guardianships). [*Forms-Letters of Appointment, Guardian of the Estate, AOC-E-407; Guardian of the Person, AOC-E-408; General Guardian, AOC-E-413*]

2. **Powers and Duties of Guardian**

(a) *Guardian of the Estate*

Unless limited by court order, the Guardian of the Estate has the general power to "perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest...." The complete listing of powers can be found in G.S. 35A-1251 and 1253 (Incompetent) and G.S. 35A-1252 and 1253 (Minor).

In addition to duties imposed by law or by order of the clerk, the guardian of the Estate also has the duty to take possession, for the ward's use, of the ward's estate, to collect monies due the ward, to pay debts of the ward including taxes, to obey all lawful orders of the court and to observe the standard of judgment and care that an ordinary prudent person serving as a fiduciary would take in acquiring and maintaining the ward's property.

(b) *Guardian of the Person*

Unless limited by court order, a guardian of the person has custody of the ward and is responsible for making provisions for the ward's care, including medical and psychological treatment; comfort, including shelter; and maintenance, including education, training, and employment. [G.S. 35A-1241] If the ward has written advance instructions for the ward's medical or mental health care, the guardian should honor those instructions.

(c) *General Guardian*

Unless otherwise limited by court order, a General Guardian has all the powers and duties of a guardian of the estate and guardian of the person. [G.S.35A-1202(7)]

NOTE: The powers and duties of the guardians referenced in subparagraphs (a), (b), and (c) may be limited by court order allowing the ward to retain certain designated rights and responsibilities.

3. **Property, Investments and Verifications**

(a) *Property*

The ward's property, real and personal, must be maintained in such a manner to ensure the ward has a place to live or money with which to pay for his or her living expenses. The guardian must maintain an accurate accounting of the ward's property, income, expenses and disbursements.

To the extent possible, only the ward's income (rather than any portion of the principal) should be used to pay for his or her care. The guardian of the estate or general guardian must petition the clerk in advance should real property need to be sold to pay for the ward's needs, or if more than \$5,000 of the ward's personal property needs to be sold in any one accounting period to pay for the ward's needs.

(b) *Investments*

The ward's funds shall be invested in interest bearing accounts or other approved investment accounts [G.S. 35A-1251; 1252] in the name of the ward, and showing the name of the guardian who is acting on behalf of the ward. The guardian must properly manage the funds to ensure money is available to pay for the ward's needs, such as shelter, food, clothing and medical care.

NOTE: Failure to properly manage and secure the ward's funds may result in personal liability for the guardian's breach of fiduciary duty. Investment of the ward's funds in securities or other investment devices that subject those funds to loss of principal, may, under the reasonable prudent man rule, subject the guardian to personal liability for breach of fiduciary duty.

(c) *Verifications*

The guardian must maintain cancelled checks and receipts of all expenditures, and provide them to the clerk with each accounting, together with bank statements, titles, or other documentary evidence of balances still held or invested.

4. Miscellaneous Responsibilities

- (a) Promptly notify the clerk if you change your name or address.
- (b) Promptly notify the clerk if you change the residence of the ward.

5. Prohibited Acts of all Guardians

- The real and personal property of the ward may not be used for anything or anyone other than the ward.
- The money belonging to the ward must be kept separate from the personal funds of the guardian. The guardian should appear on any guardianship account as acting on behalf of the ward. The guardian should not be listed on any such account as a joint account holder with or without right of survivorship, or as a payee on death.
- The guardian may not borrow money from the ward or loan the ward's money to anyone unless ordered by the court.
- The guardian shall not write any checks for "cash" unless regular cash distributions to the ward are authorized by the court.
- The ward's real property may not be sold unless the sale is ordered in advance by the court. A guardian of the estate or general guardian, without court approval, may not sell more than \$5,000 of the ward's personal property in any one accounting period.
- The ward's real property may not be sold unless the general guardian or the guardian of the estate files a special proceeding seeking authority and approval of the court in advance.
- If the general guardian or guardian of the estate wishes to sell personal property of the ward, during any one accounting period, which has a value of over \$5,000.00, the guardian must file a motion in the estate proceeding seeking authority and approval by the court, prior to the sale. Sales of less than \$5,000.00 in value during any one accounting period do not need prior court approval, and need only be reported on the next annual accounting.
- Minor's funds **should not** be used by the minors parents for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent or guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The clerk, however, has total discretion in determining whether the request should be granted.
- The minor's property must be delivered to the minor once the minor has reached 18 and the clerk has approved the final accounting.
- Guardian may not consent to have the ward sterilized. A ward may only be sterilized when medically necessary treatment for an illness may result in sterilization and that treatment is approved by the clerk.

EXPENSES, REIMBURSEMENTS AND COMMISSIONS

1. Allowable Expenses and Reimbursements

The Clerk may approve certain expenses of the guardian to be reimbursed from the ward's estate, such as bond premiums and court costs.

[G.S. 35A-1267]

If the ward is living with the guardian or some other person, the Clerk may also approve payment to the guardian or other person to pay the ward's share of the household expenses, food and other necessary items.

2. Commissions (Applies only to Guardians of the Estate and General Guardians)

The guardian may receive a commission for the guardian's time and trouble in handling of the ward's estate. The amount or method of compensation is set by the Clerk of Superior Court, in the clerk's discretion, up to, but not to exceed five percent (5%) of the qualified estate receipts and disbursements. [NOTE: Any commissions with respect to principal are allocated (divided) over the time remaining in the estate (i.e., the number of years until the minor reaches age 18, or the remaining life expectancy of the incompetent calculated under G.S. 8-46).] The clerk will consider the time, responsibility, trouble, and skill involved in the management of the estate. Commissions to guardians are accounted for as costs and expenses of administration. The commission is to cover any ordinary expenses, such as telephone, mailing, and travel, incurred by the guardian in performing the duties of the guardian, as well as paying the guardian for his or her services in managing the estate. In limited circumstances, the clerk may approve additional reimbursement for out of pocket expenses. The guardian must petition the Clerk for approval of a commission or additional reimbursement for out of pocket expenses before making distribution of that commission. [G.S. 35A-1269]

3. Attorney's Fees (Applies only to Guardians of the Estate and General Guardians)

The guardian may choose to hire an attorney to represent the estate. However, the funds of the estate may not be used to pay the attorney's fee unless the clerk finds that the fee is reasonable. Unless the attorney's services are beyond the normal scope of estate administration, the attorney's fees allowed may reduce the amount of the guardian's commission. Not all attorney's fees may be approved by the clerk and if not allowed, the guardian will be personally responsible for the attorney's fees.

