This issue distributed to:

Magistrates, Chief District Court Judges, Clerks of Superior Court

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

August 1979 No. 79/09

1979 LEGISLATION AFFECTING MAGISTRATES

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This memorandum deals with legislation about subjects other than criminal law enacted by the 1979 General Assembly that affect magistrates. Separate memoranda by Robert Farb will deal with changes in criminal law.

SALARIES AND QUALIFICATIONS

Like other state employees, magistrates received a 5 per cent salary increase, effective July 1, 1979. G.S. 7A-171.1, which sets out the salary scale for full-time magistrates, was amended as follows to reflect that increase:

Years of Service	Salary
Less than 1	$ 8,592
1, but less than 3	9,348
3, but less than 5	10,212
5, but less than 7	11,136
7, but less than 9	12,168
9 or more	13,308

In addition, every magistrate who will have been a magistrate for at least one year as of November 1, 1979, will receive a one-time $200 bonus in the month of November.

Another act (Ch. 991, H 263) gives seniority credit to full-time magistrates who meet certain education requirements. Effective July 1, 1979, a beginning full-time magistrate who has a two-year Associate in Applied Science degree in criminal justice or paralegal training from a North Carolina community college or technical institute or the equivalent degree from a private institution in North Carolina may be initially employed at the annual salary for a magistrate with three or more but less than five years of service. A full-time magistrate with a four-year degree from an accredited college may be initially employed at the salary level for a magistrate with five or more but less than seven years of service. A beginning full-time magistrate with a law degree from an accredited law school may begin at the salary for a magistrate with seven

or more but less than nine years of service. And finally, a beginning full-time magistrate who is licensed to practice law in North Carolina may begin at the salary for magistrates with nine or more years of service. Magistrates who begin at the higher salary levels will thereafter receive seniority increments at two-year intervals. An example of how this law will operate is as follows: On January 1, 1980, a magistrate with a four-year degree from UNC is hired. His beginning salary will be $11,136 and on January 1, 1982 his salary will increase to $12,168 (or whatever the salary for magistrates with seven or more but less than nine years of service would be at that time). In 1984, his salary will rise to $13,308. He will advance to the highest salary level after four rather than nine years.

Ch. 991 provides that magistrates hired before July 1, 1979, who meet the educational qualifications are entitled to receive the same benefits, effective July 1, 1979. A full-time magistrate with a two-year degree who was hired before July 1 will receive an increase, effective July 1, of three years for pay purposes; one with a four-year degree will receive a five-year credit; one with a law degree would receive seven years' credit, and one who was licensed to practice law will receive nine years' credit. For example, a magistrate who has an Associate in Applied Science degree, who has been a magistrate for four years, and who was being paid a salary of $9,720 (the pre-July 1, 1979 rate) will be increased to the rate of a magistrate with seven years of service and will receive a salary of $12,168 (the post-July 1, 1979, rate).

As written, the new law applies only to full-time magistrates, with one exception. A part-time magistrate who is licensed to practice law in North Carolina receives the benefits of the new law. No other part-time magistrates will receive salary credit for education.

A bill (S 283) that would have required experienced magistrates to complete at least ten hours of continuing education every other year to be eligible for reappointment failed in the late days of the session because of insufficient funds. That matter cannot be reconsidered until the 1981 session. Therefore the only mandatory training for magistrates continues to be the two-week course for new magistrates within six months after they have been appointed.

JURISDICTION AND FEES

Several jurisdictional matters that affect magistrates were considered by this General Assembly. Ch. 144 (S 132), effective October 1, 1979, increases the magistrates' maximum jurisdiction in small claims cases from $500 to $800. In addition, Ch. 144 clarifies the magistrate's authority to accept waivers of trial and guilty pleas in worthless-check cases. Before 1977, G.S. 7A-273(6) had authorized magistrates to hear and enter judgment in all worthless-check cases when the amount of the check was $50 or less. In 1977, when the General Assembly amended that subsection to allow magistrates to try worthless-check cases as the chief district judge directs if the check is for $400 or less, it did not change G.S. 7A-273(8), which allows

magistrates to accept written waivers of trial and pleas of guilty in worthless-check cases if the amount of the check is $300 or less. Ch. 144 amends G.S. 7A-273(8) by raising the amount of a worthless check on which the magistrate can accept a guilty plea to $400, thereby conforming the two subsections.

