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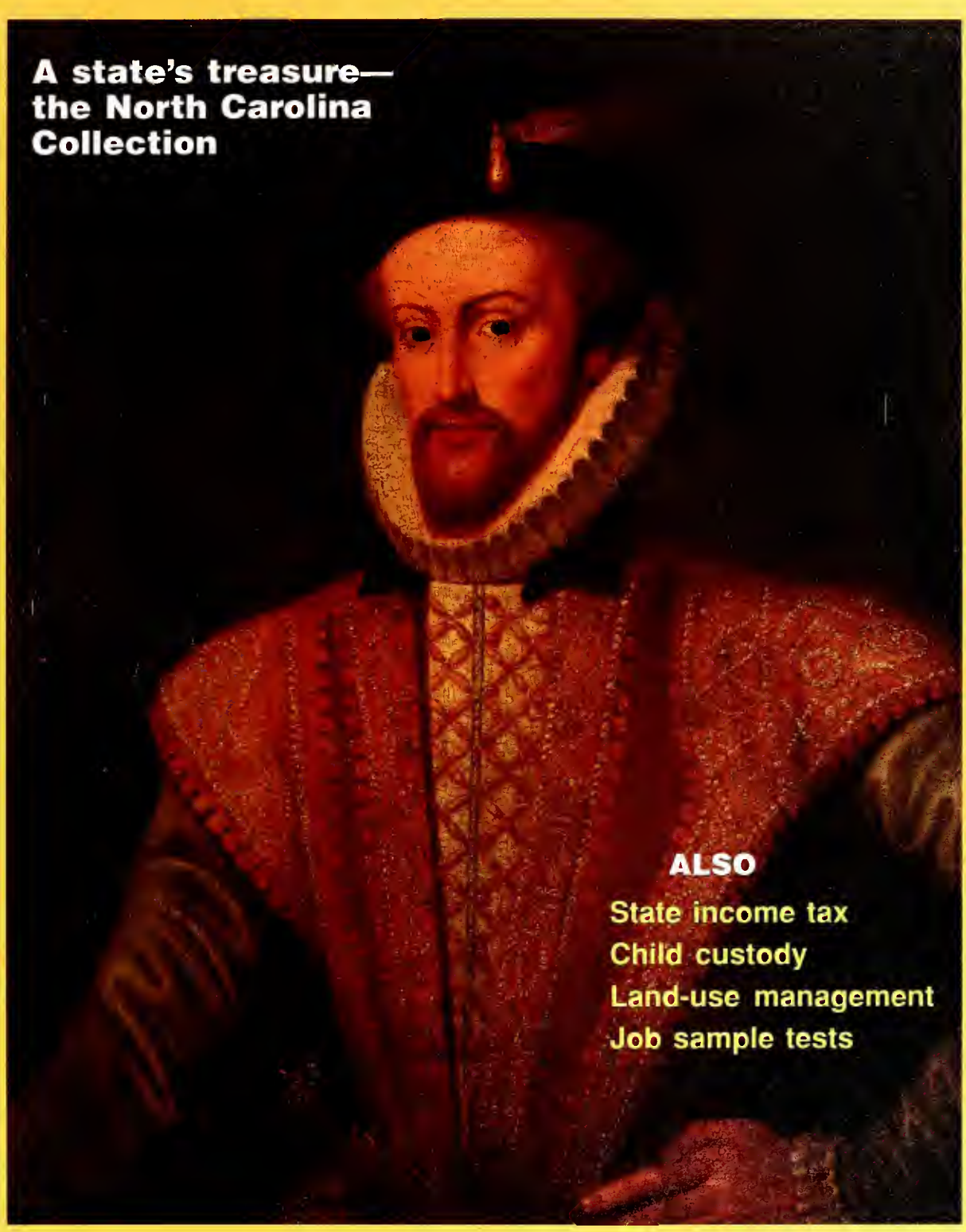
Popular Government

Institute of Government • The University of North Carolina at Chapel Hill



On the Cover

Portrait of Sir Walter Raleigh, oils on board, English, unsigned, 1590s. Photograph by Bob Donnan.

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Each day that the General Assembly is in session, the Institute's Legislative Reporting Service reports on the Assembly's activities for members of the legislature and other state and local officials who need to follow the course of legislative events.

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Feature Articles

Around the State

North Carolina's New Income Tax

David Crotts

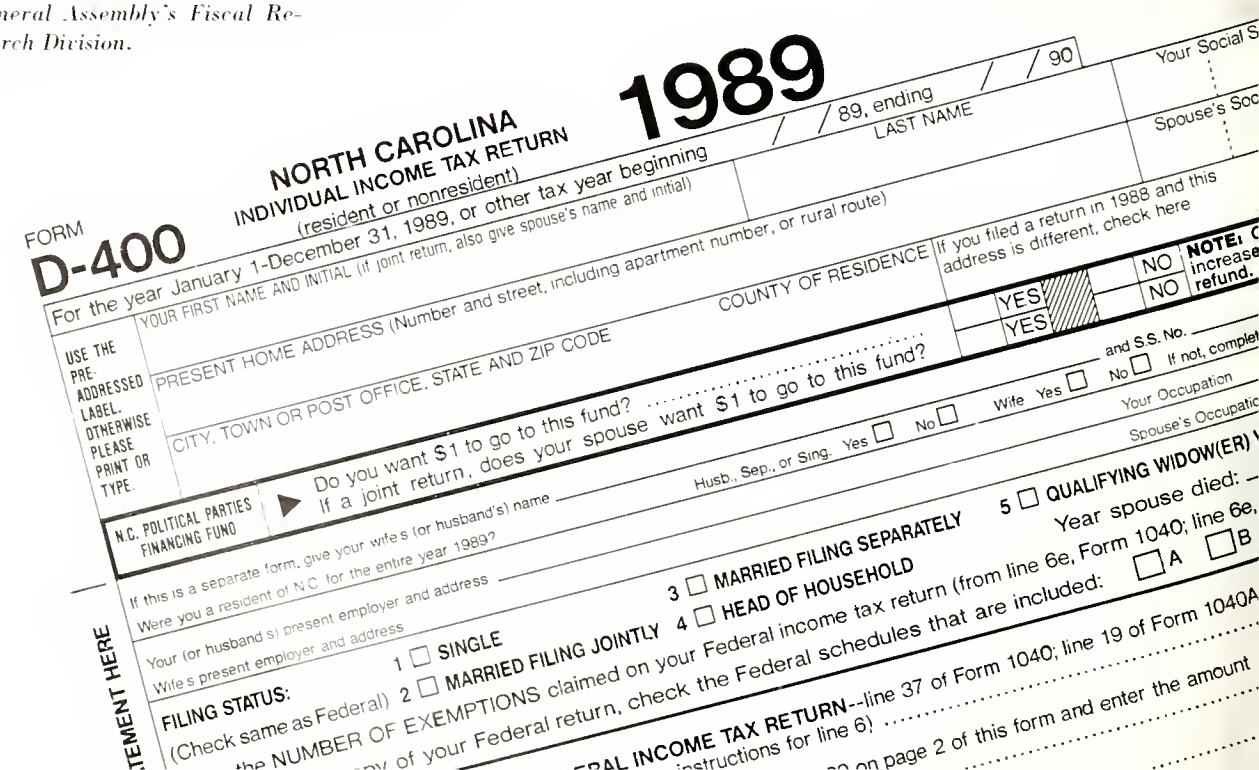
The North Carolina personal income tax has been the workhorse of the state tax structure for the last five decades. From fiscal year 1937–38 to 1987–88, this tax alone was responsible for one half of the increase in the size of the General Fund tax base. Rapid growth of the income tax has provided an automatic mechanism for the state to fund the new and expanded services demanded by a growing state, meeting federal mandates, eliminating outdated taxes, reducing reliance on the property tax, and increasing assistance to local units.

Much of the fast growth of the tax has been fueled by increases in the state's population and its residents' income, coupled with the graduated rate schedule of the tax. As income rises, taxpayers are pushed into higher tax brackets and pay a larger percentage in tax. This shift conforms to the original tax-equity objective of a progressive tax that would offset regressive sources such as the sales tax and the gas tax. (A tax is "progressive" when the ratio of tax to income rises as income rises.)

But during the last two decades, a new source of growth has entered the picture. Persistently higher inflation has pushed more taxpayers into higher brackets without an increase in their standard of living. If the inflation tax burden were shared equally, inflation would not be a major issue. But it has a larger adverse impact on those individuals least able to afford the tax (see Figure 1). Thus high inflation, combined with an income tax structure essentially unchanged for fifty-two years, shifted the tax burden from wealthy taxpayers to low- and middle-income citizens.

This article describes a major effort by the 1989 General Assembly to address this issue. The work

The author is a senior fiscal analyst with the General Assembly's Fiscal Research Division.


FORM D-400

NORTH CAROLINA INDIVIDUAL INCOME TAX RETURN (resident or nonresident)

1989

For the year January 1-December 31, 1989, or other tax year beginning / / 89, ending / / 90

USE THE PRE-ADDRESSED LABEL. OTHERWISE PLEASE PRINT OR TYPE.

YOUR FIRST NAME AND INITIAL (If joint return, also give spouse's name and initial)

LAST NAME

Your Social S

Spouse's Soc

PRESENT HOME ADDRESS (Number and street, including apartment number, or rural route)

CITY, TOWN OR POST OFFICE, STATE AND ZIP CODE

COUNTY OF RESIDENCE

If you filed a return in 1988 and this address is different, check here

N.C. POLITICAL PARTIES FINANCING FUND

▶ Do you want $1 to go to this fund? YES NO

If a joint return, does your spouse want $1 to go to this fund? YES NO

NOTE: C increase refund.

If this is a separate form, give your wife's (or husband's) name

Husb., Sep., or Sing. Yes ☐ No ☐ Wife Yes ☐ No ☐ and S.S. No. If not, complet

Were you a resident of N.C. for the entire year 1989?

Your (or husband's) present employer and address

Your Occupation

Wife's present employer and address

Spouse's Occupatio

FILING STATUS: (Check same as Federal) 1 ☐ SINGLE 2 ☐ MARRIED FILING JOINTLY 3 ☐ MARRIED FILING SEPARATELY 4 ☐ HEAD OF HOUSEHOLD 5 ☐ QUALIFYING WIDOW(ER) Year spouse died: —

the NUMBER OF EXEMPTIONS claimed on your Federal income tax return (from line 6e, Form 1040; line 6e,

py of your Federal return, check the Federal schedules that are included: ☐A ☐B

ERAL INCOME TAX RETURN--line 37 of Form 1040; line 19 of Form 1040A

instructions for line 6)

e on page 2 of this form and enter the amount

TEMENT HERE

resulted in the enactment of Senate Bill 51 (Tax Fairness Act of 1989). This act not only made the tax more equitable by eliminating 700,000 low-income taxpayers from the tax rolls but greatly simplified the tax and enhanced its enforcement.

Original Development

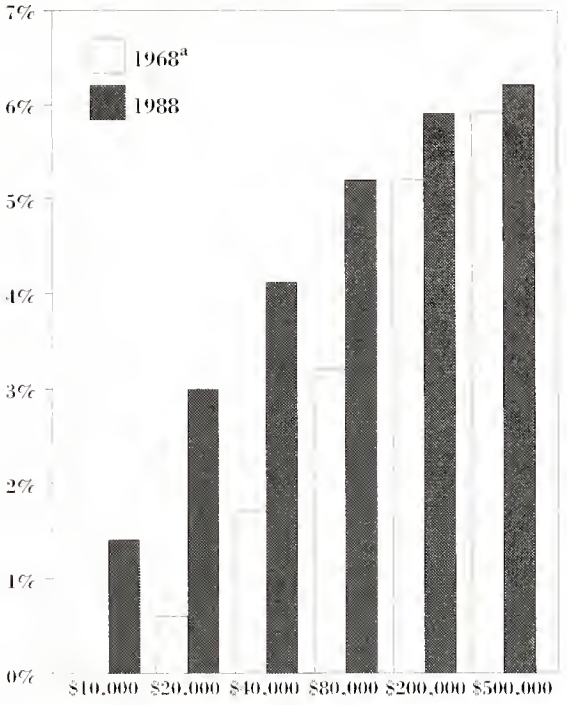
In 1849 North Carolina was one of the first states to enact a personal income tax, which was collected locally. This tax was levied at 3 percent of interest and dividends and at a flat rate on salaries and fees. In 1921 the state became the eleventh to enact a broad-based income tax administered by the state.

The 1921 action, along with numerous rate increases over the next sixteen years, was a major part of a fiscal revolution that took place in the 1920s and 1930s. During this period many nonfederal program responsibilities were shifted from local units to the state, and the state and local tax structure was realigned and expanded to provide adequate resources for the state and its local units to meet the new responsibilities.

The structure of the North Carolina tax was based on model legislation developed by the National Tax Association and the experience of other states. The taxation of all sources of income improved the equity of the system, and the graduated rate system built an ability-to-pay factor into the system. Finally, the adoption of relatively high personal exemptions ($2,000 for a head-of-household plus $1,000 for a spouse with income and $200 for each dependent) meant that only a handful of wealthy individuals would pay the tax (per capita income in 1929 was only $331).

By 1937 all the tax rate changes had been incorporated into a schedule of five rates, ranging from 3 percent on the first $2,000 of net taxable income (income remaining after personal exemptions and deductions) to 7 percent of taxable income above $10,000. Because the tax was levied on the income of individuals, married couples were not permitted to file joint returns. Beginning in the 1970s, couples were allowed to file on a combined form, but the tax continued to be calculated separately for each spouse.

Figure 1
Tax Liability as a Percentage of Gross Income



Source: Select Legislative Committee on Tax Fairness.

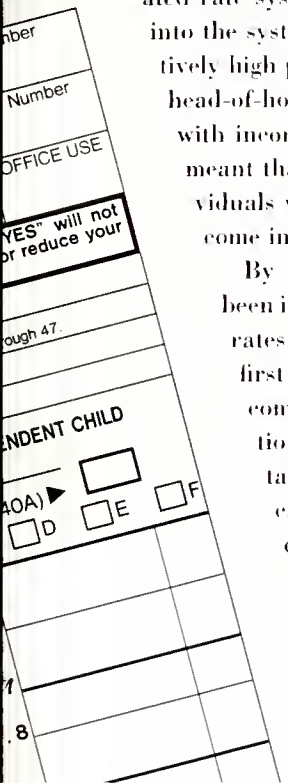
Note: Calculated for a married couple with two children.

[a]The calculations for 1968 were made by determining the 1968 income level that would correspond to the 1988 level (taking inflation into account) and then determining the relevant exemptions, deductions, and tax liability.

During these early years, officials noted one other feature of the tax. As the income of taxpayers grew, the graduated rate schedule meant that overall tax collections rose faster than the economy. This growth increment meant that state government would be able to meet the additional spending demands of a growing economy without the need for rate increases or new tax sources.

Middle Years

In the three decades after 1937, the personal income tax served North Carolina well. Collections from the tax rose seven times as fast as the income of the state's residents as taypayers were shifted into higher brackets. At the same time the share of state General Fund revenue derived from the tax rose from 8 percent to 33 percent. This rapid growth



Other Tax Fairness Legislation

Senate Bill 51 was not the only action taken by the 1989 General Assembly that improved the fairness of the state tax system. In fact, the 1989 session will be remembered for decades for the scope and magnitude of state tax changes.

Many of the issues were addressed by the Select Legislative Commission on Tax Fairness. This fourteen-member commission recommended five pieces of legislation that would have a major bearing on tax fairness. The legislature enacted four of these recommendations as well as a measure that had tax fairness as one of its objectives.

Tax Enforcement Package

The commission recommended a unified, three-part package to enhance the enforcement of state and local taxes collected by the Department of Revenue. Reducing tax evasion would make the tax system more fair. Modeled after successful programs in more than thirty other states, the package included a tax amnesty program, stiffer tax evasion penalties upon the completion of amnesty, and a 10 percent increase in funding for the Department of Revenue (targeted for enforcement resources). The enacted bill was identical to that of the commission except for technical changes. On December 1, 1989, the first part of the package, tax amnesty, was successfully completed.

Vehicle Sales Tax

Previously, the state sales tax on motor vehicles, boats, aircraft, and railway locomotives was 2 percent of the sales price, limited to $300 of tax per vehicle (amounting to a $15,000 price threshold). The local 2 percent sales tax did not apply to these transactions. After discussing the possibility of both eliminating the tax limit and raising the rate, the commission recommended eliminating the limit.

The need to generate an additional $8.6 billion to virtually eliminated the need for additional revenue (other than the amount due to expansion of the economy) from the other state taxes. In fact, the only significant General Fund tax changes to occur during this period were increases in the tax on alcoholic beverages.

An increased dependence on the personal income tax meant that the overall state tax structure by the late-1960s had become much more progressive than that of the 1930s. Even with this growth, however, the personal exemptions and standard deduction continued to shield a large portion of income from taxation. For example, in 1968 a family of four at the statewide median income of $8,000 could receive as much as $4,950 of income tax-free (assuming a two-earner couple).

Nevertheless, North Carolina tax burdens increased. The graduated rate schedule, combined with the fixed exemptions and standard deduction, led to a hidden tax increase each time wages and salaries increased. This result did not generate concerns, because most of the growth represented real improvement in the standard of living of taxpayers and because it eliminated a problem experienced in most other states—the constant search for additional sources of revenue.

Inflationary Period

The rapid rate of growth in state income tax collections continued into the next two decades. From 1968 to 1988, receipts increased at double the increase in personal income, and the portion of state General Fund tax revenues derived from this tax rose from 33 percent to just under 50 percent. In fact, the only reason that tax growth was not higher is that many taxpayers had already reached the top bracket.

fund a twelve-year highway improvement program led a legislative commission to recommend an increase in the tax for motor vehicles, with the proceeds earmarked for a new highway trust fund. The final legislative package raised the state rate to 3 percent with a $1,500 limit (a $50,000 price threshold). The tax rate for boats, aircraft, and railway locomotives remained at 2 percent, but the General Assembly raised the limit from $300 to $1,500 to cover the General Fund shortfall.

Pension Tax Rules

The commission report noted the inequity caused by different rules on the taxation of retirement benefits for different classes of retirees. The pensions of state and local government retirees had been exempt from taxation since 1941. Federal government retirees received a $4,000 exclusion. But private sector retirees received no exclusion.

The commission recommended a unified partial exclusion based on the amount of benefits received as well as the amount of income from all sources. The exclusion would decline as benefits rose or total income increased. Retirees receiving more than $6,000 of pension income or having total income in excess of $30,000 would receive no exclusion.

Pressure from public sector retirees led to the early defeat of the proposal. However, a United States Supreme Court decision brought the issue back on the table. In *Davis v. Michigan* the Court ruled that a state could not provide less income tax relief on the retirement income of federal civil service or military retirees than the relief provided to its own retirees.

After a lengthy review of several proposals, the General Assembly authorized a $4,000 exclusion for public sector retirees and a $2,000 exclusion for private sector retirees. For retirees receiving more than one pension, the maximum exclusion is $4,000. The equalization of the tax benefit for public sector retirees and the new exclusion for private sector retirees were major steps in the policy direction recommended by the Tax Fairness Commission.

Dependent Care Credit

To provide relief to working families with children and other dependents, the commission recommended an increase in the tax credit for dependent care from 7 percent of eligible expenses to 10 percent. As part of Senate Bill 51, the General Assembly allowed the increase for parents with dependent children under the age of seven.