ACCOUNTINGS

(Applies only to Guardians of the Estate and General Guardians)

1. Types of Accountings

(a) *Inventory [Inventory For Guardianship Estate, AOC-E-510]*

Within three (3) months from the date of qualification, the guardian must file with the Clerk of Superior Court's office an accurate inventory of the ward's estate, giving descriptions and values of all real and personal property owned by the ward as of the date of qualifying. The guardian should obtain copies of signature cards and deposit contracts associated with any joint accounts from the depository financial institution and submit them with the inventory. [G.S. 35A-1261] Property discovered later must be reported on a supplemental inventory. [G.S. 35A-1263.1] Income of the ward's estate (e.g., pension payments, interest, social security, etc.), property later acquired by the estate, or asset conversions (e.g., sale of real estate or stock, foreclosure of deed of trust, etc.) must be reported on the next annual accounting.

(b) *Annual Accounting [Account, AOC-E-506]*

The guardian **must** file an annual accounting no later than thirty (30) days after the expiration of one year from the date on which he or she qualified to serve. The accounting **may** be filed earlier. The guardian must then file annual accounts every year thereafter until the final accounting is filed. [G.S. 35A-1264]

(c) *Final Accounting [Account, AOC-E-506]*

The guardian **must** file a final accounting within sixty (60) days after the termination of the guardianship. [G.S. 35A-1266]

2. Proofs

All accountings must be accompanied by cancelled checks or other proof satisfactory to the clerk for all disbursements and distributions, and for all balances held or invested (e.g., bank or brokerage statement showing balance held, vehicle title, recorded deed to real estate, etc.). [G.S. 35A-1268]

3. Contents Of Accountings

All accountings filed with the Clerk of Superior Court must be signed under oath and contain:

- (a) The period which the account covers and whether it is an annual accounting or final accounting;
- (b) The amount and value of the property of the estate according to the inventory and appraisal, or according to the previous accounting; the manner and nature of any investments; the amount of income and additional property received during the accounting period; and all gains or losses from the sale of any property or otherwise;
- (c) All payments, charges, losses, and distributions;
- (d) The property on hand constituting the balance of the estate, if any;
- (e) Any other facts and information determined by the clerk to be necessary to an understanding of the account. [G.S. 35A-1264, 1266]

4. Failure to File Accountings

If the guardian fails to account as required, or if he or she renders an unsatisfactory account, the Clerk of Superior Court may, after notice, issue an order for the guardian to appear and show cause as to why she or he failed to file an inventory or account. If, within 20 days after service of such an order, she or he does not make the required filing, the clerk may have the sheriff serve the guardian with an order of contempt and commitment, and the sheriff will place the guardian in the county jail until she or he complies with the order. The guardian shall be personally liable for all costs associated with such proceedings. The clerk may also remove the guardian from office and appoint someone else to complete the administration of the estate. [G.S. 35A-1265]

TERMINATION OF GUARDIANSHIP

1. Resignation or Death of Guardian

(a) *Resignation*

A guardian who wishes to resign, must petition the Clerk of Superior Court for an order authorizing the resignation. [G.S. 35A-1292] The clerk may approve the resignation upon approval of a final account.

(b) Death

Upon the death of a guardian, the clerk will appoint a successor guardian following the same procedure for the initial appointment.
[G.S. 35A-1293]

2. Removal

(a) Mandatory

The clerk must remove a guardian or take other action when the guardian has been adjudged incompetent, has been convicted of a felony, was initially unqualified, fails to renew a bond, fails to file accountings, fails to obey any citation, notice or process served on the guardian or the guardian's process agent, or the clerk finds the guardian to be unsuitable to continue serving. The complete listing of bases for mandatory removal is found at G.S. 35A-1290(c).

(b) Discretionary

The clerk may remove a guardian or take other action when the clerk determines that the guardian has mismanaged or wasted the ward's money or estate, neglected to provide care for the ward, violated a fiduciary duty or has become insolvent. The complete listing of bases for discretionary removal is found at G.S. 35A-1290(a) and (b).

(c) Emergency

The clerk may remove a guardian without a hearing upon finding reasonable cause to believe an emergency exists that threatens the well being of the ward or the ward's estate.

(d) Interim Orders

When a guardian is removed the clerk may make such interim orders as the clerk finds necessary for the protection of the ward or ward's estate.

3. Restoration to Competency

When a ward's competency is restored (See, Restoration below) the guardianship shall terminate and a final accounting must be filed within sixty (60) days.
[G.S. 35A-1295]

4. Death of the Ward

Upon the death of the ward, guardianship shall terminate and a final accounting must be filed within sixty (60) days. [G.S. 35A-1295] Any remaining assets of the estate must be paid to the personal representative of the estate of the deceased ward and a receipt should be obtained from the personal representative and filed with the final accounting in the guardianship.

5. Minor Reaches Majority

When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship.

RESTORATION TO COMPETENCY

1. **Petition**

A guardian, ward, or other interested person may file a petition (as a motion in the cause) with the Clerk of Superior Court for partial or full restoration of the ward's competency. The petition must be served on the ward and guardian. There is no AOC form for this proceeding. No petition or proceeding is required for a minor reaching the age of 18.

2. **Hearing**

The clerk will schedule and hold a hearing to consider evidence of the ward's competency.

3 **Guardian *ad litem* or attorney**

The ward is entitled to be represented at the hearing by an attorney or the clerk will appoint a guardian ad litem attorney.

4. **Order**

(a) *Full restoration.*

If the clerk finds by a preponderance of the evidence that the ward is competent, the clerk will enter an order restoring the ward to competency. The ward may then handle his or her own affairs and enter into contracts as if he or she had never been adjudicated incompetent.

(b) *Alternative to full restoration*

If the clerk finds that the ward is able to make some of his own decisions, the clerk may enter an order changing the guardianship to a limited guardianship. A limited guardianship permits the ward to have input into or to make certain decisions, such as housing and medical care, as designated by the clerk.

(c) *Against restoration.*

If the clerk finds there is insufficient evidence to restore the ward's competency, the clerk will enter an order to that effect. The guardian of the ward will continue to serve. [G.S. 35A-1130]

[illegible]



NORTH CAROLINA
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Attorney Fee Provisions in North Carolina Contracts

Ann M. Anderson

The long-standing rule in North Carolina is that, unless a statute provides otherwise, the parties to litigation are responsible for their own attorney fees.¹ “It is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879.”² This rule applies even when a party has agreed in a contract to reimburse another party’s attorney fees incurred in an enforcement action:

Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys’ fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor.³

A key statutory exception to the rule against enforcing contractual attorney fee provisions is found in Section 6-21.2 of the North Carolina General Statutes (hereinafter G.S.), which allows enforcement of attorney fee provisions in notes, conditional sale contracts, and “other evidence of indebtedness” under certain circumstances. Since 1967, this statute has been the main statutory exception applicable to fee provisions in contracts and the subject of much case law.⁴ In June 2011, the North Carolina General Assembly added another major exception by creating G.S. 6-21.6, which authorizes courts to enforce reciprocal attorney fee provisions in business contracts. This bulletin discusses the law surrounding the existing statute and introduces new G.S. 6-21.6.

Ann M. Anderson is a faculty member of the School of Government specializing in civil procedure.

1. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E.2d 40, 42 (1973); *Stevenson v. Bartlett*, 177 N.C. App. 239, 244–45, 628 S.E.2d 443, 445 (2006) (Attorney fees “in this State are entirely creatures of legislation, and without this they do not exist.”). There is a narrow common law exception, called the “common fund doctrine,” where a party who, by his or her own effort and expense, has preserved or increased a common fund or common property. *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 281, 679 S.E.2d 512, 518 (2009) (stating the general standard).

2. *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814–15 (1980).

3. *Id.*

4. Numerous other statutes allow attorney fees in circumstances not specifically related to contractual provisions. Examples of commonly invoked statutes include G.S. 6-21.5, allowing fees in nonjusticiable cases; G.S. 75-16.1, authorizing fees in certain unfair trade practice actions; and G.S. 1D-45, requiring fees in certain cases in which punitive damages have been awarded.

G.S. 6-21.2: Actions on Notes and Other Evidence of Indebtedness

A “far-reaching exception”⁵ to the long-standing rule against allowing attorney fees as costs, G.S. 6-21.2 provides that

Obligations to pay attorneys’ fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity[.]

The statute places specific limits on these fees, as discussed in detail below. When the statutory requirements are met, however, the court does not have discretion to disallow the fees.⁶ The statute applies only to actions to enforce mature debt; it does not provide for fees in actions to enforce other provisions of the same contract.⁷

Determining the Fee Amount

The statute sets a limit on the amount of the award at 15 percent of the “outstanding balance” due on the contract.⁸ The court of appeals reversed an award of \$3,670.05 on an outstanding debt balance of \$20,846.43 because it exceeded the 15 percent allowed in G.S. 6-21.2, and remanded to the trial court for an award of \$3,126.97.⁹ Similarly, the court reversed and remanded a fee award of \$5,876.49 where that amount “far exceeded th[e] fifteen percent (15%) limitation.”¹⁰ The trial court may not exceed the 15 percent limitation even if the actual attorney fees incurred are in excess of that amount.¹¹

In most cases, the court’s fee award involves no exercise of discretion and amounts to exactly 15 percent of the outstanding balance. Whether a fee award will amount to *less* than 15 percent depends on the wording of the contractual attorney fee provision at issue. The statute contemplates two basic scenarios:

Contract States Specific Fee Percentage (G.S. 6-21.2(1))

First, where the provision sets a specific percentage, the court must enforce it “up to but not in excess of” 15 percent. G.S. 6-21.2(1) states that:

5. Coastal Prod. Credit Ass’n v. Goodson Farms, Inc., 70 N.C. App. 221, 227, 319 S.E.2d 650, 655 (1984).

6. Kindred of North Carolina, Inc. v. Bond, 160 N.C. App. 90, 104, 584 S.E.2d 846, 855 (2003).

7. For example, the court of appeals reversed an award of \$22,575.00 in attorney fees in a breach of contract action where the agreement and promissory note did provide for attorney fees, but the plaintiff’s action involved breach of other provisions of the agreement, not collection of the debt itself. Moreover, the debt had not yet matured, and the defendant was not the specific party owing the debt. Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc., 143 N.C. App. 1, 12, 545 S.E.2d 745, 752 (2001).

8. G.S. 6-21.2(1), (2).

9. Wachovia Bank & Trust Co. v. Peace Broad. Corp., 32 N.C. App. 655, 660, 233 S.E.2d 687, 690 (1977).

10. McGinnis Point Owners Ass’n, Inc. v. Joyner, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999); *see also* Southland Amusements and Vending, Inc. v. Rourk, 143 N.C. App. 88, 96, 545 S.E.2d 254, 258 (2001) (remanding a fee award of 32% of the liquidated damages judgment).

11. North Carolina Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 368, 649 S.E.2d 14, 23 (2007) (reversing an award where the trial court enforced a lease provision requiring defendant to “fully reimburse all attorneys’ fees reasonably incurred”).

If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

So, if the contract provides for a fee of 10 percent of the outstanding balance, the court will allow a fee of 10 percent. If the contract provides for a fee of 20 percent, the court will allow a fee of 15 percent. When awarding the fee, the court need not receive evidence or make findings as to reasonableness.

When the specified percentage is exact, as just described, the trial court's task is simple enough. If, however, the contract provides a percentage *range*, the trial court's discretion comes into play. In *Coastal Production Credit Ass'n v. Goodson Farms, Inc.*,¹² the promissory note provided for "a reasonable attorney's fee of not less than ten per centum of the total amount" due. The court of appeals determined that this language did in fact provide "some specific percentage" and thus fell within G.S. 6-21.2(1). The percentage was not fixed at a single number, however, so the trial court was required to exercise its discretion in determining a reasonable attorney fee within the contractual range—between 10 percent (the contract minimum) and 15 percent (the statutory maximum):

The provision in the note is "valid and enforceable up to but not in excess of fifteen percent." The note and the statute combine to set a range of reasonable attorneys' fees between 10% and 15%. What the proper award was within this range was thus the question before the trial court at the hearing.¹³

The trial court was required to consider evidence as to the reasonableness of the fees and to make specific findings of fact to support its award.¹⁴ The trial court did in fact make findings of fact and ultimately awarded the plaintiff \$36,356.91, an amount lower than the 15 percent statutory cap. The court of appeals examined the trial court's findings of fact, however, and based on the actual attorney time spent and the hourly rate for services, determined that those findings could support a figure no higher than \$27,112.50. The court remanded the matter for a downward modification of the award.¹⁵

Language to a similar effect appeared in the promissory note in *West End III Limited Partners v. Lamb*.¹⁶ The note provided for "reasonable attorney fees *not exceeding* a sum equal to

12. 70 N.C. App. 221, 319 S.E.2d 650 (1984).

13. *Id.* at 225, 319 S.E.2d at 654.

14. *Id.* at 226, 319 S.E.2d at 655. Generally, the factors about which a court must make findings when setting an attorney fee include the skill, ability, and experience of the attorney; the customary fee for like work; and the time and labor expended. *Printing Servs. of Greensboro, Inc. v. American Capital Grp., Inc.*, 180 N.C. App. 70, 82, 637 S.E.2d 230, 237 (2006). Other factors often considered are those listed in Rule 1.5 of the North Carolina State Bar Rules of Professional Conduct. The N.C. Supreme Court has further stated that a judge should consider, where appropriate, the novelty and difficulty of the legal questions; the adequacy of the representation; the difficulties the attorney faced (especially if unusual); and the types of cases for which fees are usually appropriate. *United Laboratories v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381–82 (1993).