The nature of the growth during this period was different, however. From 1937 to 1967, personal income increased at an annual rate of 7.2 percent. Nearly two thirds of the increase (4.3 percent) was due to real growth, and the remainder was due to inflation. But from 1967 to 1987, inflation rose to 6.3 percent annually, and real growth was only 2.2 percent. Thus three quarters of income growth during this period was due to inflation.

Although inflation, as well as real growth, increases the amount of income subject to taxation, the personal exemptions and the standard deduction do not automatically increase with inflation. Thus the devices for protecting lower-income taxpayers are not shielded from inflation. The effect of "inflation tax" is much greater on low- and middle-income taxpayers who are still moving through the graduated rate schedule than on wealthy individuals who are already at the top rate.

For example, the Select Legislative Committee on Tax Fairness (also known as the Tax Fairness Commission) looked at a hypothetical family of four with 1988 income of $20,000 and whose income over the last two decades had just kept up with inflation. Because the personal exemptions, standard deduction, and rate bracket amounts had not been significantly adjusted for inflation during this period, the family's income tax bill would have risen by 1,730 percent although income rose only 240 percent. Expressed another way, the family's tax burden (tax as a percentage of income) rose 100 percent even though its standard of living had not improved.

Reform Movement

Economists and tax analysts did not become concerned about the effect of inflation on taxes

until the mid-1970s. As late as 1964, the annual rate of inflation was only 1 percent. When inflation remained at over 3 percent even after the 1970 recession, it looked as if higher inflation was a fact of life, and conservative economists began writing articles about the "inflation tax." Their primary concern was the hidden nature of tax increases and the ease with which it was possible to increase government spending with hidden taxes. At the same time, the economists noted that the exemptions under the federal and most state income taxes, as well as federal and state death taxes, had not been adjusted and that the impact of "taxflation" was not distributed equally among all income groups.

During the 1970s the federal government responded by increasing the federal exemptions and standard deduction limit in a series of steps. The first state response came in the late-1970s in reaction to California's Proposition 13 and similar tax and expenditure limitations. These movements spurred politicians to examine the causes of their tax and expenditure growth, producing the idea of tying the dollar amount of the income tax to increases in the level of consumer prices (indexing). During the next few years, ten of forty states with a broad-based income tax indexed some or all of the major features of the tax (since then five states have eliminated indexing because of budget constraints). In addition, the 1979 North Carolina General Assembly increased the value of personal exemptions and the standard deduction by 10 percent.

In 1981, the Reagan Administration was able to push through a 25 percent cut in income tax rates and indexation of the tax. In 1982 members of the United States House of Representatives began developing federal tax reform legislation that would simplify the Internal Revenue Code. The administration soon joined the effort.

After two years of extensive debate and legislative deliberations, Congress enacted the most sweeping reform of the federal tax since its creation in 1916. The legislation achieved its objectives of simplifying the tax code (at least for most taxpayers) and making it fairer by eliminating many tax loopholes (special exclusions, deductions, and credits). These base-broadening measures largely affected wealthy taxpayers. The revenue generated was used to raise personal exemptions and the standard deduction, thereby exempting six million taxpayers with the lowest incomes. Finally, the number of tax rates was reduced from fifteen to two, and the additional revenue from base-broadening allowed the top rate to drop from 50 percent to 33 percent.

Within a month of enactment, groups interested in state tax policies began encouraging states to use the federal changes as a window to reform state taxes. For the twenty-four states whose tax base was tied to the federal adjusted gross income, the proposals would return some or all of the windfall from federal base-broadening to taxpayers via higher personal exemptions, a higher standard deduction, and lower rates. For the six states with a tax tied to federal taxable income, lower rates could be adopted.

The Tax Fairness Commission noted that twenty-five of forty states with a broad-based income tax undertook major actions in the middle-1980s. Nine states completely reformed their tax, and the others raised exemptions and deductions and reduced tax rates. The list included all of the neighboring states with an income tax (Georgia, South Carolina, and Virginia).

North Carolina Actions

The first reform bill was introduced early in the 1987 session by Senator Dennis Winner. During committee discussions, Winner indicated that the primary impetus for the bill was his personal frustration over a lengthy tax-filing process caused by the large number of differences between the state and federal tax code. Winner's bill based state liability on a flat 6.6 percent of federal taxable income. Thus North Carolina would follow federal rules for the reporting of income and itemized deductions. In addition, the state would use federal personal exemptions and the standard deduction. Given the prospect of a budget shortfall, the rate selected was designed to ensure no reduction in state tax collections.

Winner had considered tying the tax directly to the federal liability of a taxpayer, a procedure used in four states. But this method was rejected because it would have made North Carolina's revenues totally dependent on federal decisions. At the other extreme, tying the tax to federal adjusted gross income did not offer as much simplification as using taxable income as the starting point.

Table 1
Comparison of Previous Tax Law with the Tax Fairness Act

	Previous Law	Tax Fairness Act
Income Taxed	Unique rules	Federal rules
Exemptions	$1,100 for single person $2,200 for married couple ($3,300 if both work) $2,200 for head-of-household $800 for dependents	$2,000 each for self, spouse, and dependents
Standard Deduction	$550 maximum for each taxpayer ($1,100 if both spouses have income)	$5,000 joint return $4,400 for head-of-household $3,000 for single person $2,500 for married filing separately
Itemized Deductions	Unique rules	Federal rules
Rates	All taxpayers (no joint returns) $1–$2,000 3% $2,001–$4,000 4% $4,001–$6,000 5% $6,001–$10,000 6% $10,000 and over 7%	Married filing jointly, surviving spouse $1–$21,250 6% $21,251 and over 7% Head-of-household $1–$17,000 6% $17,001 and over 7% Single person $1–$12,750 6% $12,751 and over 7% Married filing separately $1–$10,625 6% $10,626 and over 7%
Tax Threshold (Family of Four)	$4,350 (one spouse working) $6,000 (both spouses working)	$13,000
Low-Income Credit	$1–$5,000 $25 $5,001–$10,000 $20 $10,001–$15,000 $15	Replaced by higher personal exemptions and standard deduction

No committee action took place during the 1987 or 1988 session. Federal tax reform was new, and other states were only beginning to consider action. Also, more research on the fiscal, legal, and technical aspects of the bill was needed before serious consideration could take place. A third reason was the attention being focused on other fiscal matters, such as revenue for funding school facilities assistance. Finally, because the state income tax had not been tied to the federal code at the time of federal tax reform, North Carolina would not get the large revenue windfall from federal base-broadening received by many states. Thus the relief to low- and middle-income taxpayers through increased personal exemptions and the standard deduction would have to be financed by tax increases on wealthy taxpayers.

In the interim between the 1988 and 1989 sessions, the Tax Fairness Commission analyzed the state tax system in depth, including the impact of inflation on the income tax. As a result of this analysis, the commission recommended that a modified version of the Winner bill be adopted to restore fairness to the income tax. The commission also

Table 2
Comparison of Estimated Tax Liability for a Married Couple Filing Jointly under Previous Tax Law and the Tax Fairness Act

Adjusted Gross Income	Number of Returns	Tax under Previous Law	Tax under Tax Fairness Act	Dollar Change	Percentage Change	Dollar Change after Federal Tax[a]	Percentage Change after Federal Tax[a]
$5,000 or less	35,939	—	—	—	—	—	—
$5,001–$10,000	99,296	$90	$10	-$80	-88.9%	-$80	-88.9%
$10,001–$15,000	134,405	281	116	-165	-58.7	-165	-58.7
$15,001–$20,000	155,247	491	356	-138	-27.9	-138	-27.9
$20,001–$30,000	287,141	890	786	-101	-11.7	-93	-10.4
$30,001–$40,000	238,625	1,385	1,355	-30	-2.2	-26	-1.9
$40,001–$50,000	177,735	1,892	1,987	95	5.0	68	3.6
$50,001–$75,000	228,418	2,723	2,901	178	6.5	127	4.7
$75,001–$100,000	62,532	4,118	4,472	351	8.6	255	6.2
$100,001–$200,000	45,427	6,811	7,509	698	10.2	468	6.9
More than $200,000	9,989	27,493	29,484	1,991	7.2	1,431	5.2

Source: Based on a simulation by Price Waterhouse using federal returns of North Carolina taxpayers.

Note: The estimates were calculated for the typical taxpayer in each income category. For a particular taxpayer, the actual results may differ from the estimates.

[a]State income taxes are allowed as a deduction on federal returns.

recommended a 5 percent and 8 percent rate schedule in lieu of the flat tax concept. The rate thresholds were set at a level that would, based on staff estimates, ensure that the bill would not affect state tax revenues.

The commission's bill was introduced early in the 1989 session. Legislators raised a number of concerns immediately. One issue involved the legal and policy implications of tying much of the state tax to a constantly changing federal code. Supporters of the bill argued that conformity would not be automatic, because the state constitution required state legislation before a federal change could be adopted. Those questioning the benefit of tying in with the federal code argued that the massive 1986 federal tax reform would stave off wholesale changes in the federal code in the near future.

Another issue concerned the 8 percent top rate in the commission's bill. Some thought that because the highest rate under the existing schedule was 7 percent, it would be hard to convince many taxpayers that the new system was revenue-neutral.

Third, some legislators were concerned about increasing the burden of high-income taxpayers under income tax reform in the same year that many other major tax increases were being considered. For instance, a legislative commission had recommended a massive increase in the state highway construction program and large increases in the fuel tax, vehicle sales taxes, and user fees to fund the program. To meet a large General Fund shortfall, the governor had proposed a one cent increase in the state sales tax. Finally, a group of legislators was trying to meet General Fund needs by closing many sales tax loopholes. Supporters of Senate Bill 51 acknowledged these issues but explained that recent increases in the regressive sales and motor fuel taxes, combined with the current proposals, made it imperative that the income tax be made fairer.

A final issue had to do with the elimination of special preferences by tying the state tax to the new federal tax. Some people were concerned that beneficial tax breaks would be lost in the process. In states undertaking tax reform, much time is spent in hearing interested groups defend the policy objectives of the exclusions, deductions, and credits that have been in the tax code for years. Repeal of the full exclusion for Social Security benefits and the elimination of the $15,000 exclusion for North Carolina dividends received the most attention in the North Carolina debate.

Final Enactment

The final version of Senate Bill 51, effective for

the 1989 tax year, was very similar to the 1987 Winner bill and the commission's recommendation. Simplification was achieved by adopting federal taxable income as the starting point for the state calculation, by using two tax rates, and by allowing the joint filing option for married couples. A 6 percent and 7 percent rate schedule was adopted because it caused less of a shift in tax burdens than the 5 percent and 8 percent proposal and because the top rate did not increase. Once tax rates were set, rate thresholds were selected to ensure that state revenues would not change. To estimate the fiscal impact of the changes, tax consultants with Price Waterhouse completed a tax simulation of 12,000 North Carolina taxpayers. The simulation used data from 1985 federal returns for North Carolinians, made adjustments for federal tax reform and economic growth since 1985, and recalculated tax liability under the new rules.

The bill maintained a handful of provisions from the previous law. Foremost was the full exclusion for Social Security benefits. The $15,000 deduction for dividends from North Carolina corporate activity was converted to a 6 percent credit ($300 maximum) for dividends paid by companies with at least 50 percent of their operations in the state. For taxpayers with a child under the age of seven, the dependent care credit increased from 7 percent to 10 percent. Finally, the bill retained the $1,500 exclusion for National Guard pay. (See Table 1 for a comparison of the major provisions of the old and new tax laws. See Table 2 for the impact of the tax change by gross income level.)

The primary sponsor, Winner, considered but rejected indexing the new tax in the same fashion as the federal government and a handful of other states. Indexing would limit income tax growth to the rate by which state personal income increased. However, the state will need additional revenue in the future to fund federal mandates and legislative commitments to improve the quality of education; therefore the indexing question was deferred.

Major Effects of the New Law

The Price Waterhouse study indicates that the Tax Fairness Act will reduce the number of taxpayer units subject to the North Carolina income tax from 3,100,000 to 2,400,000 (a married couple filing jointly counts as one unit). Approximately two thirds of married couples will pay lower taxes under the act. For unmarried taxpayers with dependents (that is, heads-of-households), almost 98 percent will receive relief. Married couples will receive a relatively lower benefit because under the old system, the single rate schedule and the individual-return requirement allowed married couples to benefit from the lower rate brackets because each spouse reported income separately. Taxpayers who see their state tax burden increase can offset up to 33 percent of the increase through the federal tax deduction for state income taxes.

The Tax Fairness Act will result in a major shift in tax burden from low-income to wealthy taxpayers, as 700,000 low-income taxpayers are removed from the tax rolls while a few high-income taxpayers see a 10 percent increase in their taxes. The magnitude of the shift is so great because North Carolina is one of the last states to update personal exemptions and the standard deduction for inflation. In fact, the Tax Fairness Commission found that in 1988 North Carolina had the second highest income tax in the United States for a family of four with $10,000 of income. Thus an increase in the tax threshold for a family of four from $4,350 ($6,000 if both spouses had income) to the federal level of $13,000 will mean big dollars.

Although raised as a concern during the debate, the compression of five rate brackets into two will not reduce tax elasticity (the responsiveness of tax collections to income growth). With tight budgets, it is essential that revenues not be reduced in future years. The Price Waterhouse study found that this will not happen. The reason is that freezing the personal exemptions and standard deduction at the new, higher level mathematically will lead to enough automatic tax growth as income rises to offset the loss of elasticity from fewer brackets.

In addition to simplification and tax-equity objectives, the Tax Fairness Act will enhance the enforcement of the income tax. For one thing, there will be 700,000 less returns to process. A simpler system will reduce taxpayer errors and will free the time of tax administrators for discovering and collecting unpaid taxes. Also, the close tie-in to the federal tax will make it easier to use federal audit results and will make the federal-state information exchange system more workable. ❖

Recharting the Polar Star: Child Custody in North Carolina

Clarence E. Horton, Jr.

Long wooden benches line the areas outside civil courtrooms in North Carolina. Children wait on those benches, their legs swinging, families clustered about them. Later in the day they will become restless and explore the unfamiliar surroundings. The older children are aware that their future is to be determined by a judge they may never see. The younger children are only aware of the tension between their parents and grandparents, as revealed by the anxious anger and the harsh language.

The days spent in court are long for children and their parents. The evenings and nights that follow them are longer still for the judges who must make decisions about the placement of these children. Twenty-four years' experience as trial attorney and judge has not eased the burden of these decisions for me or removed the doubts that linger after a difficult placement decision.

Those years have brought dramatic changes in the law of child custody. Although the concept of the best interests of the child is still the polar star by which North Carolina judges have set their courses for more than a century,[1] perceptions of what is best have changed. There is no longer any unwritten rule that a "fit" mother of children is automatically awarded their custody, a change that has resulted in increased litigation. We are more aware of the harmful effects of litigation on the children involved and have begun to question whether our traditional adversarial trial system is the most appropriate way of resolving these disputes. The desire to spare children the stress of traditional litigation, compounded by an increase in divorces and contested custody matters, has fueled a movement toward alternative methods of dispute resolution, such as mediation. Whether custody dispositions are made through out-of-court settlement, through mediation, or by court order, new patterns of sharing parental responsibilities have emerged. In an effort to preserve the vital relationships between a child and each parent, those new patterns include concepts such as "joint custody" and "shared parenting." Where mediation and out-of-court settlement efforts are unsuccessful, judges recognize that custody trials are a different kind of civil litigation and that they call for different approaches.

This article will trace the changes in child custody law over the past quarter-century, as shaped in part by sweeping societal changes—among them, a rising divorce rate (see Figure 1). There is already sharp disagreement about the validity of some of the ideas and approaches discussed here; in other areas, the lack of research findings makes evaluation difficult at this time. The ongoing debate about these developing concepts and alternatives will benefit the children of divorce and their families.

Repealing the Unwritten Law

As a newly appointed district court judge in 1981, I soon found myself making custody decisions without the benefit of a statutory preference that either the mother or the father have custody. In 1965, when I had begun practicing family law, the unwritten but widely accepted "maternal preference" rule provided that a mother routinely would be awarded custody of young children unless she were shown to be "unfit."[2] Unfitness usually meant a showing of adulterous conduct; other forms of misconduct rarely were considered cause for a mother to "lose her children." Further, society regarded a mother who did not have primary custody with suspicion and disapproval. A combination of the maternal

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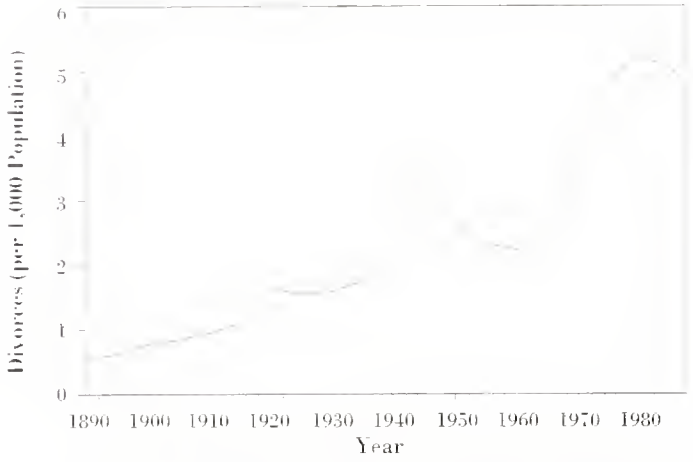
Figure 1
United States Divorce Rate, 1890–1987



Source: Figures for the years 1890 through 1905 were taken from Ray E. Baber, *Marriage and the Family* (New York: McGraw-Hill Book Co., 1939), 441. Figures for the years 1910 on were taken from U.S. Bureau of the Census, *Statistical Abstract of the United States: 1987*, 107th ed. (Washington, D.C.: GPO, 1986), and *Statistical Abstract of the United States: 1989*, 109th ed. (Washington, D.C.: GPO, 1989).

Note: The rates for 1920 and 1945 were affected by the endings of World War I and World War II, respectively.

preference rule and the risk of societal stigma resulted in few instances when a mother voluntarily agreed that a father would have primary custody. Because of the maternal preference rule, there was little reason in most cases to contest an award of primary custody to the mother and "standard" visitation rights to the father on alternate weekends. When a trial was necessary, the adversarial system generally was satisfactory, as the focus of the trial was on proving specific acts of misconduct by a parent.

The sexual and social revolutions of the 1960s and 1970s began to bring striking changes in family law. The increasing entry of mothers into the work force, a change in the perception of a father's ability to raise his children, and a consciousness of the need of children to have a continuing relationship with both parents led to legislative abolition of the maternal preference rule. The North Carolina legislature provided in 1977 that in a custody dispute between mother and father, "whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child."[3] Later the concept of equal access to the children was strengthened by a statutory amendment providing that the court must consider joint custody if requested to do so by either parent.[4] Other amendments gave parents equal access to medical and school information concerning their children.[5]

Search for a Standard

Today the North Carolina trial judge sits without a jury in child custody disputes, guided to a decision only by a broad statutory directive that an order be entered that "will best promote the interest and welfare" of the child.[6] In contrast to detailed guidelines in areas such as sentencing convicted felons and distributing property between divorced spouses, there are almost no other statutory guidelines to light the judge's way to a decision. Neither *custody* nor *joint custody* is even defined in the statutes. The discretion of the judge is so broad that his or her decision is likely to be affirmed by the appellate courts unless an error of law is made or the judge's discretion is abused.[7] A new district court judge quickly becomes painfully aware that he or she is sitting as the child's supreme court.