15. *Id.* at 228–29, 319 S.E.2d at 656.

16. 102 N.C. App. 458, 402 S.E.2d 472 (1991).

fifteen percent (15%) of the outstanding balance.”¹⁷ Citing *Coastal Production*, the court of appeals held that, because the trial court had discretion to award a sum in any amount up to 15 percent, it was required to make written findings of fact to support an award in that range. The trial court awarded the full 15 percent (\$39,924.24 on a balance of \$265,000.00) but made

no findings as to the amount of time defendants’ attorney actually spent attempting to collect the debt, the attorney’s hourly rates, or the reasonable amount of time required to collect at debt such as the one owed by plaintiffs.

The court of appeals thus remanded the case to the trial court for appropriate findings.¹⁸ Likewise, in *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*,¹⁹ the contract at issue called for an attorney fee “not exceeding a sum equal to fifteen percent (15%) of the outstanding balance.” Because the trial court awarded the full 15 percent without making findings of fact, the court of appeals remanded the award.²⁰

Finally, in *Barker v. Agee*,²¹ the contract called for “reasonable fees ‘but not more than such attorneys’ usual hourly charges for the time actually expended.” The court of appeals held that this language also fell within G.S. 6-21.2(1) and would permit an award of reasonable fees of any amount up to the “attorneys’ usual hourly charges for the time actually expended,” capped at 15 percent of the outstanding balance.²² Thus, pursuant to *Coastal Production*, findings of fact and an evidentiary basis were required. The court of appeals examined the trial court’s findings and held that the “evidence and findings of fact are sufficient to support the amount of the award.”²³

Contract Silent as to Amount of Fee (G.S. 6-21.2(2))

If the contract specifies *no* specific fee amount or percentage, the court must allow a fee of 15 percent of the outstanding balance. No exercise of discretion is involved. G.S. 6-21.1(2) provides that:

If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys’ fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the “outstanding balance” owing on said note, contract or other evidence of indebtedness.

Therefore, if the contract provides for a fee, but is silent as to the amount of the fee, the statutory fee is 15 percent.²⁴ Where a contract provides for “reasonable attorneys’ fees” without further specifying a fee amount or percentage, it is “subject to the provisions in G.S. 6-21.2 subsection

17. *Id.* at 459, 402 S.E.2d at 473 (emphasis added).

18. *Id.* at 461, 402 S.E.2d at 475.

19. 126 N.C. App. 637, 642, 486 S.E.2d 229, 232 (1997).

20. *Id.* at 643, 486 S.E.2d at 233.

21. 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff’d in part and rev’d in part on other grounds*, 326 N.C. 470, 389 S.E.2d 803 (1990).

22. *Id.* at 544, 388 S.E.2d at 571–72.

23. *Id.*

24. *McGinnis Point Owners Ass’n, Inc. v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 321 (1999); *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993); *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987); *Four Seasons Homeowners Ass’n v. Sellers*,

(2), [which] has predetermined that 15% is a reasonable amount.”²⁵ Characterizing the 15 percent fee as a “statutory mandate,” the court of appeals has further held that the 15 percent fee is required even where it exceeds the actual attorney fees incurred by the creditor.²⁶

Outstanding Balance

The statute provides two definitions of “outstanding balance,” depending on the type of contract at issue. The first, G.S. 6-21.2(3), applies to notes and evidence of indebtedness:

As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the “outstanding balance” shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

The second, G.S. 6-21.2(4), applies to conditional sales contracts and certain security agreements:

As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the “outstanding balance” shall mean the “time price balance” owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

While these provisions speak in terms of the amount owing at “the time suit is instituted,” typically it is not the amount alleged in the pleadings that determines the actual “outstanding balance.” In matters in which a jury determines such damages, it is the jury’s measure of damages that decides the figure. In *North Carolina Industrial Capital, LLC v. Clayton*,²⁷ the court explained that where the balance due on a contract is a question for the jury, the “outstanding balance” under G.S. 6-21.2 is the amount awarded by the jury as contract damages. Thus the jury award is the basis for calculating the attorney fee, and the trial court properly calculated a fee of \$15,274.55 on the jury award of \$101,830.38.²⁸ Similarly, where a jury awarded the plaintiff \$10,199.49 as damages for breach of an operating contract, the trial court exceeded the statutory cap by awarding a fee of \$3,300.²⁹

Also, while the definitions of “outstanding balance” speak of balance owing at the time “suit” is instituted, the “suit” is not necessarily the underlying action in which the judge is making the fee award. Several opinions have upheld awards in which the trial court included in the “outstanding balance” sums garnered in earlier proceedings to collect portions of the same debt. The key factor is whether the other proceedings are “reasonably related” to the collection of the debt in question. As the court of appeals has stated,

72 N.C. App. 189, 191–92, 323 S.E.2d 735, 737–38 (1984); *see also* *Inst. Food House, Inc. v. Circus Hall of Cream, Inc.*, 107 N.C. App. 552, 558, 421 S.E.2d 370, 374 (1992) (strictly enforcing G.S. 6-21.2(2)).

25. *Trull v. Cent. Carolina Bank & Trust*, 124 N.C. App. 486, 493–94, 478 S.E.2d 39, 44 (1996).

26. *Id.* (rejecting an argument that such a fee amounts to a windfall). This holding is in contrast to the situation in which the contract allows a fee within a percentage range, such as the contractual language at issue in *Coastal Production*, discussed *supra*.

27. 185 N.C. App. 356, 649 S.E.2d 14 (2007).

28. *Id.* at 368, 649 S.E.2d at 23.

29. *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 96, 545 S.E.2d 254, 258 (2001).

Mindful of . . . the infinite variety of activities which attorneys may engage in to bring a case to successful settlement or verdict, we believe that when other actions are reasonably related to the collection of the underlying note sued upon, attorneys' fees incurred therein may properly be awarded under G.S. 6-21. 2. Nothing prohibits such an interpretation; the statute merely allows attorneys' fees "upon any note" "collected by or through an attorney at law." The General Assembly did not limit those fees solely to those incurred directly in the prosecution of the action on the note. In fact, it recognized that in some cases "ancillary claims" would be necessary, without in any way barring attorneys' fees incurred in pursuing such claims.³⁰

The court of appeals has found bankruptcy proceedings, receiverships, foreclosure actions, and deficiency actions to be reasonably related to the collection of debt under a note.³¹

In a recent action to collect on a lease agreement, the trial court awarded \$92,208.76 in attorney fees on a jury award of \$421,680.67. The defendant argued that the attorney fee award violated G.S. 6-21.2(2) because it exceeded the statutory 15 percent cap. The court of appeals disagreed, noting that the plaintiff had collected an additional \$302,635.00 of the debt through an ancillary Kansas bankruptcy proceeding. Thus the "balance of the debt collected in both the current action and the Kansas . . . proceeding was \$724,315.67." Finding that the Kansas proceeding was "reasonably related to the current action," the court held that the fee award was thus "well below the statutory ceiling of fifteen percent."³²

The burden of demonstrating that the other proceeding is "reasonably related" to collection of the debt is on the plaintiff.³³ Where a trial court declines to include other collection proceedings in its calculation of "outstanding balance," that decision is reviewed only for abuse of discretion.³⁴

Other Evidence of Indebtedness

The statute authorizes enforcement of obligations to pay attorney fees upon any note, conditional sale contract, or "other evidence of indebtedness." Whether a contract falls within the category of other evidence of indebtedness has been a frequent question for the courts. In *Stillwell Enterprises*, the Supreme Court held generally that "the term 'evidence of indebtedness' as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money."³⁵ Thus far, North Carolina courts have held that the following types of agreements fall within this definition:

30. *Coastal Prod. Credit Ass'n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 227–28, 319 S.E.2d 650, 655–56 (1984) (internal citations omitted).

31. *Trull v. Cent. Carolina Bank & Trust*, 124 N.C. App. 486, 493, 478 S.E.2d 39, 44 (1996); *Coastal Production*, 70 N.C. App. at 228, 319 S.E.2d at 656.

32. *Telerent Leasing Corp. v. Boaziz*, 200 N.C. App. 761, 767, 686 S.E.2d 520, 524 (N.C. App. 2009); see also *Trull*, 124 N.C. App. at 493, 478 S.E.2d at 43 (affirming award of \$100,825.27 on original balance of \$672,168.48 calculated prior to the beginning of an earlier collection proceeding).

33. *Coastal Production*, 70 N.C. App. at 227–28, 319 S.E.2d at 655–56.

34. *North Carolina Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 369, 649 S.E.2d 14, 24 (2007).

35. 300 N.C. 286, 292–95, 266 S.E.2d 812, 817–18 (1980). Contracts must be in writing to fall within this statute. *Jacobs v. Cent. Transport, Inc.*, 891 F. Supp. 1120, 1124 (1995).

- commercial real property leases;³⁶
- personal property leases;³⁷
- credit agreements;³⁸
- credit applications signed in connection with related credit accounts;³⁹
- operator agreement to supply equipment to defendant amusement park;⁴⁰
- obligation by lot owners to pay maintenance fees in a declaration of covenants, conditions, and restrictions;⁴¹ and
- guaranty agreements in connection with commercial loan.⁴²

By contrast, in the following cases the courts have held that the agreements in question did *not* constitute evidence of indebtedness:

- consent judgment to settle a declaratory judgment action,⁴³
- contract for construction of condominiums on defendant's land,⁴⁴
- sales receipts and invoices.⁴⁵

In addition, in the unusual case of *Calhoun v. WHA Medical Clinic, PLLC*,⁴⁶ the court of appeals was confronted with the question of whether an employer–employee non-compete agreement fell within the scope of G.S. 6-21.2. Rather than decide the legal question, the court noted that the trial court had made no “findings of fact” as to whether an employment contract was a “printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money” and whether it “relates to commercial transactions.” The court then remanded to the trial judge for those findings.⁴⁷

36. *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 257–58, 644 S.E.2d 245, 250 (2007); *RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993).

37. *Stillwell Enterprises*, 300 N.C. at 292–95, 266 S.E.2d at 817–18.

38. *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 422, 360 S.E.2d 814, 816 (1987) (“A formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney’s fees it will be legally enforceable pursuant to GS 6-21.2.”).

39. *Hedgecock Builder’s Supply Co. of Greensboro v. White*, 92 N.C. App. 535, 544, 375 S.E.2d 164, 170–71 (1989).

40. *Southland Amusements and Vending, Inc. v. Rourk*, 143 N.C. App. 88, 94–96, 545 S.E.2d 254, 256–58 (2001). This case takes a very expansive view of the definition of “evidence of indebtedness,” particularly by contrast to the earlier case of *Yeargin Construction Co., Inc. v. Futren Development Corp.*, 29 N.C. App. 731, 733–34, 225 S.E.2d 623, 625 (1976), noted *infra*.

41. *Four Seasons Homeowners Ass’n v. Sellers*, 72 N.C. App. 189, 191–92, 323 S.E.2d 735, 737–38 (1984).

42. *FNB Se. v. Lane*, 160 N.C. App. 535, 541, 586 S.E.2d 530, 534 (2003).

43. *Harborage Property Owners Ass’n, Inc. v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 298, 551 S.E.2d 207, 212 (2001) (declining to enforce a provision in the consent judgment requiring the non-prevailing party to “cover reasonable attorney fees” of the prevailing party).

44. *Yeargin Constr. Co., Inc. v. Futren Dev. Corp.*, 29 N.C. App. 731, 733–34, 225 S.E.2d 623, 625 (1976) (provision for attorney fees in the amount of 10% of any unpaid amounts under the contract was not enforceable).

45. *State Wholesale Supply, Inc. v. Allen*, 30 N.C. App. 272, 277–78, 227 S.E.2d 120, 124 (1976) (where attorney fee provision was absent from the underlying credit agreement).

46. 178 N.C. App. 585, 632 S.E.2d 563 (2006).

47. *Id.* at 604–05, 632 S.E.2d at 575.

Enforcement against Guarantors

An attorney fee provision may be enforced under G.S. 6-21.2 against a guarantor to the agreement when the document the guarantor signed properly references the fee obligation. For example, where the note in question provided for payment of attorney fees by guarantors, but the guaranty agreement had no such attorney fee provision, the attorney fee provision was not binding on the guarantors. The court of appeals, in *EAC Credit Corp. v. Wilson*,⁴⁸ stated that “North Carolina . . . recognizes that the obligation of the guarantor and that of the maker, while often coextensive are, nonetheless, separate and distinct.”⁴⁹ By contrast, where the note maker and the guarantor signed one instrument together, rather than separate agreements, the attorney fee provision in the instrument would be enforced against the guarantor.⁵⁰

The language in the guaranty agreement need not, however, specifically reference attorney fees if it otherwise provides adequate notice of the attorney fee obligation. In *RC Associates v. Regency Ventures, Inc.*,⁵¹ the guaranty agreement stated that the guarantor “unconditionally guarantees the full and punctual payment of the rent and other charges provided for in this lease[.]” The court of appeals found this language sufficient to put the guarantor on notice of the obligation to pay attorney fees pursuant to the language of the lease.⁵²

Notice Requirement

The statute contains a notice requirement that gives debtors a *very* brief window during which to avoid attorney fees. In most contracts covered by the statute, the party seeking to collect is required to provide notice to the debtor of its intent to enforce the attorney fees provision.⁵³ The debtor “has five days from the mailing of such notice to pay the ‘outstanding balance’ without the attorneys’ fees.” If the party pays in full within that time frame, “the obligation to pay the attorneys’ fees shall be void, and no court shall enforce such provisions.”⁵⁴ Because mailing often takes at least two days, the window for payment typically amounts to no more than three days.