Thus, when I came to district court, there was a statutory statement as to the goal to be reached but no description of how to get there. My decisions were being shaped more by my own background and biases than by a rational and defined process. Searching for a charted path through this trackless mire, I soon discovered a growing body of case law that discussed the role of the trial judge in a custody case. Our North Carolina Supreme Court has stated that the trial judge's duty, which it described as a "grave" and "heart searching" responsibility, is to "determine by way of comparisons between the two applicants, upon consideration of all relevant factors, which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being."[8] A decision of the California Supreme Court states that "[s]tability, continuity and a loving relationship are the . . . most important criteria for determining the best interests of the child. . . . Implicit in this premise is the recognition that existing emotional bonds between parent and child are the consideration in the best interest determination. . . . [The decision] must reflect a factual determination of how best to provide continuity of attention, nurturing, and care."[9] The same ideas are echoed in appellate decisions across the country, and they are validated by patient researchers who have added to our

knowledge of the dynamics of families fragmented by separation and divorce and to our understanding of the developmental stages of children.[10]

Continuity of Relationships

One such group of researchers gave us the seminal work *Beyond the Best Interests of the Child.*[11] When it was first published, I doubt that even its authors realized that the slim volume would help shape a new approach to child placement decisions in American courts. The book was the result of an interdisciplinary effort by experts in both law and child development, and it introduced us to concepts of the "child's sense of time," the "psychological parent," and the importance of stability and the continuity of relationships. For authors Joseph Goldstein, Anna Freud, and Albert J. Solnit, a child's developmental needs were paramount: "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development."[12]

The discarded maternal preference rule had met the need for stability by leaving the child in the custody of the mother, who at that time was likely to be the primary nurturing parent. Goldstein and associates recognized the need to identify the child's "primary caretaker," as they taught us that a parent listed on a birth certificate is not necessarily the most important figure:

> [F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection, and stimulation. Only a parent who provides for those needs will build a psychological relationship to the child on the basis of the biological one and will become his "psychological parent" in whose care the child can feel valued and "wanted." An absent biological parent will remain, or tend to become, a stranger.[13]

Thus, to ensure the continuity of relationships, the court must first identify the parent who has acted as the primary caretaker of the child before the separation of the parents. In West Virginia, where the primary caretaker usually is entitled to the custody of young children, the state's supreme court has directed that the trial judge determine which parent has primarily performed "caring and nurturing duties," including preparing meals; providing personal care (including clothing), medical care, and transportation; and disciplining, training, and teaching the child.[14]

But merely identifying one parent as the primary caretaker does not furnish a simple solution to ensuring a continuity of relationships. Placement of the child with the primary-caretaker parent, who would then make all major life-style decisions and have physical possession of the child except on alternate weekends and two weeks in the summer, is far from restructuring a family environment in which the child can continue to develop properly. Under this typical custody arrangement, fathers—usually the noncustodial parents—have felt shut out of their children's lives and excluded from important decisions. Often, noncustodial parents have not been told about problems at school, medical conditions, and orthodontic decisions until after the fact.

Although pointing to the need for a better approach to custody, Goldstein and associates did not offer a complete alternative to the traditional arrangement. Furthermore, the "standard" custody and visitation arrangement had been the basis of North Carolina settlements and court orders for years, and I was not prepared to abandon it without convincing evidence. That evidence was not long in coming.

Joint Custody and Shared Parenting

After noncustodial fathers had complained for years that they were merely "zoo daddies" or "weekend parents,"[15] researchers began to agree not only that noncustodial parents needed to see their children more but that the maintenance of a meaningful relationship with *both* parents was necessary if the children were to develop fully.[16] These conclusions were validated further by what I heard in chambers from the children themselves. One freckled ten-year-old volunteered that there was a vacant apartment next to his mother's apartment, and he wished his father would rent it so that they could all be together. Many others echoed this thought, wishing that they could live with both parents and that things would be as they once were.

The idea of sharing responsibility for the children, or joint custody, began to receive wide attention in the late 1970s. North Carolina joined a national trend in 1987 when legislators amended its statutes to provide that the courts must consider

joint custody arrangements upon the request of either party. However, the state still had not defined *joint custody*.

California, which has become the trend setter in the area of joint custody, has given considerable insight to state courts just beginning to wrestle with the concept. In the California statutes, *joint custody* is defined as being composed of both joint physical custody and joint legal custody. Joint physical custody means that the parents have "significant periods of physical custody" so that the child has "frequent and continuing contact" with both of his or her parents.[17] Parents having joint legal custody share the responsibility of making decisions affecting the health, education, and welfare of their children.

Without the benefit of a similar statutory definition, lawyers in North Carolina began to fashion settlements providing that the parents were to have joint custody, with one parent designated as the primary custodian with whom the child would physically reside the greater portion of the time and the other parent designated as secondary custodian. The attorneys had created, in effect, an agreement awarding joint *legal* custody while preserving many of the aspects of the traditional custody and visitation schedule.

There were important advantages to the new arrangements, however. Periods of secondary custody came to mean something more thoughtful and extensive than the routine every-other-weekend arrangement, and the children were assured of more frequent contact with both parents. Perhaps most important was the change in language. Parents had objected for years to the idea of "visiting" with their own children, as if they were in jail or the hospital. The new language tended to heal, rather than hurt, and made it clear that both parents would continue in the role of parent.

Joint *physical* custody still presents some problems. If it is taken to mean that each parent has equal time with the child, by using some sort of alternating arrangement, then its use is severely limited. It usually would require a situation where the parents live in the same school district, have homes in which similar rules are enforced and similar values taught, and are able to communicate and cooperate fully with one another.[18] There are few such ideal situations. And those are not likely to be before the court for decision, because ideal parties would have settled their cases outside the court system. Even in those rare instances there are difficulties. Judge Beth Keever of Cumberland County recalls a case in which she ordered that custody alternate on a monthly basis. At a scheduled review of the case, the child involved asked that she change the order and place his custody with either one of his parents so that he would have a fixed home. We do not yet know the long-term effects of an alternating custody arrangement on a child's development, and some leading researchers are expressing cautious misgivings.[19]

Whatever the future of joint custody, arrangements should no longer be all or nothing situations in which one parent is excluded from taking an active role in raising his or her child, unless there are compelling questions of fitness. It is helpful to talk in terms of sharing custody and its responsibilities, rather than using restrictive terms such as *visitation*. Whenever possible, joint legal custody should be considered. Even when it is inappropriate because of the poor relationship between the parties, both parents can be guaranteed some participation in the decisions affecting the child by requiring that the parties discuss major decisions such as school, summer activities, elective surgery, orthodontic care, and so on. Requiring the parent having primary custody to keep the other parent advised about school progress and medical needs obviously gives that parent a sense of being more involved in his or her child's life.

The Mediation Alternative

Trial lawyers in North Carolina are apt to look with suspicion on any efforts to modify or replace the venerable adversarial system of dispute resolution, and many expected the child custody mediation pilot program established in Mecklenburg County in 1983 to fail. Fortunately, a dedicated bench and family law bar worked together to make this alternative system of resolving custody disputes successful. An evaluation by the North Carolina Bar Association in 1986 indicated a high level of client and attorney satisfaction with the program and recommended that the Mecklenburg program continue as a "mandatory prerequisite to child custody litigation" and that mediation be made available in other judicial districts willing to make a commitment to training and retaining quality me-

diators.[20] Gaston County was added as a pilot county in 1987, and voluntary mediation programs were made available in other counties served by dispute resolution centers.[21]

In 1988 a committee of district court judges unanimously recommended the expansion of mediation services throughout the state.[22] Franklin Freeman, Jr., director of the Administrative Office of the Courts, in submitting legislation implementing that recommendation, concurred that mediation offers a "viable alternative to the traditional adversary system of resolving custody and visitation issues" and expressed the hope that a setting less adversarial than the courtroom would "encourage the parties to develop an agreement that is in the best interest of the children."[23]

As enacted by the 1989 General Assembly, the legislation directs the Administrative Office of the Courts to phase in a statewide Custody and Visitation Mediation Program as resources are available. It also appropriates funds to continue the Mecklenburg and Gaston pilot programs and to add two new programs by the end of the 1990–91 fiscal year.[24]

The new law provides that all contested custody and visitation matters be referred for mediation prior to trial unless waived by the court for good cause. The mediation program is conducted by a skilled mediator with at least a law degree or master's degree in certain disciplines such as social work. To avoid the stress of trial, the setting is structured, confidential, and nonadversarial. If an agreement is reached by the parties, it is submitted to the court for incorporation into a court order, which makes it enforceable. Economic issues are not mediated.

In its statement of purpose, the legislature expressed the hope that mediation would help reduce the animosity between the parties to a custody dispute, provide them with informed choices, give them responsibility for making placement decisions, and thereby help develop agreements in the child's best interests. It also expected that relitigation would be reduced, benefiting not only the parties and children but also the court system.

The Settlement Alternative

Despite the steady increase in domestic case filings, many separated North Carolina couples reach an agreement without ever filing an action. There is no requirement that an agreement between parents with regard to custody and support of their children receive the approval of a judge or be reduced to a written agreement, although custody and support provisions often are included in a comprehensive settlement document prepared by an attorney. Often the work schedules of the parties, their respective abilities to provide child care, and the ages and wishes of the children mandate a certain child custody arrangement. That initial working relationship later can be destroyed, however, by a new love interest or by disagreements over financial details. The increased expense of maintaining two households can undermine the most amicable support agreement. Thus, for a variety of reasons, parties may find themselves in court months after an apparently friendly separation.

Even where relations have been relatively cordial during the period of separation, the decision of one spouse to file for divorce after the requisite year's separation can alter the parties' relationship. One party may view the divorce trial as an opportunity to have the court incorporate prior oral agreements into a written court order, or as an opportunity to ask that the court resolve areas of disagreement about visitation schedules and regularity of support payments.

Fortunately for the children involved, most custody matters are settled with the help of experienced domestic lawyers before trial. Even pretrial settlement has its shortcomings, however. Because judicial approval is not required, and because the child has no independent representative, there is no guarantee that the negotiated terms are in the best interests of the child. All too often such a settlement is part of an agreement on all economic issues, and one or both parties will bargain a financial settlement with the child as pawn. Neither the parties nor their counsel are trained to recognize or understand a child's developmental needs, and the terms of a separation agreement are likely to be those most convenient for the adult parties. Some parties attempt to avoid the perils and price of litigation by entering into a cumbersome alternating custody arrangement without adequately considering the child's schedule and needs.

Even though a custody suit may be settled before trial, its very existence is upsetting to all family members. Although the pending lawsuit may not be discussed with or around the child, he or she knows

it is pending and shares in the anxieties and tensions of the parents. In some cases parents seek, by relaxed discipline or gifts, to influence the child's choice of custodian. Driven by a compulsion to win at all costs, parents cajole and threaten, further burdening thin shoulders already carrying a weight of separation and sorrow that will influence the remainder of the child's life.

Trial—the Last Resort

Settlement, however flawed, is greatly preferable to trial of the custody case, which is sometimes described as a subtle form of child abuse. In declaring the goal of custody litigation to be settlement, William DaSilva, a prominent New York family law practitioner and author, described the effects of litigation:

> A custody trial commonly rakes up all the animosities of the parties, encourages character assassinations, and often creates warped and embellished reviews of incidents bearing upon the unfitness of the other party. The scarring that impacts upon the parties and the children is permanent and irreparable. The battle does not end with the decision, or even an appeal. The war carries on usually as long as the relationship among the children and the parties exists. This is the tragedy of a child custody case trial, one which is seldom realized by the litigants and too frequently not discerned by the attorneys.[25]

Although DaSilva's assessment of the effects of a custody trial is shared by most domestic lawyers, dockets continue to lengthen and more custody cases proceed to trial. In modern families, with both parents working, the father is more likely to have participated in rearing his children and to have established closer bonds with them. Without the maternal preference rule, a father is more likely to be awarded primary custody and more often elects to proceed to trial. Further, the living arrangements of the children can have an impact on the financial settlement between the parties, as the custodial parent is normally awarded possession of the marital home and furnishings. Such considerations, along with the need to vent emotions over the marital breakup, unfortunately but inexorably lead to trial.

The adversary system, admirably suited for the trial of nondomestic civil cases, focuses on winning and losing rather than on the best interests of the child.[26] Evidence tends to be fault-centered, with each party trying to prove that the other is not fit to have custody. Consequently, the court often is buried under an avalanche of fault-centered information, little of which deals with the crucial decisional factors.

Further, the adult parties in a custody case are present in court, vocal and usually represented by counsel. The child is not represented, an omission that may deny the court access to information necessary to make the best decision. Because the child is unrepresented, there is no one to object to his or her being called as a witness, although there is general agreement that testifying publicly in a custody dispute is devastating for children, particularly pre-adolescents. Some attorneys are not aware of the psychological damage that can result from such action and even subpoena children to appear in court. Others are simply unable to dissuade a client bent on "winning" custody. I often regret the absence of a guardian ad litem who could protect the child's interests through impartial investigation and presentation of evidence, as is the case in abuse, neglect, and dependency matters arising under the North Carolina Juvenile Code.[27]

Perhaps the grimmest reality of a custody trial is that the judge's decision does not permanently solve anything. Unlike the parties in ordinary civil trials who need not have post-trial dealings with one another, the parties to a custody trial must continue to deal with all the recurring problems of separation and divorce. Relationships tend to become hopelessly polarized by trial, and many parties can only communicate thereafter in writing or through third parties. Disappointed litigants may ask repeatedly that the court modify its decision on the pretext that circumstances affecting the welfare of the child have substantially changed since the prior trial. And so the tragedy continues.

Avoiding the Pitfalls of Trial

In cases that must be tried, the judge must balance and integrate the concepts of no preference and non–fault-based custody trials, the child's developmental needs, and the idea of sharing custody. Along this recharted path, the judge is still moving toward the polar star of the child's best

interests. A decision of the Pennsylvania Supreme Court provides an analysis of the trial judge's task in a custody case, which can serve as a point of departure on a decisional journey:

> [T]he resolution of this [child placement] issue is far from simple, as it requires recognition and provision for the delicate physical, mental, emotional and spiritual needs of a young child, the most exacting and sensitive scrutiny of the entire record, critical weighing and evaluation of numerous, often conflicting, variables reflecting upon the "best interests" of the child, and a solemn judgment, in light of all the variables, predicting which course of future action would be most likely to provide the child with a nurturing environment in which to develop to maturity.[28]

The district court judge in North Carolina usually sits as a jury, so that resolving questions of credibility is a familiar task. Emotions run high, and the parties tend to exaggerate relatively minor points in their zeal to prevail. In making a final decision, the judge must be careful not to "punish" the parties for untrue testimony by handing down a decision adverse not only to the untruthful party but to the best interests of the child.

The judge's real dilemma is how to limit the evidence, and thus the length of the trial, to that evidence reasonably necessary to a decision, while allowing the parties to present their cases fully. My preference is toward broadening the range of admissibility, as the parties will accept the court's decision more readily if they feel it was based on a consideration of all their evidence.

Another dilemma arises when the evidence does not provide all information necessary for a decision. An avalanche of fault-based and emotion-laden testimony may have left unanswered basic questions such as the proximity of schools, relatives, and playmates. The judge might suggest avenues of inquiry to counsel but must be very careful about asking questions, for one party may feel that the judge is taking sides in the dispute, no matter how even-handed and nonjudgmental his or her efforts.

Under current North Carolina law, the judge may not talk with a child in chambers, out of the presence of the parties, without their consent.[29] A party may withhold consent to avoid anticipated damaging testimony or an expressed preference for the other parent. The parent may choose to submit the child to the trauma of in-court testimony in the hope that the child will testify more favorably in his or her presence. In those instances the court should consider either appointing a guardian ad litem to represent the child or obtaining an independent psychological opinion as to the effect of in-court testimony. Many judges simply make it clear before trial that it is not in the best interests of a child to be called as a witness.

Even the preferable alternative of talking in chambers can be a disturbing experience for the child unless it is handled properly. The child is often shy and cautious, and the conversation should center initially on familiar topics of school and friends—anything the child appears comfortable talking about. The judge should avoid asking the child's preference directly because this places the

Uniform Marriage and Divorce Act

The Uniform Marriage and Divorce Act was approved by the American Bar Association in 1974. Although it has not been adopted in North Carolina, its concepts of no-fault divorce and equitable distribution of property are now important parts of our domestic law. In its custody provisions the act uses a multifactor approach to determining the best interests of the child and minimizes fault considerations that do not affect the child's welfare:

§ 402. [Best Interest of Child]

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school, and community; and

(5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Table 1
Single- and Double-Parent Families
As a Proportion of All Families with Own Children Present

	United States			North Carolina		
	1970	1980	1986	1970	1980	1986
One-Parent Families,						
Maintained by mother	9.9	17.6	19.3	10.9	16.6	19.3
Maintained by father	1.2	2.0	3.0	1.6	2.3	3.0
Two-Parent Families	88.9	80.5	77.8	87.5	81.1	77.7

Source: For United States figures, U.S. Bureau of the Census, *Statistical Abstract of the United States: 1987*, 107th ed. (Washington, D.C.: GPO, 1986), and *Statistical Abstract of the United States: 1988*, 108th ed. (Washington, D.C.: GPO, 1988). For North Carolina figures, percentages calculated from U.S. Bureau of the Census, Annual Demographic File, March 1986, Current Population Survey (unpublished estimates developed by the N.C. State Data Center, Office of State Budget and Management); U.S. Bureau of the Census, *Census of Population, 1980*: Vol. 1, *Characteristics of the Population*: Ch. B, *General Population Characteristics*: Pt. 35, *North Carolina* [PC80-1-B-35] (Washington, D.C.: GPO, 1982), tab. 21; and U.S. Bureau of the Census, *Census of Population, 1970*: Vol. 1, *Characteristics of the Population*: Ch. B, *General Population Characteristics*: Pt. 35, *North Carolina* [PC(1)-B35 NC] (Washington, D.C.: GPO, 1973), tab. 22.

child in the impossible situation of choosing between the two most important individuals in his or her young world. The child will sometimes volunteer a statement of preference, and that preference is entitled to consideration and respect. The court must be aware, however, of the many variables that can influence the child's choice of custodian: promised rewards and gifts, fear of disapproval and punishment, desire to gain the parent's love, dislike of a new spouse, retribution for being disciplined. Also, children are wonderfully caring and protective toward their parents; one child explained to me that he wanted to live with his father because he had been with his mother three years and felt that it would be fair to live with his father an equal time. An eleven-year-old said that his alcoholic mother needed him to look after her! Where the court's decision is designed to allow the child to have substantial periods of time with both parents, as it should be, the result is not all or nothing, and the pressure on the child to state a preference, and on the court to honor it, is lessened.