48. 12 N.C. App. 481, 183 S.E.2d 859 (1971).

49. *Id.* at 485–86, 183 S.E.2d at 862. A note’s *endorsers* are treated differently than guarantors, as endorsers’ obligations do not necessarily arise from a separate agreement. Where a note provided that the attorney fee obligation would apply to “all parties,” and “all parties” was defined to include endorsers, the attorney fee provision would be enforced against the note’s endorsers. *Wachovia Bank & Trust Co. v. Peace Broad. Corp.*, 32 N.C. App. 655, 659, 233 S.E.2d 687, 689–90 (1977) (distinguishing *EAC Credit*).

50. *First-Citizens Bank & Trust Co. v. 4325 Park Road Assocs., Ltd.*, 133 N.C. App. 153, 157, 515 S.E.2d 51, 54 (1999).

51. 111 N.C. App. 367, 373–74, 432 S.E.2d 394, 397–98 (1993).

52. *Id.*; see also *Devereux Props., Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 625, 442 S.E.2d 555, 557 (1994) (reaching same result interpreting identical guarantee language).

53. G.S. 6-21.2(5) provides that

The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys’ fees in addition to the “outstanding balance” shall be enforced[.]”

54. G.S. 6-21.2(5). There is an exception to the notice requirement where certain ancillary claims must be filed to recover possession of the property:

There is no particular time requirement for sending the notice other than “after maturity of the obligation.”⁵⁵ It is not necessary to give the notice prior to instituting an enforcement action; the parties may give the notice during the course of the proceedings.⁵⁶ In *Gillespie v. DeWitt*, the court held that a plaintiff was entitled to collect attorney fees pursuant to a note even where the defendant received the statutory notice four days after the collection action was initiated.⁵⁷ In the bankruptcy context, the Fourth Circuit Court of Appeals held that a creditor could provide the statutory notice in conjunction with a motion for relief from the automatic stay.⁵⁸ It should be noted however, that after a voluntary dismissal without prejudice of a foreclosure action under North Carolina Rule of Civil Procedure 41(b), the plaintiffs were required to send a new notice of intent to seek attorney fees. The first notice did not survive the voluntary dismissal.⁵⁹

As for form, “[t]he statute does not require any particular form, other than mailing, for giving such notice.”⁶⁰ In practice, notice is typically given in the form of a letter to the debtor or its counsel.⁶¹ Discussing long-standing agency principles, the court of appeals held that service upon counsel representing the debtor in connection with the debt constitutes proper notice upon the debtor itself.⁶² Citing similar agency principles codified in G.S. 59-42, the court also held that a North Carolina partnership was properly notified when the creditor sent the notice letter to the home address of *one* of the partners in the partnership.⁶³

While the timing and form of the notice are flexible, the courts consider the notice requirement itself to be “explicit” and strictly enforce it before allowing an award of fees.⁶⁴ Where a

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by G.S. 25-9-609, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys’ fees in addition to the outstanding balance.

G.S. 6-21.2(6).

55. *Coastal Prod. Credit Ass’n v. Goodson Farms, Inc.*, 70 N.C. App. 221, 223, 319 S.E.2d 650, 653 (1984).

56. *Federal Land Bank of Columbia v. Lieben*, 86 N.C. App. 342, 348, 357 S.E.2d 700, 704 (1987).

57. 53 N.C. App. 252, 269, 280 S.E.2d 736, 747 (1981). Accordingly, the notice may be sent to the debtor’s attorney of record after the proceedings have commenced. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 377–78, 206 S.E.2d 775, 779 (1974).

58. *Shangra-La, Inc. v. Harden*, 167 F.3d 843, 850–52 (4th Cir. 1999).

59. *Thomas v. Miller*, 105 N.C. App. 589, 592, 414 S.E.2d 58, 60 (1992).

60. *Coastal Production*, 70 N.C. App. at 223, 319 S.E.2d at 653.

61. Apparently there is no requirement that the notice actually mention attorney fees as long as it refers specifically to the relevant provision in the agreement. In *Beau Rivage Plantation, Inc. v. Melex USA, Inc.*, a certified mail letter informing defendant that “we shall exercise our rights pursuant to paragraph 19 ‘Remedies’ of the Lease” was acceptable notice of intent to enforce attorney fee provision, where paragraph 19 included an attorney fee provision. 112 N.C. App. 446, 453, 436 S.E.2d 152, 156 (1993). This type of indirect reference, however, is not standard (or suggested) practice.

62. *Crist v. Crist*, 145 N.C. App. 418, 425–26, 550 S.E.2d 260, 265–66 (2001) (“[D]efendant was placed on notice when his attorney received the letter from plaintiff[.]”).

63. *Hedgecock Builder’s Supply Co. of Greensboro v. White*, 92 N.C. App. 535, 544, 375 S.E.2d 164, 171 (1989).

64. *McGinnis Point Owners Ass’n, Inc. v. Joyner*, 135 N.C. App. 752, 757, 522 S.E.2d 317, 320 (1999); see also *ITT-Indus. Credit Co. v. Hughes*, 594 F.2d 384, 388 (4th Cir. 1979) (holding that filing a claim in bankruptcy was not sufficient to satisfy the notice requirement).

creditor did not demonstrate compliance with the notice requirement, the court of appeals held that an award of attorney fees was unauthorized and must be vacated.⁶⁵ Similarly, in *McGinnis Point Owners Ass'n, Inc. v. Joyner*,⁶⁶ the record on appeal did not reflect whether or not notice was given, so the court vacated the fee award and remanded to the trial court to determine whether notice was given.

Special Requirements for Debt Buyers and Assignees

In 2009, the General Assembly enacted legislation aimed in part at ensuring fair collection practices by “debt buyers”—companies in the business of buying and collecting delinquent consumer debt.⁶⁷ Part of the legislation requires such a company to more thoroughly document to the court its entitlement to collect the debt, including its right to enforce an attorney fee provision in the debt instrument. G.S. 6-21.2 was amended to provide that, where the plaintiff is a debt buyer or assignee of the debt, that party must provide the court all of the following:

- a. A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.
- b. A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor’s name associated with that account number.⁶⁸

The court must receive and be satisfied that these requirements (in addition to the notice requirements) have been met before allowing the party to receive an award of fees under this statute.⁶⁹

65. *Davis Lake Cmty. Ass’n v. Feldmann*, 138 N.C. App. 292, 297, 530 S.E.2d 865, 869 (2000); *Northwestern Bank v. Barber*, 79 N.C. App. 425, 430, 339 S.E.2d 452, 455 (1986).

66. 135 N.C. App. 752, 756–57, 522 S.E.2d 317, 320 (1999).

67. This legislation was part of the Consumer Economic Protection Act of 2009, S.L. 2009-573. “Debt buyer” is defined in the amended G.S. 58-70-15(b)(4) as

a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt.

68. G.S. 6-21.2(6).

69. *Id.*

New Legislation: G.S. 6-21.6—Reciprocal Attorney Fees in Business Contracts

In June 2011, the General Assembly enacted new legislation providing another significant exception to the general North Carolina rule against enforcement of contractual attorney fee provisions. Session Law 2011-341 created G.S. 6-21.6, which authorizes courts to enforce reciprocal contractual attorney fee provisions in business contracts. The statute provides that

[r]eciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract.⁷⁰

In enacting this statute, North Carolina joins what appears to be a majority of the states in allowing attorney fees in some types of general business agreements. The law is effective October 1, 2011, and it applies to business contracts entered into on or after that date.

Scope of the Statute

"Business contract" is defined in the new statute as "a contract entered into primarily for business or commercial purposes."⁷¹ That definition by itself is quite broad, but expressly excluded from its scope are consumer contracts, employment contracts, and contracts "to which a government or a governmental agency of this State is a party."⁷² A consumer contract is a contract "entered into by one or more individuals primarily for personal, family, or household purposes."⁷³ An employment contract is a contract "between an individual and another party to provide personal services by that individual to the other party, whether the relationship is in the nature of employee-employer or principal-independent contractor."⁷⁴ By excluding consumer and employment agreements, the General Assembly sought to confine the statute to contracts in which the parties are in reasonably even bargaining positions.

Attorney fee provisions in business contracts are "reciprocal" when each party to the contract agrees

upon the terms and subject to the conditions set forth in the contract that are made applicable to all parties, to pay or reimburse the other parties for attorneys' fees and expenses incurred by reason of any suit, action, proceeding, or arbitration involving the business contract.⁷⁵

Thus, a fee clause that provides for payment of attorney fees by only one (or by less than all) the parties to the contract cannot be enforced under this statute.

"Sign by Hand"

The statute provides that these reciprocal fee provisions are enforceable "only if all of the parties to the business contract *sign by hand* the business contract."⁷⁶ The statute does not define the phrase "sign by hand." If in fact it is to be read literally to mean physically signed in ink with

70. G.S. 6-21.6(b).

71. G.S. 6-21.6(a)(1).

72. *Id.*

73. G.S. 6-21.6(a)(2).

74. G.S. 6-21.6(a)(3).

75. G.S. 6-21.6(a)(4).

76. G.S. 6-21.6(b) (emphasis added).

a writing instrument, it serves as a significant limitation on the applicability of the statute. On the other hand, is it possible that “sign by hand” is a term of art that may be read to encompass electronic signatures or other common forms of delivery and acceptance? This latter scenario would better reflect modern business, but it appears unlikely at best: the language was added in the fourth edition of the bill, so there seems to have been a specific limiting purpose behind it. *Counsel may wish to advise their business clients to have the parties physically execute these agreements if they truly seek to enforce reciprocal fee provisions.*

In addition, the statute states that “all parties” to the business contract must sign it by hand in order for it to be enforceable. Again, if “sign by hand” is to be interpreted literally, a party may not, then, enforce a fee provision against a party who signed the agreement by hand if there is any other party who *did not* sign it by hand (who signed it electronically, for example). It appears that a key to enforceability under this new statute is thoroughness and formality in the preparation and execution of the final agreement.

Determining the Amount of the Fee

Like G.S. 6-21.2, this new statute provides that the relevant attorney fee provisions are “valid and enforceable.” In the new statute, however, the trial court’s enforcement discretion is much broader. As discussed above, G.S. 6-21.2 generally *requires* the court to award the attorney fee, typically at the fixed and limited amount of 15 percent of the outstanding balance. The new reciprocal attorney fee statute takes the more traditional approach (found in other attorney fee statutes) of giving the trial judge considerable discretion over *whether* to award a fee and *how much* to award. The statute states:

If a business contract governed by the laws of this State contains a reciprocal attorneys’ fees provision, the court or arbitrator in any suit, action, proceeding, or arbitration involving the business contract *may* award reasonable attorneys’ fees in accordance with the terms of the business contract.⁷⁷

In determining “reasonable” fees, the court or arbitrator “may consider all relevant facts and circumstances, including, but not limited to” the following thirteen factors listed in the statute:

- (1) The amount in controversy and the results obtained.
- (2) The reasonableness of the time and labor expended, and the billing rates charged, by the attorneys.
- (3) The novelty and difficulty of the questions raised in the action.
- (4) The skill required to perform properly the legal services rendered.
- (5) The relative economic circumstances of the parties.
- (6) Settlement offers made prior to the institution of the action.
- (7) Offers of judgment pursuant to Rule 68 of the North Carolina Rules of Civil Procedure and whether judgment finally obtained was more favorable than such offers.
- (8) Whether a party unjustly exercised superior economic bargaining power in the conduct of the action.
- (9) The timing of settlement offers.
- (10) The amounts of settlement offers as compared to the verdict.
- (11) The extent to which the party seeking attorneys’ fees prevailed in the action.

⁷⁷ G.S. 6-21.6(c) (emphasis added).

- (12) The amount of attorneys' fees awarded in similar cases.
- (13) The terms of the business contract.⁷⁸

The judge's discretion in setting the award under this statute is not limited by terms in the contract at issue, by other statutory presumptions, or by the results of prior litigation:

Reasonable attorneys' fees and expenses shall not be governed by (i) any statutory presumption or provision in the business contract providing for a stated percentage of the amount of such attorneys' fees or (ii) the amount recovered in other cases in which the business contract contains reciprocal attorneys' fees provisions.⁷⁹

It appears, then, that even if a business contract attempts to limit the amount of a reciprocal fee award (for example, to 20% of a compensatory damages verdict), the court is not to be bound by that limit.

While the judge has very broad discretion in setting the award, the statute does attempt to set an upper limit in actions primarily for the recovery of monetary damages. Two separate subparagraphs of the statute, however, each place the cap at a different amount. Subparagraph (b) states that, "[i]n any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees *may not exceed the monetary damages awarded*."⁸⁰ Subparagraph (f) states that, "[i]n any suit, action, proceeding, or arbitration primarily for the recovery of monetary damages, the award of reasonable attorneys' fees *may not exceed the amount in controversy*." It is unclear from the legislative history which provision was intended to be the final provision in the act. Both limits are high, however, and it seems that most fee awards—at least in larger cases—will not approach either of them.