Once all evidence has been received, the court must identify those factors that will guide it to a child-centered decision. The judge must determine "where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture."[30]

The first inquiry must be whether both parents are "fit and proper" individuals to have primary physical custody of the minor child. Allegations of misconduct often center around a party's relationship with a new boyfriend or girlfriend, although allegations of child or spousal abuse and drug or alcohol addiction are increasingly common. In some ways such cases are easier to decide because they are more suited to the traditional adversarial approach. When both parents are suited to have primary custody, the court must compare and balance their respective abilities to raise the child and must consider the existing relationships. Any special medical or developmental needs of the child must be considered, as some parents are better suited by reason of temperament, education, or training to meet those needs. The balancing process should not include consideration of misconduct of the parties toward each other unless it affects the child's best interests in some way. The judge also must avoid being judgmental about the parties' life-styles because a decision based on his or her biases may deprive a child of the most suitable caretaker.

Although both parents and the child need significant blocks of time with each other, the child also needs a home base, a primary residence. While this is obviously true for school-age children, it is equally true for preschoolers. Logistical factors, such as the parents' work schedules, the nearness of parental residences, and the availability of child care, must be considered along with the child's age and any special needs that he or she has. The lengths of the periods of custody are not likely to be as important as their regularity and the quality of time shared. Most important, the parents must not be allowed to use the exchanges of physical custody as an extension of the divorce battlefield. When one or both parents show no inclination to deal reasonably with the problems attendant to sharing custody, the court can structure its order to avoid confrontations. Parents must understand that few arrangements in the best interests of the child result in mathematically equal periods of physical custody.

Regardless of the physical custody decision, the judge also must address the issue of legal custody. Many judges do not separate legal and physical custody and routinely award legal custody to the party with primary physical custody. However, where the parties have demonstrated an ability to cooperate in decisions concerning their child despite other problems with the separation, an award of joint legal custody gives each a part in the child's

life and future. Where the parties remain hopelessly bitter and embattled, however, it is more logical to award legal custody to the party having primary physical custody. Even then, the judge should consider at least requiring the party designated as legal custodian to consult with the other parent before making major decisions concerning the child.

Conclusion

Agreements and decisions concerning child custody continue to haunt parents, judges, and attorneys. Mediation offers parents an alternative to traditional litigation with its delay and expense. When trial cannot be avoided, it should be conducted with sensitivity to the parents' need to be heard, but with the child's best interests foremost. Legislation is needed to make it clear that a district court judge may appoint a guardian ad litem when necessary to protect a child's best interests. Alternatives to in-court testimony by a child should be developed and allowed by statute. When possible, the court should consider whether shared custody arrangements would best preserve the child's continuity of relationships.

The application of these new principles and language to the shape and direction of custody litigation in North Carolina is no academic exercise. The percentage of families maintained by only one parent has increased substantially (see Table 1). Of the children born in 1988 in the United States, the Bureau of the Census estimates that only 39 percent will live with both parents until their eighteenth birthday. It is for our present and future children of divorce that we seek to rechart the polar star of the child's best interests. ❖

Notes

1. *In re* Lewis, 88 N.C. 31, 34 (1883).

2. Howard A. Davidson and Katherine Gerlach, "Child Custody Disputes: The Child's Perspective," in *Legal Rights of Children*, ed. Robert M. Horowitz and Howard A. Davidson (New York: McGraw-Hill Book Co., 1984), 232–61.

3. 1977 N.C. Sess. Laws ch. 501, § 2.

4. N.C. Gen. Stat. § 50-13.2(a).

5. N.C. Gen. Stat. § 50-13.2(b).

6. N.C. Gen. Stat. § 50-13.2(a).

7. Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979).

8. Griffith v. Griffith, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954).

9. Burchard v. Gray, 42 Cal. 3d 5311, 229 Cal. Rptr. 800, 724 P.2d 486, 62 A.L.R. 4th 237 (1986).

10. See, for example, Judith S. Wallerstein and Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* (New York: Basic Books, 1980); Judith S. Wallerstein and Sandra Blakeslee, *Second Chances* (New York: Ticknor & Fields, 1989); Marla Beth Isaacs, Braulio Montalvo, and David Abelsohn, *The Difficult Divorce* (New York: Basic Books, 1986).

11. Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973).

12. Goldstein, Freud, and Solnit, *Beyond the Best Interests* (1979 ed.), 31–32.

13. Goldstein, Freud, and Solnit, *Beyond the Best Interests* (1979 ed.), 17.

14. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

15. Gerald A. Silver and Myrna Silver, *Weekend Fathers* (Los Angeles: Stratford Press, 1981).

16. See the opinions in Beck v. Beck, 86 N.J. 480, 432 A.2d 63, 17 A.L.R. 4th 997 (1981), and *In re* Marriage of Burham, 283 N.W.2d 269 (Iowa 1979), which discuss in detail the reluctance of courts to make joint custody awards, present the arguments for and against such awards, and cite numerous authorities.

17. Cal. Civ. Code §§ 4600.5(d)(1), (3), (5), and (g) (West 1986).

18. Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

19. Wallerstein and Blakeslee, *Second Chances*, 256–73. See also the discussion in Robert D. Felner and Lisa Terre, "Joint Custody: A Simplistic Solution," *Family Advocate* 9 (Summer 1986): 7–8.

20. N.C. Bar Ass'n, *Mandatory Child Custody Mediation Program in Mecklenburg County: A Study and Evaluation* (Raleigh, 1987), 8.

21. "100 Divorce Mediators Trained," *The N.C. Mediator* Fall 1988: 5; "Family Mediation Gets Results" and "Wake Judge Recommends Family Mediation," *The N.C. Mediator* Spring 1989: 6.

22. "Final Report of the Advisory Committee on Child Custody and Visitation Dispute Mediation" (distributed by the Administrative Office of the Courts, 1989).

23. Franklin Freeman, Jr., letter to Lt. Gov. James C. Gardner and Josephus L. Mavretic, Speaker of the House, 27 April 1989.

24. 1989 N.C. Sess. Laws ch. 795, § 15.

25. "The Sense of Settlement in Child Custody," *FairShare* 9 (March 1989): 12.

26. Robert Riddle, "Custody: Some New Ideas," *Trial Briefs* 19 (3rd Quarter 1987): 16–18.

27. N.C. Gen. Stat. § 7A-586.

28. *In re* Davis, 465 A.2d 611, 616 (Pa. 1983).

29. *In re* Gibbons, 245 N.C. 24, 95 S.E.2d 85 (1956); Raper v. Barrier, 246 N.C. 193, 97 S.E.2d 782 (1957).

30. Bah v. Bah, 668 S.W.2d 663, 666 (Tenn. Ct. App. 1983).

Preserving North Carolina's Literary Heritage

H. G. Jones

Superior Court Judge David Lowry Swain (1801–1868) was only thirty years old when his travels to the various courthouses confirmed—to his mortification—that North Carolina did indeed deserve its characterization as the "Rip van Winkle State of the Union." He spent the remainder of his life trying to alter that derisive image.

While he was the state's youngest governor, Swain persuaded the General Assembly to charter a state historical association, for he believed that a sense of pride was a prerequisite to an invigorated populace. However, more pressing matters, including the threat of revolution by westerners demanding reapportionment of the legislature and reform of the state's archaic constitution, prevented him from implementing the charter.

Elected president of The University of North Carolina even before his gubernatorial term ended, Swain brought to Chapel Hill his mission to lift the state from its economic and intellectual stupor. Here, too, other duties such as raising funds for the operation of the University and supervising a sometimes unruly faculty and student body demanded his primary attention. Finally, in 1844 he launched

The author is curator of the North Carolina Collection. Unless otherwise noted, photographs by the North Carolina Collection, University of North Carolina Library at Chapel Hill.

the *University of North Carolina Magazine* and formed the Historical Society of the University of North Carolina, the latter to acquire manuscripts and "every book, pamphlet, and newspaper published in this state since the introduction of the printing press among us," as well as other materials pertaining to the state and its citizens regardless of authorship or place of publication. Thus, in the office of the university president, the North Carolina Collection was begun. Nearly a century and a half later it is the largest, most comprehensive library of materials relating to a single state in the Union.

Establishing the Collection

When Swain died in 1868, an incomparable collection of manuscript and printed North Caroliniana was found in his office. His widow claimed the manuscripts as private property. Some of them were sold for the benefit of the estate and now are scattered in other repositories, such as the New York Public Library and the William L. Clements Library at the University of Michigan. Most of the manuscripts, however, eventually found their way to the North Carolina State Archives or were reunited with the books at Chapel Hill.

Another president of the University, Kemp P. Battle (1831–1919), adopted Swain's mission of promoting the state's history. He continued soliciting North Caroliniana, and in 1891 he stepped down to establish a graduate program in history with special emphasis on North Carolina. He even sought funds—unsuccessfully—for a "historical museum under a salaried curator, in a fire-proof building" for the display of North Caroliniana.

At the turn of the century, the Swain-Battle mantle fell on young Louis Round Wilson (1876–1979), the vigorous university librarian from 1901 to 1932. Wilson soon was joined in his collecting zeal by Joseph Gregoire deRoulhac Hamilton (1878–1961), who was hired by the Department of History in 1906. The following year special quarters were provided for North Caroliniana in the new Carnegie Library (renamed Hill Hall in 1929).

Once Hamilton had scoured the state for books and manuscripts, he crossed the border and began hauling in materials from other states. By 1917 the North Carolina Collection was large enough to be established as a separate department with its own curator, Mary Lindsay Thornton (1891–1973). It nearly doubled in size the next year with the purchase of the Stephen Beauregard Weeks Collection, the largest accumulation of North Caroliniana then in private hands. From that time, Thornton gave primary attention to the published works, and Hamilton continued his forays to the towns and countryside regardless of state boundaries, for other public universities in the South had not yet seriously entered the acquisitional race. He was so successful that in 1930 the manuscripts were established separately as the Southern Historical Collection with its own director—Hamilton, of course.

Bob Donnan/Courtesy Dialectic Society

David Lowry Swain, as painted by William Garl Browne in 1856

Thereafter, with few exceptions (including manuscripts that had been bound and cataloged as books) the North Carolina Collection concerned itself with nonmanuscript library materials. The proliferation of printed North Caroliniana posed an enormous task of acquiring, cataloging, and making accessible the rapidly expanding holdings.

Private Support, Public Service

The North Carolina Collection might have survived as only a minor department in the University except for financial support from John Sprunt Hill (1869–1961), a native of Duplin County and an 1889 graduate of the University, who settled in Durham following a short but successful law practice in New York City. Hill's interest in the history of the state was demonstrated as early as 1891 when he established the Hill Prize. He donated a scholarship in 1905, and the following year—about the time he was elected to the University's board of trustees—he began endowing the North Carolina Collection. In 1917 his funds paid for the first curator's salary.

John Sprunt Hill, circa 1935

In 1935 Hill gave the University the Carolina Inn, with the stipulation that its net earnings be applied to the support of the North Carolina Collection. When Wilson Library was expanded and the collection received new quarters in 1952, Hill selected and paid for the Chippendale reproduction furnishings that, with chandeliers and its period Sir Walter Raleigh and Early Carolina rooms, made the collection a favorite place for study by scholars and serious students. Finally, before his death in 1961, he gave the Hill buildings on Franklin Street, the rents of which are applied to the collection. Today earnings from the Hill properties provide for virtually all of the books, most exhibition costs, and nearly a quarter of staff salaries.

There have been, of course, other major donors. Bruce Cotten, a native of Pitt County, gave his outstanding library of North Caroliniana to the collection in 1954, along with a trust fund to provide for additions to the Cotten Collection. The Roanoke Colony Memorial Association, upon its dissolution, left its treasury for the beginning of a Sir Walter Raleigh Collection relating to Elizabethan exploration, including books by and about the courtier. Embarrassed by the University's inability to raise the $5,000 needed to purchase the New York manuscripts of Thomas Wolfe in 1939 (which were bought by William W. Wisdom and given to Harvard University), friends of the author established a small fund for the purchase of materials to augment the collection of correspondence, personal papers, and presentation copies given to the North Carolina Collection by Wolfe's brothers and sisters in the 1950s. Banker and scholar Archie K. Davis of Winston-Salem established a fund in memory of his father, and the earnings provide an annual Thomas Whitmell Davis Research Assistantship for a graduate student specializing in North Carolina studies. Finally, alumni, friends, and authors continue to make contributions, often to the North Caroliniana Society, a private, nonprofit, educational corporation whose special interest is the North Carolina Collection. Last year it provided the collection with a variety of support amounting to nearly $10,000.

A recitation of past benefactions, however, should not obscure current challenges to the collection's foremost standing. The proliferation of printed matter stemming from new technology and an activist society dictates a tightening of the previously inclusive collection policy. Prices of books and other library materials increase annually. For example, the microfilm copy of one daily newspaper costs more than $1,200 per year, and books priced at more than $50.00 are not uncommon. The rapidly growing holdings create increasingly heavy demands on the staff, yet there have been no additional appropriations for staffing in eleven years. In fact, two new positions that are essential to the operation of expanded facilities in renovated Wilson Library are charged to reinvested trust funds. Meanwhile, income from the Carolina Inn has dropped 80 percent in five years while other trust income has remained essentially stable, resulting in a steady drain upon the Hill benefaction just to hold onto the present small staff. More to the point, there is urgent need for additional staff, particularly to reduce a mammoth backlog of uncataloged materials, to convert to on-line cataloging the first 140 years of accessions, to adequately preserve and provide finding aids for tens of thousands of photographic negatives and prints, and to extend the hours of the North Carolina Collection Gallery. For the collection to maintain its national ranking, substantial additional financial support will be required.

Ironically, it is support from the *private* sector that makes the North Carolina Collection a *public* resource. It serves a constituency far beyond the University community. Left to appropriated library funds, the collection might have been maintained as simply a minimal service to the faculty and students. Twentieth-century Tar Heels, however, are notable for the pride that Swain sought to instill in their predecessors. Hill was not interested in supporting a *mediocre* North Carolina Collection serving only the campus. In 1945 he wrote, "I am more and more interested in the North Carolina Collection and I am determined to make it one of the outstanding Collections of State History in the whole country. For more than forty years I have kept this purpose in mind and . . . I intend to increase

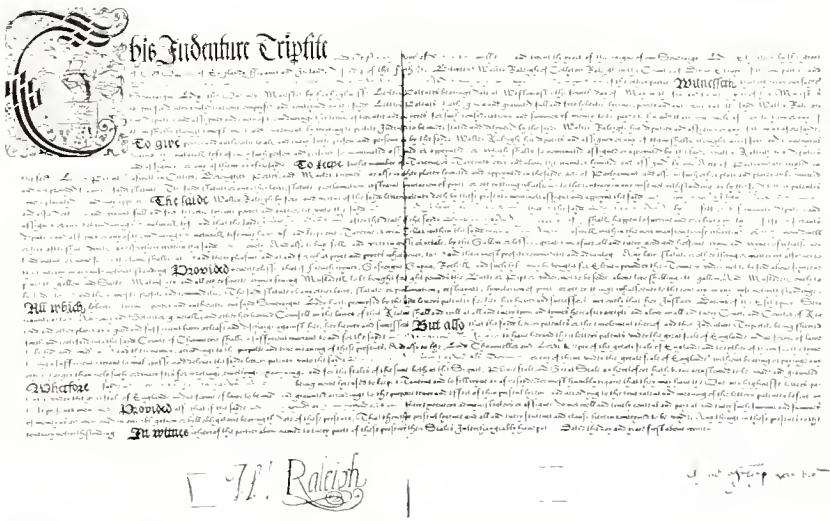
the endowment for this particular purpose." It was this yearning for excellence that helped promote the North Carolina Collection as a statewide resource without peer and enabled it to gain national recognition.

Beyond private support, continuity of purpose has been the collection's major strength. The acquisitions policy—everything written *by* North Carolinians, regardless of subject or language, and everything written *about* North Carolina or North Carolinians, regardless of author or language—has been followed steadfastly by collectors and curators. Mary Thornton served forty-one years and was succeeded in 1958 by William S. Powell, who turned to full-time teaching in 1973. Counting the present curator's sixteen years, the collection has been guided for nearly three-quarters of a century by only three individuals, each committed to Swain's charge. The staff, now consisting of library, history, museum, and archives professionals and paraprofessionals, often is cheered by statements like this one from a curator in another state: "You and the North Carolina Collection serve as inspirations for all of us who labor in less productive vineyards."

From 32 to 250,000 Items

Starting with the thirty-two publications acquired in Swain's first year as founder of the Historical Society, the North Carolina Collection today holds a quarter of a million items, making it larger than the entire libraries of all but thirteen colleges and universities in the state. Remarkably, these materials have been paid for not from appropriated funds but from the benefaction of Hill and others, and they have been selected, cataloged, and given reference service by the collection's small staff. The magnitude of the holdings is summarized below. The statistics reflect holdings as of June 30, 1989.[1]

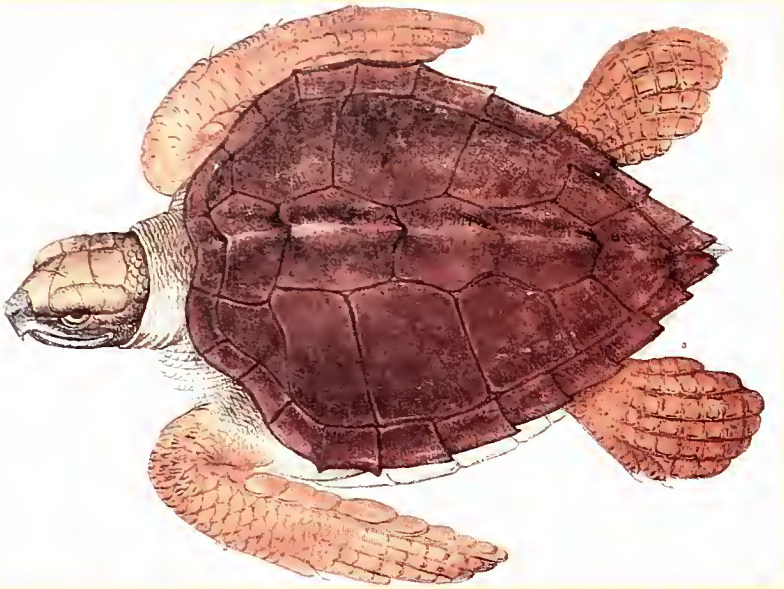
Not surprisingly, books constitute the largest number of individual items and consume the most space. The 109,153 cataloged books range in date from 1577 (Pietro Martire d'Anghiera, *The History of Trauayle in the VVest and East Indies*) to the latest novel by Reynolds Price, poetry by Fred Chappell, and history by William S. Powell. Numbering 73,537, pamphlets bound in boards and fully cataloged supplement the books.



Biographers have counted more than seventy contemporary spellings of Walter Raleigh's surname, but those who argue that the courtier never spelled it with an "i" have overlooked this license issued by Raleigh in 1583 to Johanna Somers to sell wine in Lyme Regis. Even before sending out his first expedition to America and his subsequent knighthood, young Raleigh was favored by Queen Elizabeth with a monopoly over the sale of wine in England.

Researchers are sometimes surprised to learn that the University's only copy of a highly specialized study is in the North Carolina Collection rather than the general collection; this is because by either authorship or association the volume meets the definition of North Caroliniana. Patrick Nisbett Edgar's *The American Race-Turf Register, Sportsman's Herald, and General Stud Book* (New York, 1833) is found in the North Carolina Collection because it is decorated with a fore-edge painting of Cylburn, Bruce Cotten's home in Baltimore. Edward Gibbon's bookplate is represented because he owned, studied, and discussed in his diary the copy of Raleigh's *History of the World* purchased by the collection from a New York book dealer. Rare travel books and histories of Union regiments are found among North Caroliniana because they describe places and events in the state. Antislavery books attributed to escapees from North Carolina, biographies of men and women who either were born in or migrated to the state, and works of native or adopted Tar Heels are included.