In addition, any award of fees by the court under this statute should be supported by findings and conclusions in the order. It is well-settled North Carolina law that where a trial court has discretion over an attorney fee award, the judge must support that award with written findings of fact and conclusions of law. These findings and conclusions must address both entitlement to attorney fees and the dollar amount of attorney fees awarded, taking into consideration the factors relevant to each case, including those prescribed by statute.⁸¹

Relationship to G.S. 6-21.2

Many, if not most, notes and similar debt instruments covered by G.S. 6-21.2 contain unilateral, rather than reciprocal, fee provisions; thus they do not come within the scope of the new reciprocal fee statute. Other contracts covered by G.S. 6-21.2 may, however, fall within both statutes, and where this occurs, the new statute allows parties to elect recovery under either statute:

If the business contract is also a note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2, then the parties that are entitled to recover attorneys' fees and expenses may elect to recover

⁷⁸ *Id.*

⁷⁹ G.S. 6-21.6(d).

⁸⁰ G.S. 6-21.6(b) (emphasis added).

⁸¹ See generally *Gilchrist v. French*, 169 N.C. App. 255 (2005); *Washington v. Horton*, 132 N.C. App. 347 (1999). See also note 14, *supra*.

attorneys' fees and expenses either under this section or G.S. 6-21.2 but may recover only once for the same attorneys' fees and expenses.⁸²

The statute does not specify when the party must make the election, but presumably the party may do so after the judge determines the amount of the fee to be awarded under the reciprocal statute.

The court is not expressly prohibited from setting the fee under both statutes at 15 percent of the outstanding balance (or damages award). The new statute makes clear, however, that the fee "shall not be governed by . . . any statutory presumption . . . providing for a stated percentage of the amount of such attorneys' fees."⁸³ Thus the court should be careful to support its determination with specific findings of fact to show the decision was not arbitrary or based purely on the statutory presumption set by G.S. 6-21.2.

Together, G.S. 6-21.2 and the new G.S. 6-21.6 carve out significant exceptions to the common law rule against enforcing contractual attorney fee provisions. Given a trial court's wide discretionary range in setting a fee under the new business contracts statute, this state's trial judges can expect to have more attorney fee hearings on their civil dockets than in decades past.

82. G.S. 6-21.6(e). The new statute also does not affect the validity of a contractual provision falling within the older statute: "Nothing in this section shall in any way make valid or invalid attorneys' fees provisions in consumer contracts or in any note, conditional sale contract, or other evidence of indebtedness that is otherwise governed by G.S. 6-21.2." *Id.*

83. G.S. 6-21.6(d).

Selected Rules of Evidence of Interest to North Carolina Magistrates

Rule 102. Purpose and construction.

In general. – These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 414. Evidence of medical expenses.

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied.

Rule 602. Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

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Rule 614. Calling and interrogation of witnesses by court.

- (a) Calling by court. – The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
- (b) Interrogation by court. – The court may interrogate witnesses, whether called by itself or by a party.
- (c) Objections. – No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled.

Rule 701. Opinion testimony by lay witness.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of other evidence of contents.

The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if:

- (a) Originals Lost or Destroyed. – All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
- (b) Original Not Obtainable. – No original can be obtained by any available judicial process or procedure; or
- (c) Original in Possession of Opponent. – At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
- (d) Collateral Matters. – The writing, recording, or photograph is not closely related to a controlling issue.

Factors to Consider When Issue Involves Error in Names of Parties

- ☒ Who is the intended defendant? (e.g., administrator of estate, person with whom I contracted, etc.)
- ☒ What is that person's name?
- ☒ Was that person properly served?
- ☒ Is that person present in court?
- ☒ What name appears in the caption of the complaint? The caption of the summons? The "directed to" portion of the summons?
- ☒ If the name that appears in court documents is not correct, does that name correctly identify some other natural or corporate person?
- ☒ What degree of confusion is likely to result from the error?

Liquidated Damages as Contract Remedy

Fact Situation #1. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John and Mary agree that John will pay Mary \$200 to hold the apartment for him, and not rent it to anyone else, for three days. John does not return with his wife and on the fourth day Mary rents the apartment to someone else. John sues to get his \$200 back. What do you do?

Fact Situation #2. John is interested in renting an apartment from Mary, but he wants his wife to take a look at it first. He's worried, though, that someone else will rent the place before he can get back with his wife. John tells Mary he wants to go ahead with the deal, and promises to return tomorrow with his wife to sign the written lease. Mary agrees to rent the apartment to John, and tells him that she requires a non-refundable \$200 deposit, which will be credited against his first month's rent and if when he returns to sign the lease. John's wife hates the place, and so the deal falls through. John sues to get his \$200 back. How is this different from Fact Situation #1?

Liquidated damages: "a sum which a party to a contract agrees to pay or deposit which he agrees to forfeit if he breaks some promise . . . arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach."

Penalty: "a sum which a party similarly agrees to pay or forfeit, . . . but which is fixed, not as a pre-estimate or probable actual damages, but as a punishment, the threat of which is designed to prevent the breach."

McCormick, *Damages* §146 (1935)

A liquidated damages provision is enforceable under North Carolina law when:

1. damages are speculative or difficult to ascertain, and
2. the amount stipulated is a reasonable estimate of probable damages, OR
the amount stipulated is reasonably proportionate to the damages actually caused by the breach.

The party challenging the validity of the provision has the burden of demonstrating that it does not satisfy the requirements for enforceability.

Essential Elements

Trespass to Chattel

- ✓ Plaintiff had either actual or constructive possession of the goods in question
- ✓ at the time of the trespass,
- ✓ and defendant either interfered with property, or removed possession of the property from plaintiff,
- ✓ and defendant's action was either unauthorized or unlawful.

Constructive possession exists when a person, while not in actual possession of property, has title such that the person has an immediate right to actual possession.

Affirmative defense of privilege requires showing by defendant that

- ☒ he reasonably believed his action was necessary to protect his own property, and
- ☒ the harm inflicted was not unreasonable compared to the harm threatened.

Unfair or Deceptive Acts or Practices

- ✓ Defendant committed an unfair* or deceptive trade practice;
- ✓ the act or practice was in or affected commerce;
- ✓ the plaintiff suffered injury as a result.

*A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, or where the conduct by the party manifests an inequitable assertion of power or position.

Malicious Prosecution

- ✓ Defendant initiated the earlier proceeding*;
- ✓ the defendant acted with malice** in doing so;
- ✓ there was a lack of probable cause for the initiation of the earlier proceeding; and

✓ **the earlier proceeding terminated in favor of the plaintiff.**

*The courts have said that simply reporting suspicious circumstances to the police is not enough to make a person responsible for subsequent events. However, “where it is unlikely there would have been a criminal prosecution of [a] plaintiff except for the efforts of a defendant” that is evidence that would support a finding that Essential Element #1 has been satisfied.

Malice in a malicious prosecution claim may be demonstrated by evidence that the defendant ‘was motivated by personal spite and a desire for revenge’ or that defendant acted with ‘reckless and wanton disregard’ for plaintiffs' rights.