Broadsides numbering 3,921 are especially strong in political subjects, such as handbills and posters. The 4,320 maps encompass the entire recorded history of the area, starting with those produced by the Roanoke colonists and continuing to the present, including county, city, geodetic, and fire insur-



John White's watercolor of a loggerhead turtle. Plate 55 in *America 1585: The Complete Drawings of John White*, edited by Paul Hulton. © 1984 The University of North Carolina Press. Drawings, © 1964 The Trustees of the British Museum. Used with permission of the publisher. The collotypes, hand painted from the originals and from which the printing plates were made, are owned by the North Carolina Collection.

A Compleat Map of North Carolina, drawn by John Abraham Collet from a draft prepared earlier by William Churton, was published in London in 1770. This map provided the basis of the northern portion of the Mouzon Map of 1775, which was used by both American and British forces in the Revolution. Collet, governor of Fort Johnston in 1775, was forced to watch from a ship as Americans looted and burned his house. But he wreaked revenge the following year when he led a destructive British attack upon the Cape Fear.

ance maps. The huge framed Collet Map of 1770 and Mouzon Map of 1775 greet visitors at the entrance to the Reading Room and the North Carolina Collection Gallery, respectively.

Newspapers begin with the *North-Carolina Gazette*, published in New Bern by the colony's first printer, James Davis, and are particularly rich for the nineteenth century. Even more numerous are what librarians call serials—magazines, journals, newsletters, reports, and other numbered issuances of individuals, organizations, church and fraternal bodies, businesses, labor unions, political activists, and the like. The recent proliferation of such publications is suggested by the fact that the collection currently receives about 3,000 separate titles in serial form.

Government itself produces great quantities of publications referred to by librarians as documents. The collection has been assiduous in acquiring publications of the state government, and a remarkable body of printed archival materials has been incorporated into the bookstacks.[2] That traditional collection policy was made statutory in 1988 with the addition of Chapter 125, sections 11.5 through 11.12, of the North Carolina General Statutes.[3] Under those statutes the State Library designated the North Carolina Collection as one of six "full" depositories for state documents. The law, which seeks to provide a regularized distribution to ensure public access and preservation of publications of all state agencies, promises eventually to replace the previously independent acquisition efforts. By increasing the number of documents flowing into the collection, however, this designation adds a heavy load to staff responsibilities in cataloging and reference.

In the absence of local libraries or systematic means of preserving local government publications *in situ*, the collection once played a vital role in acquiring and cataloging printed county and municipal documents. Often the only extant copies are found in its holdings. In recent decades, however, the proliferation of local government publications and the difficulty of acquiring and cataloging them have dictated, reluctantly, a policy of encouraging their systematic preservation only in community libraries and among county and municipal archives. It simply is no longer feasible for local documents to be concentrated at the state level.

In earlier times federal documents relating to North Carolina also were assiduously acquired. Today, preservation and cataloging by officially designated federal documents depositories relieve the collection of much of this responsibility, though federal documents are still acquired on a selective basis.

The archival copies of all graduate theses and dissertations and undergraduate honors essays are kept by the North Carolina Collection. This large library of original research dates from 1894 and accelerates in demands for space each year.

For a variety of reasons, many materials are preserved in microform, usually 35-mm microfilm. The 12,637 reels represent more than 1,800 titles of books, pamphlets, newspapers, journals, and the like. Newspapers are particularly suited for copying on microfilm, for the contents of papers scattered in distant locations can be incorporated into one chronological sequence for ease of study.

Although most manuscripts previously held by the North Carolina Collection were transferred when the Southern Historical Collection was established in 1930, some unpublished materials remain among North Caroliniana. Of the items that had already been cataloged and shelved as vault books, a prized example is William Byrd's manuscript diary of the dividing line between North Carolina and Virginia, complete with secret code. Other manuscripts were acquired in connection with specialized collections. An example is a 1583 license from young Walter Raleigh authorizing Johanna, the wife of Admiral Sir George Somers (the discoverer of the Bermudas and unconscious begetter of Shakespeare's *The Tempest*), to sell wine in Lyme Regis, Dorsetshire. A manuscript in Arabic was written by Omar ibn Said, the "Slave Prince" once owned by the family of Governor John Owen. The largest body of manuscripts, of course, is the Thomas Wolfe Collection, use of which requires the advance permission of the administrator of the novelist's estate.

One of the collection's most heavily used sources is a massive newspaper clipping file dating chiefly from the 1920s to the present and arranged alphabetically by name and subject. Clippings for the years through 1975 have been photographically copied, bound in 364 volumes, and placed on the reading room shelves. The clippings after 1975 are still pasted on tagboards but may be requested from the reference counter by name or subject.

The North Carolina Collection's Photographic Archives of nearly a quarter of a million negatives, prints, and posteards includes examples of all formats from the daguerreotype of the 1840s to the images made by today's sophisticated cameras. A portrait collection includes formal and candid pictures of Tar Heels, from the humble to the famous; a subject classification permits identification of scenes in categories such as home life, religion, lumbering, textiles, and tobacco; and a file for each

A mountain woman with her family wash was pictured by Bayard Wootten, North Carolina's leading female photographer.

AUGUST 8, 1777. THE NUMBER 388.

NORTH-CAROLINA GAZETTE.

With the latest ADVICES, FOREIGN and DOMESTIC.

SEMPER PRO LIBERTATE, ET BONO PUBLICO.

The several Printers of News Papers in the United States are requested to infert the Refolves of Congrefs on the Commiffary's Department, for the information of the Public.

RESOLVED,

THAT for fupplying the army of the United States with provifions, one Commiffary General and four Deputy Commiffaries General of perchafes; and one Commiffary General and three Deputy Commiffaries General of Iffues, be appointed by Congrefs.

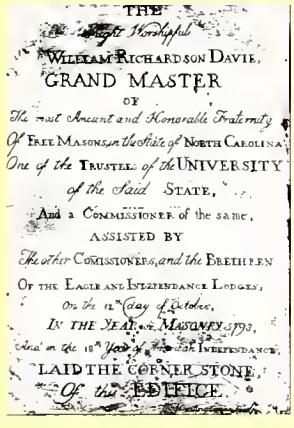
II. That each of the faid Commiffaries and Deputy Commiffaries be authorized to appoint for himfelf one Clerk.

III. That the Deputy Commiffaries General have authority to appoint as many Affiftant Commiffaries to act under them as may from time to time be neceffary, and the fame to difplace at pleafure, making returns thereof to the Commiffaries General refpectively, who fhall have full power to limit their numbers, to difplace fuch as they fhall think diffatisfied for that truft, and direct their refpective Deputy Commiffaries General to appoint others in their ftead. That fpecial care be taken by the officers empowered as aforefaid, to appoint none but perfons of probity, capacity, vigilance, and attachment to the United States, and the caufe they are engaged in, and to make returns to the Board of War, the Commander in Chief, and the Commander of the refpective Department, of the Affiftant Commiffaries by them refpectively appointed, their feveral places of abode, the time of their appointment and diftinction, and the poft, place, magazine or diftrict to which they are feverally affigned, and that the Deputy Commiffaries General of purchafes and iffues in the fame diftrict make fimilar returns to each and deliver the Commiffary General of Iffues, or his Deputies or Affiftants, in fuch quantities and at fuch places or magazines, as the Commander in Chief, or the Commander in the refpective Department fhall direct.

VIII. That the Commiffary General of Iffues fhall direct the refpective Deputy Commiffaries General to ration one of their Affiftants at every fort, poft, place, or magazine where provifions are or may be ifued.

IX. That the Commiffary General of Purchafes fhall furnifh each of the Deputy Commiffaries General and Affiftants with a book, in which is to be entered every purchafe by them refpectively made. And that all the accounts may be kept in the fame form, he fhall caufe the pages of fuch books to be divided into ten columns, in the firft of which fhall be entered the year, month and day on which any purchafe is made; in the fecond, the names of the perfons from whom; in the third, the where place; in the fourth, the fpecies and quantity of provifions, and if live ftock, the number, colour, and the natural mark; in the fifth, the artificial marks and number; in the tenth, the prices; in the feventh, the amount of the purchafe money; in the eighth, ninth and tenth, the weight of the neat, ftock and tallow of the live ftock as hereafter directed. And the Commiffary General of Iffues fhall furnifh each of the iffuing Deputy Commiffaries General and Affiftants with a fimilar book, in which fhall be entered all provifions received by them from the purchafers refpectively, the firft column to contain the time of receiving fuch provifion, the fecond, the name of the purchafer, and in each of the other columns the entries before directed.

X. That each purchafer fhall enter, in different pages of faid



THE
Right Worshipful
WILLIAM RICHARDSON DAVIE,
GRAND MASTER
OF
The most Ancient and Honorable Fraternity
Of FREE MASONS in the State of NORTH CAROLINA,
One of the TRUSTEES of the UNIVERSITY
of the said STATE,
And a COMMISSIONER of the same,
ASSISTED BY
The other COMMISSIONERS, and the BRETHREN
Of the EAGLE and INDEPENDANCE LODGES,
On the 12th Day of October,
IN THE YEAR of MASONRY 5793,
And in the 18th Year of the State INDEPENDANCE,
LAID THE CORNER STONE
Of this EDIFICE.

The 1793 brass cornerplate from The University of North Carolina at Chapel Hill's Old East, the oldest state university building in the country. The inscription on the reverse is in Latin. Stolen from the campus, the plate was rescued and returned in 1916 when it was discovered in a foundry in Tennessee, ready to be melted down.

The August 8, 1777, issue of the *North-Carolina Gazette*. James Davis, a native of Virginia, brought the first printing press to North Carolina in 1749. Two years later he started publication of this title, which, with several years' interruption, he printed until 1778.

The North Carolina Collection Reading Room in Wilson Library, furnished with chandeliers and reproduction Chippendale pieces, seats seventy-five readers.

county holds an assortment of views. The archives has been built over the decades through gifts or purchases ranging from single images to large bodies of materials.[1] No doubt the best known is the collection of Bayard Wootten, the state's most accomplished female photographer, whose pioneering images recorded a vanishing culture in the first half of the twentieth century. A modern photographic laboratory, financed through a revolving fund, is operated in association with the Photographic Archives.

Research in the Collection

The *study* of what has been acquired, cataloged, and preserved is, of course, the ultimate justification of a special collection. Naturally, students and faculty from the Chapel Hill campus constitute the largest number of readers, ranging from professors and doctoral candidates researching intensely scholarly subjects to undergraduates writing class papers and preparing for examinations. In addition, more than a hundred other American and foreign colleges and universities usually are represented in the registration book each year. But—as has already been pointed out—the North Carolina Collection has long served as a statewide resource, welcoming the general public as do the State Library and the State Division of Archives and History.

Public use extends to an almost infinite variety of interests, such as representatives of the news media seeking background or specific data; public officials tracing county boundary changes or searching for rare state, county, or municipal documents; attorneys building their cases on printed reports or newspaper accounts; historic preservationists studying early fire insurance maps that describe the construction of individual buildings; concerned citizens studying environmental reports on proposed projects; hikers and bicyclists tracing special trails; climatologists analyzing weather trends in particular communities; citizens writing local or family histories; publishers and news media personnel selecting photographs; and politicians and special-interest reporters sleuthing the weaknesses of their opposition. Amusingly, a heavily used source (by reporters, authors, politicians, and freshmen) is Jesse Helms's WRAL-TV *Viewpoint* editorials. Only the North Carolina Collection considered these brief commentaries worth preserving from 1960 to 1972, and now they are called for so often that a reading

One of the Sir Walter Raleigh Rooms (left) with seventeenth-century paneling from a house near Hayes Barton, Raleigh's birthplace in Devon, and one of the Early Carolina Rooms (right) featuring paneling from a house built in Pasquotank County circa 1750

copy has been duplicated and the originals withdrawn for protection.

The North Carolina Collection Gallery

Over the years the collection has attracted more than traditional library materials. Artifacts, memorabilia, and artwork associated with the history of the state and particularly of the University found their way to the collection's vault for safekeeping. A few of these items were displayed from time to time, but appropriate facilities for public exhibition became available only with the renovation of Wilson Library and the conversion of the old reading room into the North Carolina Collection Gallery.

Formally opened during the bicentennial of the University's charter, the North Carolina Collection Gallery encompasses a series of special rooms and a large, open area of displays. Two sets of rooms—the Sir Walter Raleigh Rooms, with paneling and furnishings from seventeenth-century England, and the Early Carolina Rooms, with paneling and furnishings from Pasquotank County's eighteenth century—were installed in 1952 and have been retained essentially intact. Two new rooms were added during the renovation: one featuring the story of Hill and his benefactions to The University of North Carolina, and a replica of the octagonal Hayes Library at Edenton, which houses more than 1,800 books and appropriate furnishings from the antebellum library of James Cathcart Johnston and his forebears. In addition, a special Thomas Wolfe Room is located in the new reading room in the west wing.

The open area of the gallery features exhibits on the Roanoke colonists, including a small iron axe brought to America by the colonists; the history of The University of North Carolina, including the 1793 brass cornerplate from Old East, the oldest state university building in the country; selections from the Mangum and Josephine Weeks Memorial Collection of Ornithology, including double-elephant folio Audubon prints; and several temporary displays. Currently, Chang and Eng Bunker, the "original" Siamese twins who married and fathered twenty-two children in North Carolina after several stage tours of the world, are the subject of a special exhibit of their memorabilia donated by Chang's great-grandson, Milton Haynes of Wilmington. Among the antiques are furniture once owned by Elisha Mitchell, for whom Mt. Mitchell is named, and Calvin H. Wiley, the state's first superintendent of public schools.

As the North Carolina Collection approaches its sesquicentennial in 1994, it has achieved goals that

were little more than dreams of its early leaders: Swain's mission to acquire and preserve all published North Caroliniana; Battle's yearning for a gallery for the display of the cultural resources of the state; Wilson's efforts to provide adequate facilities for the preservation and study of the collection (appropriately, though probably not in his dream, in a building named for himself); and Hill's determination to lift the collection to national superiority. Although that superiority is now facing a serious challenge, the record of the first 150 years suggests that other North Carolinians will emerge to carry on the mission that they all shared: to acquire, preserve, and promote the literary heritage of North Carolina. These new benefactors will ensure that the Rip van Winkle image remains buried. ❖

The collection's offices, reading room, and photographic services are open from 8:00 A.M. to 5:00 P.M., Monday through Friday. To accommodate citizens who work during the weekdays, the reading room also is open 9:00 A.M. to 1:00 P.M. on Saturday and 1:00 to 5:00 P.M. on Sunday. Normal hours for the North Carolina Collection Gallery are 9:00 A.M. to 1:00 P.M., Monday through Friday, but group tours at other times may be made with prior arrangement. A twelve-panel leaflet describing the North Carolina Collection is available free by writing CB# 3930, Wilson Library, UNC–CH, Chapel Hill, NC 27599-3930; or by calling (919) 962-1172.

Notes

1. Most of the titles held by the collection in 1956 are listed in Mary Lindsay Thornton (compiler), *A Bibliography of North Carolina, 1589–1956* (Chapel Hill: University of North Carolina Press, 1958). In addition, since 1934 the *North Carolina Historical Review* in its April issues has carried an abbreviated bibliography of North Caroliniana cataloged in the preceding fiscal year. Compilers have been Mary Lindsay Thornton, William S. Powell, H. G. Jones, and Robert G. Anthony, Jr.

2. For holdings as of 1939, see Mary Lindsay Thornton (compiler), *Official Publications of the Colony and State of North Carolina, 1749–1939* (Chapel Hill: University of North Carolina Press, 1954).

3. 1987 N.C. Sess. Laws ch. 771. See also Marjorie W. Lindsey, "State Documents: Proposed Statewide Depository System," in *Popular Government*, 52 (Fall 1986): 8–11.

4. Because of their delicate nature, photographs and negatives may be examined only in the presence of the photographic archivist. An appointment may be made by calling (919) 962-1334 between 8:00 A.M. and 5:00 P.M., Monday through Friday.

Bias and Conflicts of Interest in Land-Use Management Decisions

David W. Owens

It is clear that a city council member should not vote on rezoning his own property. But what about rezoning the property next door? Should a county commissioner vote on a proposed subdivision that would adjoin her own neighborhood, affecting traffic, services, and perhaps her own property's value? What about a city council member voting on a special-use permit for a project when his employer has a contract to furnish the building materials if it is approved? While a zoning board of adjustment member should not vote on her own variance request, what if the request is being made by her son? What if her son is the petitioner's realtor? What about voting on a project against which the board member signed a petition prior to being appointed to the board of adjustment? Is there a different rule for planning commission members who are making a recommendation rather than a final decision?

Those who make governmental land-use decisions must often wrestle with these ethical questions. The legislature has organized North Carolina's land-use review process to put many of these decisions directly in the hands of the state's citizens. Citizen boards, not professional staff members or judges, adopt ordinances and regulations, issue special-use permits, and grant variances.

Because these decisions so vitally affect the future quality of life for the entire community, public interest in securing knowledgeable citizens to serve on the many boards involved in the land-use processes is strong. Yet these same knowledgeable citizens are also likely to be personally involved in land development and in neighborhood and environmental groups. They may make their livings as builders, realtors, surveyors, and bankers. They may have organized neighborhood associations or led groups favoring or opposing controversial development projects. In sum, their knowledge and wisdom often come from experience—their active personal participation in land-use issues.

And therein lies an inherent conflict. Although government needs the participation of knowledgeable citizens, it also is obligated to provide fair and unbiased decisions. Citizens have the right to expect that governmental decisions will be based on consideration of what is in the best public interest, not what will most benefit the personal finances or concerns of an individual citizen board member. This right is based on constitutional guarantees of due process, on common law principles, and on statutes, ordinances, and codes of conduct mandating ethics in government. This article addresses

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The author is an Institute of Government faculty member who specializes in land-use regulation. *For a more detailed review of the legal issues involved with this subject and a model ordinance, see David W. Owens, "Legal Aspects of Bias and Conflicts of Interest in Land-Use Management Decisions" (unpublished paper available from the author, 1990).*

how that inherent conflict is and can be balanced in North Carolina land-use decisions.

Types of Bias and Conflicts of Interest

There are several types of objectionable bias possible in land-use decision making by government. They include financial conflicts of interest, personal bias, association with those affected by a decision, and procedural irregularities.

The most obvious, and clearly illegal, is the straightforward bribe. Fortunately, North Carolina largely has been spared the scandal involved in outright sale of land-use approvals. However, given the very large sums of money at stake in some decisions, the temptations are such that blatantly criminal acts will be committed occasionally.

Financial conflict of interest arises more frequently. This occurs when a citizen board member is in a position to benefit financially from the outcome of a particular decision. It is important to remember that this includes direct and indirect financial benefits. For example, conflicts of interest arise not only when the board member's own property is directly affected but also when a business owned by the board member stands to benefit from increased sales if someone else's new project is built or, conversely, stands to lose sales if a competing business receives a permit.

Personal interest on other than financial grounds also can be a type of objectionable bias. The board member may have had personal dealings with a petitioner that so color the board member's judgment that he or she is unable to separate that prior unrelated encounter from the land-use issue at hand. Or, in a more typical occurrence, a board member may have taken a strong public position on a proposed development, which later is presented to the board for an objective decision based on the record developed at an adjudicatory hearing. In these situations, questions arise as to the impartiality of the decision maker. Further, the potential personal interest may not even involve the particular board member. At times it is the board member's association with an interested party that raises a potential problem. A close relative or business partner's involvement in a matter coming before the board is not uncommon, especially in small towns.

Another type of bias involves the fairness of the process itself. With some land-use decisions, such as special- or conditional-use permits, variances, and permit appeals, all of the requirements of a fair hearing must be met. If a board of adjustment member discusses a matter coming before the board informally with one of the parties, there is the possibility that the board member will then reach a decision based in part on information that was not presented at the hearing and was therefore not subject to cross-examination or rebuttal. Although this outside communication may be difficult for board members to avoid, it does taint the fairness of the hearing process and is improper.

Finally, it should be remembered that the concern is not only with *actual* conflicts but with the *appearance* of impropriety as well. In most cases, members of the public do not know government officials personally and have no way of independently verifying their integrity. As a practical matter, no one—not a close associate, judge, or jury—can know for certain what motivated a board member to vote in a certain way. Therefore the avoidance of even the appearance of a conflict of interest is required by some ethical codes.

In all of these diverse types of cases—bribery, financial conflicts, personal bias, associations with interested parties, an unfair hearing process, and the appearance of conflicts—the common thread is protecting the public interest in the fairness and integrity of land-use decisions. Public confidence in government depends on the integrity of its decisions, and the avoidance of bias and conflicts of interest in these various forms is no doubt a factor in establishing that confidence.

Types of Land-Use Decisions

Whether an improper bias or conflict of interest exists and what response is appropriate may depend in part on the character of the land-use decision involved. Decisions by citizen boards may be one of three types—advisory, legislative, or quasi-judicial.

Advisory decisions are involved when a body has no formal decision-making power but is reviewing

and commenting on a matter. Some reviews are mandatory. For instance, in North Carolina a planning board reviews all initial zoning ordinances, which may not be adopted or even sent to public hearing by the governing board until recommended by the planning board. Counties are required to send zoning ordinance amendments to a planning agency for a recommendation prior to adoption. Other reviews are optional. For instance, the planning board may receive special-use permit applications and subdivision plats for comment before the city council acts on them. In each of these instances, the advisory board takes a position that may significantly affect the outcome of the land-use decision, but it does not actually make the decision. Therefore a less-demanding conflict-of-interest policy is sometimes applied to these decisions.

The second major category of citizen land-use decision is legislative. These decisions involve policy choices that affect the entire community. The most typical case is adoption of an ordinance by a local governing board or an administrative rule by a state citizen commission. In North Carolina the courts have ruled that a zoning ordinance amendment is a legislative matter within the discretion of the city council.[1] The courts traditionally have deferred to the governing board's judgment and to the political process with legislative decisions. Therefore, resolution of bias and conflict-of-interest issues in these matters often is guided more by legislatively adopted ethical guidelines than by strict legal rules set forth by the courts.

The third type of decision by citizen boards is quasi-judicial. These decisions involve the application of adopted policies to individual situations. They must not involve new policy decisions but apply previously made legislative decisions to the facts before the board. The most common quasi-judicial decision is a variance or appeal decision made by a board of adjustment. In North Carolina law a decision on whether to issue a special- or conditional-use permit also has been ruled to be a quasi-judicial decision, whether issued by a board of adjustment or by the elected board. Consideration of permit appeals by state commissions also falls into this category. For any of these quasi-judicial decisions, the courts require that all of the essential elements of a fair trial be observed, including developing a record to support the decision and giving parties directly affected by the decision the right to offer evidence, cross-examine witnesses, and have sworn testimony. This strict requirement means special attention must be given to avoiding bias and conflicts of interest whenever a citizen board is making a quasi-judicial decision.

Ways to Avoid Conflicts of Interest and Bias

There are a number of measures that can be employed to avoid conflicts of interest, ranging from disclosure of information to nonparticipation in the decision involved. The most commonly used means of addressing financial conflicts of interest regarding legislative land-use decisions is disclosure to the public of a government official's economic interests. This usually takes the form of a financial disclosure statement that sets forth an official's substantial financial interests. Another example of disclosing information would be setting forth on the record any prior knowledge or contacts with the parties to a quasi-judicial hearing. A variation of this approach is disclosure of the possible conflict and then only continuing to participate if all of the affected parties agree.[2]

The rationale for such disclosure requirements is that public confidence in the integrity of governmental decisions will be enhanced by putting any potential conflicts on the public record. The disclosure provides the voters with information sufficient to allow them to exercise their electoral judgment should they determine improper conflicts exist.

Conflicts of interest can be avoided by using a variety of other measures. One simple measure is to remove the source of the conflict, for example, divestiture of the conflicting financial interest or placing assets in a blind trust. Another is for the board member to abstain from voting on a particular matter or even refrain from any participation at all in an individual matter. The legal term for this is *recusation*. A board member is recused when he or she is disqualified from hearing a case because of a potential conflict of interest or personal bias. Finally, the board member can always remove the conflict by resigning from the governmental body or office making the decision. Resignation is an ex-

treme measure, but sometimes the conflicts of interest presented may be so frequent that the board member must consider stepping down to make way for a replacement who will be able to participate fully and actively.

Requirements of the Law

Statutes, ordinances, regulations

Unlike a number of states, North Carolina has no specific state statute addressing the issue of bias and conflict of interest in land-use decisions. There are, however, general statutory provisions that are applicable to certain aspects of the issue.

The state's Administrative Procedures Act, which the courts have said provides a similar standard for review of local land-use decisions, has several provisions requiring fair and unbiased hearings. Administrative law judges may be disqualified for personal bias, and *ex parte* communication is prohibited in contested cases. Bribery and many direct financial contracts between a local government and a citizen board member are illegal.[3] Section 14-230 of the General Statutes also provides that any state or local official who willfully fails to discharge any legally required duty is guilty of a misdemeanor. This statute does not impose criminal liability for an error in judgment. However, in the conflict-of-interest area this criminal statute could apply to situations where an official purposefully deleted relevant information from a required financial disclosure statement and may even cover a situation where an official willfully continued to participate in a decision after being advised to withdraw because of a conflict of interest.

State statutes specifically address the question of when local elected officials can be excused from voting. Section 160A-75 of the General Statutes provides that, for city councils, "No member shall be excused from voting except upon matters involving the consideration of his own financial interest or official conduct." In such cases the board member can only be excused by a majority vote of the council. If not excused, the board member automatically is recorded as voting in the affirmative if present but not actually casting a vote. Section 153A-44 contains a similar provision for county boards of commissioners. These statutes only apply to local elected officials and do not affect voting by members of planning boards, boards of adjustment, and state citizen commissions.

These statutes on voting ensure that a quorum can be maintained and that the public's business will not be delayed by board members seeking to avoid controversial votes. Excusing board members with conflicts of interest can in rare instances leave a body without a quorum or the necessary majority required for some land-use approvals. For boards of adjustment, this can be addressed by having alternate board members, but for governing boards the lack of a quorum would result either in an automatic denial or a proceeding under a common law "rule of necessity." The latter course seems to have dubious propriety in this setting. The statutes provide that vacant seats are not considered in determining a quorum. It would be reasonable to treat disqualifications on account of conflict of interest the same way, although it is not certain that current law allows this.

These voting statutes, by specifically allowing governing board members to be excused in matters involving their own financial interest, emphasize the prohibition against financial self-dealing and financial conflicts of interest. However, they pose a dilemma for elected officials in those local governments that have chosen to retain quasi-judicial decision-making authority at the council and commission level. When voting on a special-use permit after an adjudicatory hearing, the board member may need to be excused from participation because of a nonfinancial conflict (for instance, because he or she is related to one of the parties). But the statute on its face allows board members to be excused only for financial conflicts. The voting statute apparently was intended to address the concern of voting on contracts and other legislative matters, not such more recent innovations as quasi-judicial conditional-use permits that must be approved by a city council.

Thus the voting statutes create a conflict between requiring board members to vote and protecting due process rights in a quasi-judicial hearing. The city of Charlotte resolved one aspect of this conflict through local legislation. Its code on voting excuses a board member from voting not only for financial conflicts but also when the board member failed to attend the entire hearing for a special-use permit.

This ensures that only those board members who heard all the evidence will vote on a quasi-judicial matter. But even this does not address the problem facing an elected board member who has a nonfinancial conflict of interest. Until the voting statutes are amended to authorize recusal for bias and nonfinancial conflicts of interest, this is an uncertain area of the law. Although constitutional guarantees of due process should prevail over statutory voting requirements, the issue will remain unsettled until the legislature or courts resolve the question.

One possible standard that can be used to resolve these conflicting duties is found in existing conflict-of-interest standards for judges. There is a specific standard that judges use to determine whether they should hear a matter when there may be a conflict of interest, and this standard may serve as a useful guide when citizen bodies are acting in a quasi-judicial fashion. Canon 3(C) of the Code of Judicial Conduct provides that judges should disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to situations where they have a personal bias or prejudice, they have personal knowledge of disputed facts, they or an immediate family member has a financial interest in the matter that could be substantially affected by the outcome, they are closely related to an interested party, or they have previously served (or had a law partner who served) as a lawyer or witness in the matter.

Financial disclosure requirements and a conflict-of-interest prohibition for state policy-making employees and citizen members of state boards, commissions, and councils have been in effect since 1977. The executive order establishing these requirements notes that "public office in North Carolina must always be regarded as a public trust" and that the people "have a fundamental right to the assurance that officers of their government will not use their public position for personal gain." The order prohibits those subject to it from engaging in "any activity which interferes or is in conflict with the proper and effective discharge of such person's official duties." The order also requires the annual submission of a detailed statement of economic interest that includes a list of all assets and liabilities over $5,000, a list of sources of income over $5,000, and a list of gifts valued at more than $100 (over $50 if the donor has any business with or is regulated by the state). The statement is reviewed by the state Board of Ethics for conflicts of interest, and the board may recommend remedial action if actual or potential conflicts are identified. The board also investigates complaints regarding conflicts of interest and provides for public inspection of the statements of economic interest.

Several local governments also have codes of ethics regarding conflicts of interest. The most common are financial disclosure requirements, required, for example, by Guilford and Orange counties, Greensboro, and Charlotte. Charlotte council members are required to disclose (for both themselves and their spouses) all real property holdings within the county and the identity of businesses they own and their employer. In addition to disclosure, the Guilford County code specifically requires a county commissioner to disqualify himself or herself from voting on any matter involving such a disclosed interest. The Greensboro code states that "No member of any board or commission may discuss, advocate or vote on any matter in which he has a separate, private or monetary interest, either direct or indirect."

Case law

Although there have been no reported cases directly on this subject, North Carolina does have a substantial body of case law addressing governmental and judicial decision making that can be applied to land-use situations. In an early case involving the propriety of a clerk of court ruling on the acceptability for recordation of his own mortgage, the court in 1890 adopted the English common law prohibiting a person from acting as a judge in his own case:

> This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise.
>
> It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not: all his powers are subject to this absolute limitation: and when his own rights are in question, he has no authority to determine the cause. . . . [T]he maxim "no man is to be a judge in his own cause," should be held sacred. And that is not to be confined to a cause in which he is a party,

but applies to a cause in which he has an interest.

[Those involved should] take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such an influence.[4]

The North Carolina courts have long ruled that governmental decision makers should not participate in deciding matters in which they have a pecuniary interest. In a 1919 case involving the authority of the Greensboro city council members to vote themselves a raise, the court ruled that the public policy of the state prohibits anyone from acting on a matter affecting the public when he or she has a direct pecuniary interest.[5] In a case involving legislators voting on their own travel expenses, the court in 1947 ruled, "It has long been a rule of general observance that self-interest disqualifies one from acting in a public capacity where unbiased judgment is required."[6]

When quasi-judicial land-use decisions are involved, the law requires an impartial decision maker. Therefore if a citizen board member has prejudged the merits of a matter, that is a disqualifying bias. The test set by the courts is that the decision maker should be excused if a reasonable person knowing all the circumstances would have doubts about the individual's ability to rule in an impartial manner.

A recent court of appeals case on an employment matter presents an interesting parallel to land-use cases.[7] In reviewing a dismissed teacher's claim that the school board was biased against him and that this prejudgment violated his constitutional rights, the court recognized the inherent conflict in the need to secure knowledgeable citizens to serve on boards and committees and in the necessity of having impartial decision makers for quasi-judicial decisions. The court ruled that a dismissal hearing must comply with all the essential elements of due process, including having an impartial decision maker. The court noted that the state has a "strong interest in ensuring that capable citizens of civic spirit will look to serve" on these boards, that such involved citizens cannot be expected to decide cases in a "vacuum of ignorance," and that the law therefore "affords a presumption of honesty and integrity to policymakers who possess decision-making powers." The court went on to hold, though, that if a board member had a predetermined opinion that was fixed and not susceptible to change (as opposed to a preliminary opinion about the matter or mere familiarity with the facts), that was impermissible bias. The court further ruled that even if only one of the six board members participated despite a disqualifying bias, the board's ruling would have to be set aside.

The supreme court also has ruled that a person should not participate in a quasi-judicial decision if he or she has too close an association with the parties involved. In 1951 the court ruled that a judge who had campaigned for a sheriff should not hear legal actions challenging the sheriff's election, ruling that the judge should recuse himself in proceedings "where they involve personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter."[8] In this ruling the court noted the importance of avoiding even the appearance of bias in order to preserve public confidence in the judicial system: "It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds."[9]

Conclusions

Governmental land-use decisions have a profound effect on communities and individuals. It is through these decisions that the quality and character of our state's future development will in large part be determined. These decisions also can significantly affect individual landowner's rights. It therefore is imperative that these decisions be made in a fair and impartial manner. Because many of these decisions are made by citizen officials selected in part because of their knowledge and active experience in land-use matters, maintaining impartiality and avoiding conflicts of interest can be difficult.

State law requires that those entrusted with governmental land-use decision-making authority avoid financial conflicts of interest. This applies to elected and appointed officials at both the state and local level. It applies to any participation that is likely to affect the outcome of the decision, not just voting.

Determining how substantial a financial interest must be for it to constitute a conflict of interest is a difficult question. When legislative land-use decisions are involved, if the financial interest is very

small or if the impact of the decision is remote and speculative, there is not likely to be a conflict of interest. An example is a city council member voting on a comprehensive rezoning that affects his or her property in the same way that it affects the property of all other city residents. However, if a particular land-use decision will affect a citizen board member's financial condition in a specific, substantial, and readily identifiable way, the board member would be well advised to refrain from any participation in that decision. This includes voting or even participating in the debate on a rezoning, an ordinance or rule amendment, a variance, a subdivision approval, or a special-use permit. With quasi-judicial decisions, even small or indirect financial conflicts should be avoided because these decisions do not involve the making of general public policy, where the broadest possible participation is desirable, but are the application of those policies to an individual situation, where complete impartiality is necessary. Although the law may not absolutely mandate nonparticipation in advisory decisions, full disclosure on the record in these situations is warranted, and nonparticipation is advisable.

When quasi-judicial decisions are involved, such as a permit appeal or variance, additional protections against bias and conflicts of interest on other than financial grounds also must be observed. A personal bias, a predisposition on the merits of the matter, or a close personal association with any of the parties disqualifies that board member from any involvement with the decision. In such situations, the board member should refrain not only from voting but from any participation in the matter.

If a citizen board member fails to follow these requirements, the courts may well invalidate the action taken and send the matter back to the board for a properly conducted reconsideration. This is costly and time consuming for the government, the applicant, and the person challenging the action, and it can be avoided by careful consideration of conflict-of-interest standards at the outset. Also, in some circumstances the board member who participates in spite of having a conflict of interest may be subject to individual sanctions, such as censure, removal from office, or even criminal prosecution.[10]

Given the complexity of this question and the possibilities for misunderstandings, citizen boards charged with land-use decision making should give serious consideration to adopting a written policy on conflicts of interest. Such a policy should set forth any desired financial disclosure requirements and should outline the circumstances under which the board expects its members to disqualify themselves.[11] Adoption of such a policy in advance of a conflict-of-interest controversy has several advantages. It allows a board to give rational and considered attention to this complex matter rather than having to react to what frequently are emotionally charged, individual controversies that allow little time for thoughtful deliberation. It also serves an educational purpose in that it lets decision makers, landowners, interest groups, and citizens explore the issue and set clear ground rules and expectations before conflicts arise.

A written conflict-of-interest policy also allows a clear procedure to be established for deciding who determines whether a conflict exists. Most codes leave the decision to withdraw to the individual board member, although a few provide for a vote by the full board. In either instance, it is very helpful if the code provides a means for securing an independent evaluation of the conflict and for providing board members with competent and timely legal advice. Such an independent evaluation relieves the person with the potential conflict of a decision that is not likely to instill much public confidence. In this respect, the Charlotte code provides that a city official can seek an advisory opinion from the city attorney regarding a potential conflict. State citizen board members may obtain opinions from the state Board of Ethics. Legislators may seek advisory opinions from a Legislative Ethics Committee. Including a provision in local ethics codes allowing (or even requiring) board members to refer close calls on participation to an outside party such as the city or county attorney should be considered carefully.

North Carolina is fortunate in having thousands of dedicated citizens volunteering to serve their state and local governments in land-use matters. Maintaining broad public confidence in the fairness of the process and the integrity of those involved warrants careful and continuing attention to the avoidance of even the appearance of bias or conflict of interest in land-use decision making. ❖

Notes

1. *In re* Markham, 259 N.C. 566, 131 S.E.2d 329, *cert. denied*, 375 U.S. 931 (1964). Courts in other states have ruled that individual rezonings are quasi-judicial decisions. Given the site-specific nature of such decisions and the findings the governing board must make with small area rezonings, it is possible that North Carolina courts may eventually reach a similar conclusion. This is especially the situation with the creation of conditional-use zoning districts and spot zoning. See Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988). In many ways such decisions are far more similar to quasi-judicial special-use permit decisions than the broad legislative policy choices involved with typical ordinance adoptions. In this particular instance, the "legislative" designation may be more semantical than real.

2. The method used to allow this in a judicial setting may offer some guidance for quasi-judicial boards. Canon 3(D) of the North Carolina Code of Judicial Conduct allows a judge who otherwise would be disqualified because of his or her potential financial interest or relationship to a party to disclose that fact. If all parties then agree in writing that the financial interest is insubstantial or the relationship is immaterial, the judge may continue to hear the matter. This waiver may not be applied if the disqualification is based on personal bias or prejudice or on the judge's prior service as an attorney for one of the parties.

3. Section 14-217 of the General Statutes (hereinafter cited as G.S.) makes it a felony for an office holder to receive "directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act. . . ." Section 14-218 makes the offering of such a bribe a felony. North Carolina also has statutes prohibiting gifts and favors to those involved in contracting and inspection or supervision of construction [G.S. 133-32]. Section 160A-415 provides that building inspectors may not have a financial interest in the furnishing of labor or material for the construction, alteration, or maintenance of any building they do not own within their jurisdiction and that an inspector may not "engage in any work that is inconsistent with his duties or with the interest of the city." Other specialized statutes apply to school and transportation officials [G.S. 14-236, 136-13, and 136-14]. Also, administrative law judges may be disqualified for "personal bias" [G.S. 150B-32(b)].

The state also has several conflict-of-interest statutes applicable to individual boards and commissions. Most of these statutes address membership on the boards rather than voting on individual matters. For example, nine of the thirteen members of the Environment Management Commission must be individuals "who do not derive any significant portion of their income from persons subject to permits or enforcement orders" issued by the commission [G.S. 143B-283(c)], and a majority of the Coastal Resources Commission must "not derive any significant portion of their income from land development, construction, real estate sales, or lobbying and do not otherwise serve as agents for development-related business activities" [G.S. 113A-104(e)]. Section 18B-201 similarly restricts membership on the state and local Alcoholic Beverage Control boards.

4. White v. Connelly, 105 N.C. 65, 70, 11 S.E. 177, 179 (1890). Also see Trenwith v. Smallwood, 111 N.C. 132, 15 S.E. 1030 (1892). This rule is now codified at G.S. 7A-104.

5. Kendall v. Stafford, 178 N.C. 461, 101 S.E. 15 (1919). Subsequent statutory amendments now allow city councils to set their salaries [G.S. 160A-64].

6. *In re* Advisory Opinion re Constitutionality of HB 276, 227 N.C. 705, 707, 41 S.E.2d 749, 750 (1947). A more recent statement of this general principle is found in a 1984 condemnation case, where the court ruled, "it is axiomatic, of course, that it is the lawful right of every litigant to expect utter impartiality and neutrality in the judge who tries his case. . . . This right can neither be denied nor abridged" [Colonial Pipeline Co. v. Weaver, 310 N.C. 93, 103, 310 S.E.2d 338, 344 (1984)].

7. Crump v. Board of Educ., 93 N.C. App. 168, 378 S.E.2d 32, *rev. denied*, 324 N.C. 543, 380 S.E.2d 770 (1989).

8. Ponder v. Davis, 233 N.C. 699, 701, 65 S.E.2d 356, 359 (1951).

9. *Id.* at 706, 65 S.E.2d 360.

10. Greensboro's code provides that a board member may be removed from office if the board's financial conflict-of-interest policy is violated [Greensboro Code § 2-112], as does Guilford County's [Guilford Co. Code § 1-56]. Similarly, the General Assembly's Legislative Ethics Act provides that either the House or the Senate can censure, suspend, or expel any member it finds guilty of unethical conduct [G.S. 120-103(d)(3)].

11. With city councils and boards of county commissioners, this would contain guidelines on when the board member would request the board to vote to excuse him or her from participation, as these elected officials cannot excuse themselves from voting. The General Assembly in 1975 established financial disclosure requirements for both candidates and members of the legislature [G.S. 120-85 through 120-106]. The Legislative Ethics Act also requires a legislator to disqualify himself or herself if a conflict of interest would "impair his independence of judgment" [G.S. 120-88].

Selecting Employees through Job Sample Tests

Stephen K. Straus

Many employers fail to assess job candidates adequately because they do not use direct observation to evaluate the candidates' skills. Instead, employers typically rely on such methods as interviews, applications, resumes, and references. When used properly, these more traditional selection methods can be used to evaluate the knowledge, motivation, and past experience of a candidate. But they cannot demonstrate the candidate's ability to perform the technical skills required for the new job, such as typing, teaching, computer programming, and backhoe operating.

The best way to evaluate the candidate's ability to perform these skills is to give a test. This kind of test is called a job sample test. In a job sample test the candidates perform a selected set of actual tasks that are similar to those performed on the job.[1] One example of a job sample test that is used routinely by employers is a typing test for secretarial positions. Other examples include a programming test for a computer programmer, a clutch repair test for a garage mechanic, a blueprint-reading test for a draftsman, and a balance sheet entry test for an accountant. If conducted properly, job sample tests can be a successful means of evaluating candidates for many public sector positions. This article describes how job sample tests are conducted, evaluates their advantages and limitations, and presents guidelines for their use.

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Advantages and Disadvantages

The job sample test has many advantages over other selection methods. When conducted properly, it is considered valid and unbiased. Validity refers to how accurately the selection method reflects the candidate's ability to do the job. It is important because employers can improve productivity by hiring the right person for a job[2] and because the courts have often ruled against employers using invalid selection tests. In response to these rulings, many employers have curtailed their overall use of selection tests, particularly written aptitude tests.[3] However, the courts generally have held that properly conducted job sample tests have *content* validity;[4] that is, they assess the ability of candidates to perform tasks required on the job.

Research findings also indicate that job sample tests are less biased than other selection methods because they evaluate job-relevant behavior.[5] A selection method is biased if the difference in ratings between one group (for example, minorities) and another (for example, whites) is larger on the tests than on appraisals of actual job performance.

Interviews, because they are based on subjective evaluations, tend to discriminate against women and against older candidates.[6] Written aptitude tests tend to be biased against minorities.[7] In contrast, research findings indicate that job sample tests reflect differences in scores between minorities and whites that are very similar to those differences observed in actual job performance.[8]

Job sample tests demonstrate important advantages over other selection methods, but they also have some limitations. Although they can evaluate technical skills, they are inappropriate for evaluating the more abstract skills, such as leadership and conflict management, required for supervisory and management positions. Assessment centers, which use behavioral observations, are better suited for evaluating skills for those positions.[9]

Moreover, job sample tests do not assess all the qualifications necessary for a candidate to perform effectively in a position. The tests clearly can assess some skills, and they can provide some relevant information about a candidate's knowledge. But they do not assess the candidate's *motivation* or the full range of knowledge needed for a job. For instance, candidates for the position of high school

history teacher may take a job sample test that requires them to make a presentation on the American Revolution to a group of students. That test should enable the school principal to evaluate certain teaching skills and to observe each candidate's knowledge about the Revolution. However, the test will not demonstrate whether the candidates possess the full range of knowledge required of a high school history teacher or important motivational issues such as how willing each candidate is to work with teenage students or how the candidate feels about coaching the track team.

Consequently, employers should consider using job sample tests only to evaluate nonmanagement positions and then only in combination with several selection methods. Interviews, references, and applications—though insufficient for evaluating skills—provide useful means of evaluating the knowledge, motivation, and character of candidates and thus effectively complement the information obtained through the job sample test.[10]

Guidelines for Using Job Sample Tests

Like any selection method, job sample tests require careful planning and implementation to be effective. To achieve the benefits of this method of selection, employers must perform three steps: 1) prepare a job profile by identifying the skills that are critical to the job; 2) design tests of those skills, simulating as closely as possible the actual working conditions of the job; and 3) evaluate candidates accurately.

Preparing the job profile

Because a valid job sample test must be based on a sound understanding of the job, the employer should develop a job profile that identifies the tasks required in the job and the standards by which those tasks should be performed. To identify the required tasks, the manager can interview a number of people familiar with the job, such as employees who work in the same position, people who work closely with the position (such as supervisors and subordinates), and the employee who is leaving the position. The task descriptions should be specific.[11] Most formal position descriptions are an inappropriate source for developing job profiles because they describe required tasks in general terms. However, they can be used by managers to review the completeness of the job profile.

The tasks identified in the interviews should meet two criteria to be included in the job profile. First, they should reflect only entry-level requirements and should not include tasks that the employee could expect to learn on the job.[12] For instance, a newly hired meter reader in the water department may be expected to read and record numbers off a meter. However, the meter reader should not be expected to have the ability to determine when meters have been tampered with or broken because that skill typically is acquired through on-the-job training. Second, the tasks should either be frequently performed or critical to effective job performance.[13] For instance, a police department requirement that candidates scale a six-foot wall on their own is inappropriate if police officers must seldom, if ever, perform such a feat on duty. Moreover, even if scaling a six-foot wall is a routine task, it is inappropriate to require a candidate to scale the wall alone if police officers in the department normally work in tandem.[14]

In addition to specifying the tasks required for effective performance, clearly written task statements also should identify the tools and equipment used to carry out the tasks, the objectives of the tasks, and the standards for effective performance (that is, factors of time, quantity, and quality).[15] For instance, a task statement included in a job profile for a fire fighter could be written as follows: "Climbs a fully extended fifty-foot ladder within one minute to fight fires above the first floor of buildings."

Developing and conducting the test

By identifying the relevant tasks, resources, and standards, the job profile provides the foundation for the test design. The test should simulate as closely as possible the physical conditions of the job by ensuring that candidates use similar resources in similar environmental conditions as those required in the job.[16] For instance, the test procedures for the fire fighter position call for candidates to use the same equipment, the fifty-foot ladder, employed by fire fighters. Moreover, because fire fighters work

outdoors in all types of weather, the candidates must perform the test outdoors, even in less-than-ideal weather conditions.[17]

Employers also must conduct the test fairly to ensure that candidates have an equal chance to demonstrate their abilities. The test instructor in the fire fighter example can promote fair test administration by providing the same instructions and demonstrations to each candidate and by ensuring that the quality of the equipment is the same for each candidate.

Careful selection of the type of equipment used in the test also is important to ensure that each candidate has an equal chance to demonstrate his or her ability. Though it is preferable to require each candidate to use the same type of equipment required in the job, in some instances such a requirement may be unfair. For example, some candidates for the position of equipment operator may have experience only with a certain type of backhoe, such as one operated with foot pedals. In most cases, if those candidates are competent with the foot pedal–operated backhoe, they can learn to use a backhoe with hand levers proficiently but only after one or two days of practice. If the test requires operation of a backhoe that uses hand levers, qualified candidates may be placed at a disadvantage. Therefore, when economically feasible, the test instructor might allow each candidate to choose from a variety of backhoes for the test. In other situations employers can ensure fairness by providing more basic equipment than may be required on the job. For example, candidates for an electrician position may have experience wiring devices quite different from those demanded by the job. Therefore, the test might require candidates to demonstrate their ability to perform electrical repairs by wiring a common device such as a switch box for a residential home.

To carry out the test safely, employers should involve well-trained and experienced staff in designing and conducting the tests. Competent staff members can identify and respond appropriately to many safety issues, such as inspecting the working condition of equipment and demonstrating safe procedures for performing the required tasks. Moreover, the employer should warn candidates of specific dangers in writing and give them written safety instructions for performing the tasks. Finally, candidates should take a medical exam before undergoing tests that require strenuous physical effort, and staff should check the blood pressure of each candidate at appropriate times during those tests.

Evaluating the candidates

A well-specified set of test procedures helps ensure that candidates are evaluated accurately because it clearly defines the required tasks and standards. When evaluating fire fighters, for example, it is quite simple to observe whether candidates can climb a fifty-foot ladder in one minute.

Nevertheless, questions of accuracy arise even in the simplest of tests. To protect the integrity of the test and to provide legal support, employers should consider using panels (committees) of evaluators and should maintain appropriate records of each candidate's performance. In the case of tests that produce permanent, tangible results, like a secretary's typed report, the result itself can be kept for review. In instances where the results cannot be maintained—the ditch dug by the equipment operator candidate or the presentation by the teaching candidate—video tapes of the job sample test provide an excellent record. If no record can be maintained or if the test is particularly complex, the employer should use a panel of evaluators to improve the accuracy of the evaluations[18] and to improve support in the event of a legal challenge.

Conclusion

For employers with experience in developing job profiles and in testing and evaluating candidates, these guidelines should provide the necessary information to develop and implement an effective job sample test. Less-experienced employers should ask those with relevant experience to review their tests before implementing them. Such a review can help ensure that a test is valid and well conducted. Moreover, regardless of their expertise in test development, all employers should ask current employees to take the tests before using them with candidates. Such a pretest can help ensure that a test is appropriately designed and implemented and will prepare evaluators and test instructors for the actual testing of candidates. ❖

Notes

1. Benjamin Schneider and Neal Schmitt. *Staffing Organizations*. 2nd ed. (Glenview, Ill.: Scott Foresman and Co., 1986), 319.

2. For instance, one study demonstrated that by improving testing for computer programmers the United States Army improved productivity at a minimum savings of $9,333 per position filled [F. L. Schmidt et al., "Impact of Valid Selection Procedures on Work Force Productivity," *Journal of Applied Psychology* 65 (1979): 609–26]. See also Charles B. Schultz, "Saving Millions through Judicious Selection of Employees," *Public Personnel Management* 13 (1984): 409–15.

3. Schneider and Schmitt, *Staffing Organizations*, 292–93.

4. "Comment," *Emory Law Journal* 36 (1987): 222.

5. George A. Brugnoli, James E. Campion, and Jeffry A. Basen, "Racial Bias in the Use of Work Samples for Personnel Selection," *Journal of Applied Psychology* 64 (1979): 119–23; Paul F. Wernimont and John P. Campbell, "Signs, Samples, and Criteria," *Journal of Applied Psychology* 52 (1968): 372–76.

6. R. D. Arvey and J. E. Campion, "The Employment Interview: A Summary and Review of Recent Research," *Personnel Psychology* 35 (1982): 281–322.

7. N. S. Cole, "Bias in Testing," *American Psychologist* 36 (1981): 1067–77.

8. Schneider and Schmitt, *Staffing Organizations*, 321–22.

9. For a review of the assessment center method, see Ronald J. Lynch, "Assessment Centers: A New Tool for Evaluating Prospective Leaders," *Popular Government* 50 (Spring 1985): 16–22.

10. For further discussion on the use of the interview, see Stephen K. Straus, "Selecting Employees through Systematic Interviewing," *Popular Government* (Spring 1988): 21–26.

11. These task statements will be used as the criteria for evaluating candidates. When specifically written, the task statements help ensure that evaluators evaluate behavior rather than general characteristics—that is, "able to climb a fifty-foot ladder" as opposed to "physically fit to perform the duties of a fire fighter." Moreover, by focusing on behavioral criteria, the task statements reduce the tendency of evaluators to discriminate. See Brugnoli, Campion, and Basen, "Racial Bias," 119–23.

12. Campion, "Work Sampling," 40–44.

13. "Uniform Guidelines On Employee Selection Procedures," *Federal Register* 43 (1970): 38290–309.

14. Patrick T. Maher, "Police Physical Ability Tests: Can They Ever Be Valid?" *Public Personnel Management* 16 (1987): 173–84.

15. Managers may be tempted to establish standards above those required for effective performance. Nevertheless, standards set higher than expected on the job are not legally defensible. See Schneider and Schmitt, *Staffing Organizations*, 321–22.

16. George F. Dreher and Paul R. Sackett, "Some Problems with Applying Content Validity Evidence to Assessment Center Procedures" *Academy of Management Review* 6 (1981): 554.

17. In some cases weather conditions, such as freezing rain, may pose an extreme safety risk, which may require postponement of the test.

18. George C. Thornton III and William C. Byham, *Assessment Centers and Managerial Performance* (New York: Academic Press, 1982): 220–23.

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The Paideia Program: Implementing a Vision of Educational Reform

Patricia F. Weiss

School reform takes time and requires a total approach involving a restructuring of pedagogy, curriculum, and management. This premise is fundamental to the Paideia Program, which is geared to what the student and country need now and for the future. The program has three objectives: to prepare every student for earning a living, for the duties of citizenship, and for lifelong learning and personal development.

The Paideia process envisions school as a place where learning is the goal and the understanding of concepts is valued over memorization of facts. A key belief is that all students can learn and need the opportunity to do so, beginning in kindergarten and continuing through school. When teachers exhibit a sincere belief in a student's ability to learn and achieve, the student lives up to that expectation.

Do all students learn equally as much or as quickly? Of course not. But a student should have equal opportunity and not be limited by preconceived ideas of what his or her "level" is. We underestimate our students' abilities. The goal of the Paideia Program is a general, liberal education from kindergarten through twelfth grade. Students learn not only facts but intellectual skills with which they can develop an understanding of ideas and issues. The program focuses on original texts, not textbooks; on developing skills, not ignoring them; on understanding, not memorizing. This kind of schooling is vital if we want our future citizens and members of our work force to be thinking adults and if we want our nation's economic and democratic system to survive.

The program was first introduced in 1982 by Mortimer Adler and the Paideia Group in *The Paideia Proposal* [New York: Macmillan], followed by *Problems and Possibilities* [Macmillan, 1983] and *The Paideia Program* [Macmillan, 1984]. A second group of educators, called Paideia Associates, was formed to implement the program. More than twenty-five schools in North Carolina and more than 125 across the nation are in various stages of Paideia implementation.

In September, 1988, the University of North Carolina Board of Governors established the National Center for the Paideia Program at the University's Chapel Hill campus. Its purpose is to develop and coordinate the program's goals, using the services of our Chicago office and the Paideia associates from across the country. The center's mission includes dissemination of information, training, research, and evaluation. In 1989 the center provided one hundred activities to people in fifty-seven cities and twenty-three states. In North Carolina we have worked closely with the Institute of Government's Principals' Executive Program to help principals and their staffs improve school programs. We are guiding individual schools as well as city and county school systems.

How Paideia Works

The Paideia Program is not something that you buy and plug in to "fix" the system. Instead, it requires a change in both the teaching spirit and the philosophy of education. It focuses on examining what and how students are learning and involves the school community in a cooperative dialogue. Paideia programs develop partnerships for education with parents, students, teachers, administrators, and business people.

Teachers and administrators review curriculum objectives and teaching strategies as well as the use of primary sources and time, the evaluation process, and the sequence of material presented. A school-based team provides the structure for decision-making management and monitoring of the curriculum. The team usually includes the principal and a number of teachers; it also may include students, parents, administrators, and local business leaders.

The method of implementation varies. It depends upon administrative support, grade-level is-

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sues, and the ability to deal with existing barriers to change. Three types of implementation models currently are being used:

- *The Wednesday Revolution* is a series of seminars for the whole school. These are held during an extended homeroom, special activity period, or teacher-selected time in a rotating time frame. It does not have to be Wednesday. The plan calls for some setting aside time for regular sessions on readings selected by the school team.
- *Block format* involves the teaming of teachers to maximize planning and to create longer available teaching time. This provides an interdisciplinary integration of the curriculum. These teacher groups can span grade levels or specific subject areas.
- *The Three-Columns School* uses all three types of teaching and learning—lectures, coaching, and seminars—with specific times identified for each in all subjects.

The key requirements of all three models are administrative support and staff development. Staff development is planned sequentially to meet the school's needs and to remove barriers to improvement while the school-based team monitors the program and provides direction. The main steps for implementing a Paideia program in a school involve:

1) recognizing a vision of school improvement;
2) developing program strategies and removing barriers;
3) providing ongoing staff development and planning time;
4) restructuring time for didactic, coaching, and seminar sessions; and
5) reviewing and monitoring the program regularly.

Teaching Techniques

The opening wedge for school reform is the seminar because it provides an opportunity for both teachers and students to be learners and to examine basic material. Also, in order to schedule seminars, schools must begin to restructure time and the curriculum. Although the word *seminar* is used loosely today, it means something specific in Paideia schools. Paideia seminars are educationally oriented discussions that focus on primary sources. Topics are drawn from the classics to modern works and from our nation's historical heritage to our world culture. A few examples include the Declaration of Independence, Martin Luther King's speech "I have a dream," the letters of Abigail and John Adams, Percy Bysshe Shelley's "Ozymandias," Plato's *Apology*, George Orwell's *Animal Farm*, and Sir Isaac Newton's Laws of Motion.

In order to learn the seminar method, teachers need to observe, conduct, and participate in seminars. Teachers receive training in workshops that focus on specific content topics; questioning, coaching, and listening skills; and ways of working cooperatively.

Seminars usually are held once a week, and the seminar material is integrated with the curriculum. Seminar length and frequency vary across the grade levels and according to students' ages and developmental needs. Because seminar classes are heterogeneously grouped, students with different reading abilities are assisted through peer coaching, taped material, and resource teachers.

Coaching sessions in Paideia schools focus on students' individual needs in reading, writing, speaking, and critical thinking in subject areas. Coaching focuses on teaching skills, whereas lectures and other activities are used to present basic facts necessary for learning (for example, vocabulary and multiplication tables). Here, through software programs with built-in monitoring features, computer technology aids teachers in tailoring programs to specific learning needs and different rates of learning.

Results

Paideia schools across the country are in different stages of development, but the early reports from teachers and students are favorable. In the spring of 1989 we sent out a questionnaire to help us gather data about the implementation of the Paideia Program. Teachers who responded to the survey were all positive about the impact of the program on their own teaching. Thus it appears that the program is working. Schools and parents are demonstrating that they have higher expectations for today's student—expectations that a student can learn and that American education can be better. ❖

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Seminar Teaching Successful in Caldwell County

Helen Fowler

Thinking, expressing, puzzling, expounding, discussing, persuading, questioning, searching, learning, discovering. Educators everywhere seek all sorts of methods to provoke intellectual activities such as these in their classrooms, and generally students are the ones who express, puzzle, and question. However, these activities also occurred in a unique training session for administrators in the Caldwell County School System last summer. For two days they participated in a series of Paideia seminars.

Interested in the teaching of thinking skills, administrators in the system had sponsored during the 1988–89 school year a series of critical-thinking workshops conducted by Patricia F. Weiss, acting director of the National Center for the Paideia Program at The University of North Carolina at Chapel Hill. These workshops, which were extremely successful and which formed an excellent background for the development of the seminar approach to learning, had prompted many teachers to experiment with seminars in their classrooms and to share this information with their principals and other teachers. Because the approach was being used so successfully, the Caldwell County central office staff decided that all administrators in the system needed firsthand knowledge of the procedures. The system thus planned to introduce seminar teaching at its annual retreat.

Held at Lees-McRae College, the retreat began with a background session presented by the school system's superintendent, Kenneth Roberts. Although a number of the administrators had been introduced to the concept through the Institute of Government's Principals' Executive Program, many of the participants still knew very little about the philosophy undergirding the seminar approach. During this session, Roberts reviewed the basic procedures that the group would use in their sessions, the role of the seminar leader, and how to set a noncritical atmosphere, ask and respond to questions, establish critical judgment, and evaluate the process. He also explained and modeled didactic instruction, coaching, and Socratic questioning—approaches that each administrator would use later as a seminar leader. A valuable source of information for the group was *Great Ideas: A Seminar Approach to Teaching and Learning* [Patricia Weiss and Mortimer Adler (Chicago: Encyclopaedia Britannica, Inc., 1987)].

Following this introduction, two seminars were held on the second day. Participants were well acquainted with the literature used as the foundation for the discussions. Machiavelli's *The Prince*, Sophocles' *Antigone*, and Plato's *Crito* formed the basis for the first series of seminars, led by Roberts, Assistant Superintendent Brooks Barber, and West Caldwell Principal Len Morrison. Roberts and Morrison had learned the nuts and bolts of the approach through the Principals' Executive Program.

Various staff members also were assigned to one of seven additional groups and asked to be responsible for leading a brief, ten-minute discussion on a shorter work—for example, The Declaration of Independence or "The Nightingale." The result was that by being in the two groups, each staff member had an opportunity to participate in a professionally led seminar as well as to lead a discussion.

The discussions have not ended. The principals have passed on information about the seminar approach to their faculties and, following the lead of Roberts, have demonstrated the seminar technique rather than merely imparting the procedural information. At staff meetings the seminar experiences often are mentioned and remembered. The retreat was a time when school people had a rare chance to dip into great literature and then discuss it with others, a time when they got to know each other on a new plane, and a time when they could reflect and grow. And that is what seminar teaching is all about. ❖

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Welfare Reform Update: Child-Support Developments

Janet Mason

An article in the Spring 1989 issue of *Popular Government* described the background, basic features, and implications for North Carolina of the federal Family Support Act of 1988 [Pub. L. No. 100-485].[1] It said that implementation of the act, various pieces of which become effective over the next several years, could be "a potential nightmare or a rare opportunity."[2] It is too soon to tell which, if either, will be the result in North Carolina. But as the state and counties begin to tackle implementation, there is cause to be hopeful. This article will summarize steps that have been taken or planned to implement changes in child-support enforcement, one of the three main areas that the act addresses.[3]

It is not surprising that the least controversial goal of welfare reform has been to strengthen laws and procedures for locating absent parents, establishing paternity, and establishing and enforcing child-support obligations. To the extent that a child receives adequate support from his or her parents, the child and the child's caretaker are not likely to remain or become dependent on welfare. A family is eligible for Aid to Families with Dependent Children (AFDC) benefits only if, in addition to having income and resources below specified limits, one or more children in the family are "deprived of parental support."[4] Sometimes that deprivation is due to a parent's death, disability, or unemployment. In the vast majority of cases, however, it is due to a parent's—usually the father's—absence from the home and failure to provide adequate, if any, financial support for the child.

Progress toward the goal of strengthening the child-support system can be seen already in child-support agencies, clerks' offices, and courtrooms across the state. In its 1989 session the North Carolina General Assembly passed legislation directly related to two child-support components of the Family Support Act—presumptive child-support guidelines and immediate wage withholding. The legislature also enacted other significant legislation that, although not mandated by federal law, is designed to enhance the establishment and enforcement of child-support obligations in the state. The remainder of this article will summarize those legislative developments and will briefly describe developments that are yet to come in the area of child support.

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Presumptive Guidelines

In 1984 federal law required states to develop guidelines for determining the amounts of child-support awards but provided that the guidelines could be "advisory" instead of legally binding. In North Carolina, at the direction of the General Assembly, the Conference of Chief District Judges adopted guidelines (see "Child-Support Guidelines," page 45) consisting of (1) a table for determining the amount of support by applying a percentage (based on the number of children to be supported) to the parent's gross income and (2) a list of factors that could justify varying from the amount determined by the strict application of the mathematical formula. The guidelines were widely distributed and have been used by child-support enforcement agencies in negotiating support agreements and by many district court judges in making child-support awards.

Effective October 13, 1989, the Family Support Act requires that states' child-support guidelines be "presumptive"—that is, that they be applied in every case to determine the amount of a child-support award unless specific findings justify varying from the guidelines in a particular case. Thus the guidelines have much broader application and greater legal and practical significance.

To comply with the federal mandate, the 1989 General Assembly directed the Conference of Chief District Judges to develop presumptive guidelines.[5] These are to become effective

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July 1, 1990, but must be reported to the General Assembly before May 1, 1990.[9] If the General Assembly is dissatisfied with them, presumably it could take action, including the legislative enactment of guidelines, to change them. In the meantime, the existing guidelines, which had been merely advisory, will operate as presumptive guidelines. The 1989 legislation also requires the Conference of Chief District Judges to review the guidelines at least every four years and to give the Department of Human Resources, the Administrative Office of the Courts, and the general public an opportunity to have input.

It is not clear how the use of presumptive guidelines will affect the way in which child-support obligations are determined or the amounts of child-support awards in the state. The benefits of uniformly applied guidelines can include increased consistency and fairness, more appropriate award amounts, and predictability that may encourage settlements and reduce litigation. One problem with guidelines is that the ease of application of a mathematical formula—especially one as simple as taking a percentage of gross income—may discourage adequate consideration of other relevant factors in a particular case. Related problems in both developing and applying guidelines are the difficulty of quantifying important variables and of dealing equitably with such issues as shared custody, second families, and unusual or extraordinary medical, day-care, or educational expenses.

Child-Support Guidelines

The following guidelines have been adopted by the Conference of Chief District Judges for the computation of child-support obligations of each parent. That is, the percentages set out in Section A will be applied in computing child-support obligations, unless the court makes findings to vary the amount based on the factors set out in Section B. These guidelines will operate as presumptive guidelines until July 1, 1990, at which time new presumptive guidelines will take effect pursuant to G.S. 50-13.4(c1).

A. A parent's support obligation for that parent's child or children shall be computed as follows:

Number of Children	Percentage of Parent's Gross Income
One child	17 percent
Two children	25 percent
Three children	29 percent
Four children	31 percent
Five or more children	34 percent

B. The amount of a parent's support obligation may vary from the amount as computed above, based on one or more of the following factors:

1) The special needs of the child, including physical and emotional health needs, educational needs, day-care costs, and needs related to the child's age.
2) Any shared physical custody arrangements and extended or unusual visitation arrangements.
3) A party's other support obligations to a current or former household, including the payment of alimony.
4) A party's extremely low or extremely high income, such that application of the guidelines produces an amount that is clearly too high in relation to the party's own needs or the child's needs.
5) A party's intentional suppression or reduction of income, hidden income, income that should be imputed to a party, or a party's substantial assets.
6) Any support that a party is providing or will be providing other than by periodic monthly payments, such as lump sum payments, possession of a residence, payment of a mortgage, payment of medical expenses, or provision of health insurance coverage.
7) A party's own special needs, such as unusual medical or other necessary expenses.
8) Any other factor the court finds to be just and proper.

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North Carolina's legislation requires district court judges to use the presumptive guidelines but allows the court to modify the resulting amount if it would not meet the child's needs.[7] If the court orders an amount other than that resulting from the guidelines, the judge must make findings of fact about the reasons for the variation and the basis for the amount that is ordered. The mandated use of presumptive guidelines does not necessarily change prior law regarding the basis for determining the proper amount of a child-support obligation. The statute continues to provide that orders for support "shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case."[8] The charge to the Conference of Chief District Judges seems to be to develop guidelines that will assist the parties and the court in determining what that amount is—indeed, that will operate to establish a presumption as to what that amount is—in a particular case.

Immediate Withholding

The presumptive guideline provisions apply equally to all child-support cases. Provisions for withholding from wages, however, reflect a dichotomy that has developed as a result of the structure of the state's child-support system and the nature of the federal mandates. Federal child-support provisions apply to "IV-D cases"—cases that are handled through the state's child-support enforcement program, which is based on and partially funded under Title IV-D of the federal Social Security Act.[9] Some federal mandates also apply to "non–IV-D cases"—all child-support cases that are not handled by a IV-D child-support enforcement agency. (Such cases include civil cases in which the party seeking support is represented by a private attorney or is not represented. They also include criminal cases, which are prosecuted by the district attorney on behalf of the state, although some criminal cases are IV-D cases.) In developing legislation to comply with federal mandates that apply only to IV-D cases, the state has struggled with how to maximize fairness and uniformity by treating cases as similarly as possible. But for a variety of legal, practical, and philosophical reasons, the two kinds of cases are not treated exactly the same way.

Family Support Act provisions relating to wage withholding as a means of collecting child support, like those relating to guidelines, build on federal requirements that were enacted in 1984. North Carolina responded to 1984 federal requirements by providing that wage withholding would occur when a parent was behind one month's worth of child-support payments. In IV-D cases the child-support agency could implement the withholding administratively, without court action, although the delinquent parent could request a court hearing to contest the withholding. In non–IV-D cases, withholding could be implemented only by order of the court as part of an enforcement proceeding or at the request of the responsible parent. Withholding was given precedence over contempt, which historically had been the enforcement tool of first resort.

The 1989 General Assembly, in complying with the Family Support Act requirements, furthered the dichotomy between IV-D and non–IV-D cases in the area of wage withholding.[10] Effective October 1, 1989, in IV-D cases, withholding is no longer primarily an enforcement tool for dealing with cases in which payments have become delinquent: it is the presumed method of collecting support payments. Withholding becomes effective immediately in IV-D cases whenever a child-support order is entered or modified or whenever the obligee—the person or agency entitled to receive the child-support payments—requests withholding, unless (1) insufficient information is available to implement withholding, (2) the parent who is obligated to pay support is unemployed, or (3) the parties agree to another method of payment. Federal law requires that the immediate wage withholding provisions apply to non–IV-D cases beginning January 1, 1994. For now, in non–IV-D cases, withholding remains an enforcement tool, although its availability is expanded to allow the court to order withholding when the obligee establishes that the obligor has been delinquent or erratic in making child-support payments, even if the delinquency does not

amount to a month's worth of payments.

Delinquency Notice Changes

In 1983 the General Assembly, independent of any federal requirements, enacted procedures for improving child-support enforcement. Procedures were put into place in offices of clerks of superior court to ensure that when court-ordered support payments were not made, delinquency notices would be sent or delinquent cases would be brought back before the court automatically. Previously, action was taken only if and when the obligee had the wherewithal to initiate enforcement proceedings. Later, when administrative wage withholding was made the preferred enforcement mechanism for IV-D cases, these clerks' procedures were made applicable only to non–IV-D cases except when a IV-D agency asked the clerk to initiate an enforcement proceeding for a IV-D case. (This might occur, for example, when withholding is not a sufficient remedy in the IV-D case and the court's contempt powers are needed.) An amendment that became effective January 1, 1990, provides that in non–IV-D cases, sending a delinquency notice is in the clerk's discretion if, during the preceding twelve months, the clerk has sent the obligor one or more delinquency notices.[11] If the clerk elects not to send a delinquency notice, the clerk is to issue an enforcement order immediately instead of waiting for the delinquency to remain unpaid for thirty days.

IV-D Cost Recovery Repealed

The services of IV-D agencies across the state are available to all citizens. These services include administrative and legal assistance in locating absent parents to obtain child support, establishing paternity, establishing support obligations through negotiation or litigation, and enforcing the payment of support obligations. When the program began in 1974, it emphasized serving clients who were AFDC recipients and recouping federal, state, and local funds that were expended in the AFDC program. AFDC recipients are required, as conditions of receiving AFDC, to assign to the IV-D agency their rights to collect child support and to cooperate with the agency's efforts to obtain support.[12]

The collection of support in AFDC cases is still a substantial function of IV-D agencies. It has long been well established, though, that all of the services of IV-D agencies must be available to any non-AFDC recipient who applies for them and pays specified fees or costs that are established by the state.[13] An amendment that became effective June 28, 1989, changed North Carolina's fee and cost provisions for these services.[14] Now there is a $10.00 application fee for all non-AFDC applications for IV-D services. (Previously, the fee was $5.00 or $25.00, depending on the non-AFDC applicant's income.) The legislation repeals all other provisions for the recovery of costs by IV-D agencies. (Previously, a non-AFDC client was charged for legal and administrative services if his or her income was more than 200 percent of the federal poverty level.)

Child-Support Study

In the long run, the most significant action of the 1989 session of the General Assembly relating to child support may be the requirement that the Department of Human Resources (DHR) and the Administrative Office of the Courts (AOC) jointly undertake a comprehensive study of child-support enforcement services—both IV-D and non–IV-D—in North Carolina.[15] The study is to (1) examine the current delivery of all child-support services by DHR, court offices, and county departments of social services; (2) evaluate the efficiency and effectiveness of the current system; (3) make organizational, administrative, and procedural recommendations for the effective delivery of services; and (4) examine the potential for the delivery of child-support enforcement services that provide equitable treatment of cases.

About two thirds of the counties in the state administer the local IV-D program—usually through the county social services department, but in some cases through the county manager's or attorney's office or a separate county office. In the other counties, the state administers the program. The DHR-AOC study is to examine the organizational and fiscal relationship between state- and county-administered programs. It also is to take into consideration the use of federal IV-D revenues to support child-

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support services and include cost and benefit estimates and an implementation plan with any recommendations.

To begin this large task, David Flaherty, secretary of DHR, and Franklin Freeman, director of AOC, have appointed a committee whose twenty-five members represent a broad range of state and local interests in the child-support system. The committee is chaired by Patrice Roesler, who is the director for intergovernmental programs for the North Carolina Association of County Commissioners. In January, 1990, the committee met to generate goals and ideas to serve as the basis for retaining an independent consultant to examine the state's child-support system.

The legislation requires an interim report to the Legislative Services Office by May 15, 1990, and to the 1990 session of the 1989 General Assembly. A final report is due January 15, 1991—an ambitious schedule. Many people hope that the study will provide both an opportunity to go beyond the last few years' consuming effort to comply with federal mandates and a basis for long-term improvements in the accessibility, efficiency, and effectiveness of child-support services in North Carolina.

Other Provisions

Changes in and additions to federal child-support mandates are certain to continue. In fact, the Family Support Act of 1988 includes a number of child-support provisions that either have effective dates that are later than those for presumptive guidelines and immediate wage withholding or do not require legislative action. The most significant of these other provisions include the following:

1) The state must meet federal standards for the percentage of IV-D cases in which paternity is established.
2) By October 1, 1990, the state must meet federal standards for the time within which certain actions—including responses to requests for IV-D services and the distribution of child-support payments—are taken in IV-D cases.
3) By October, 1993, the state must have a process for reviewing and, if necessary, modifying child-support orders in IV-D cases. In AFDC cases a review must occur every three years. In non-AFDC cases parents must be notified of their right to a review, and a review must occur every three years if requested by either parent. A federal study will examine the question of whether this automatic review process should be extended to non–IV-D cases. ❖

Notes

1. Daniel C. Hudgins, "North Carolina Takes on Federal Welfare Reform," *Popular Government* 54 (Spring 1989): 31–38.

2. Hudgins, "Welfare Reform," 33.

3. Implementation activity relating to the other main areas—the Aid to Families with Dependent Children (AFDC) Program and the Job Opportunities and Basic Skills (JOBS) Program—has been substantial but is beyond the scope of this article. For more detail on those areas, see Division of Social Services, N.C. Department of Human Resources, "Welfare Reform Task Force Final Report" (August 1989). For additional background on child-support developments, see Janet Mason, "Child support in North Carolina," *Popular Government* 50 (Summer 1984): 26–38.

4. N.C. Gen. Stat. § 108A-28(a)(2). Hereinafter the General Statutes will be cited as G.S.

5. G.S. 50-13.4(c1), which was rewritten by 1989 N.C. Sess. Laws ch. 529.

6. A committee of district court judges has begun looking at the guidelines issue and is expected to make recommendations to the Conference of Chief District Judges in April, 1990. The committee is chaired by Peter M. McHugh, chief district court judge in District 17-A. Other members are A. Elizabeth Keever, district court judge in District 12; William G. Jones, district court judge in District 26; and Ken Titus, chief district court judge in District 14.

7. G.S. 50-13.4(c), which was rewritten by 1989 N.C. Sess. Laws ch. 529. The act also amended G.S. 14-322(c),15A-1343(b)(4),49-7, 7A-650(e), and 110-132(b) to require that the amount of child-support payments ordered under those sections be determined by use of the guidelines as provided in G.S. 50-13.4(c).

8. G.S. 50-13.4(c).

9. The statutory base for the program in North Carolina is Article 9 of G.S. Chapter 110.

10. 1989 N.C. Sess. Laws ch. 601, which amended the withholding procedures in G.S. 110-136.3 through -136.5.

11. 1989 N.C. Sess. Laws ch. 479, which amended G.S. 50-13.9(d).

12. G.S. 110-137.

13. G.S. 110-130.1.

14. 1989 N.C. Sess. Laws ch. 490.

15. 1989 N.C. Sess. Laws ch. 795, § 28.2.

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