In 1977 the General Assembly authorized magistrates to hear motor vehicle mechanic and storage lien cases that arise under G.S. 44A-2(d). Ch. 602 (H 1215) makes a technical amendment to G.S. 7A-211.1 authorizing magistrates to hear motor vehicle mechanic and storage lien cases that arise under G.S. 20-77(d) as well as those that arise under G.S. 44A-2(d). G.S. 20-77(d) authorizes an operator of a place of business for garaging, repairing, parking, or storing vehicles for the public in which a vehicle remains unclaimed for 30 days or a landowner on whose property a motor vehicle has been abandoned for 60 days to sell the vehicle in accordance with G.S. Ch. 44A. Ch. 602 is not likely to increase significantly the number of motor vehicle lien cases heard by a magistrate.

The General Assembly increased the fees for sheriff's service of process from $2 to $3, effective July 1, 1979 (Ch. 801, S 904). Therefore the court costs in small-claims cases with one defendant is $11. Two years from now the fee for service of process will increase to $4.

CONSUMER CONTRACTS

Lending Institution Loans. There are two common types of finance companies in North Carolina--regular small-loan lenders and optional-rate lenders. Regular small-loan lenders have been authorized to lend up to $1,500 to any one individual, to take a security interest in any personal property, and to charge interest at the rate of 3 per cent per month (36 per cent per year) on the first $300 and 1 1/2 per cent on any remaining balance. The optional-rate lenders may lend up to $5,000 to any one individual, take a security interest in personal property and a junior real estate mortgage, and charge interest at the rate of 15 per cent per year. Ch. 33 (H 216) amends G.S. 53-173, effective April 14, 1979, to increase the amount a small-loan lender can lend up to any one individual from $1,500 to $3,000. The allowable interest charges or security have not been changed. If the cash advance is more than $1,500 but not more than $2,500, the loan repayment must be scheduled for not more then 49 months. If the cash advance is more than $2,500, repayment must be scheduled within 61 months.

The General Assembly also changed the interest rates that can be charged by lenders other than finance companies. Lenders that lend $5,000 or less on an installment loan not secured by real property with payment scheduled for six months to 120 months may charge 15 per cent per year. Otherwise, when lending $25,000 or less, a lender may charge 12 per cent interest. There is no maximum interest rate for home loans (first mortgage on dwelling) of over $10,000 or for other loans of over $25,000.

Mail Order Transactions. The General Assembly made it clear that certain mail order transactions with North Carolina consumers would be

covered by North Carolina consumer finance laws. Ch. 706 (S 596), effective July 1, 1979, amends G.S. 25A-2 to provide that a consumer credit sale is subject to the Retail Installment Sales Act if the buyer is a resident of North Carolina and the seller's offer or acceptance is made in North Carolina or the buyer's offer or acceptance is made in North Carolina. According to the statute, an offer or acceptance is made in North Carolina if the out-of-state seller sends it to the North Carolina resident in this state and similarly an offer or agreement to buy is made in-state if the communication originates in this state by a North Carolina resident. This new law means that when a North Carolina resident purchases goods from an out-of-state company through a mail order catalogue or advertisement, the provisions of the Retail Installment Sales Act will apply to the contract. Ch. 706 also makes the same change in the general lending laws by adding a new G.S. 24-2.1, which provides that provisions governing interest and other charges by lenders (other than finance companies) apply to out-of-state lenders when the borrower is a North Carolina resident and the lender's offer or acceptance or the borrower's offer or acceptance is communicated in North Carolina.

The North Carolina Consumer Finance Act, which covers loans by finance companies, is amended to provide that loans by finance companies outside this state cannot be enforced in North Carolina if they charge a higher interest rate or fees than allowed in North Carolina unless all the activities surrounding the loan--including solicitation, offer, acceptance, signing of documents, and delivery and receipt of funds--occurred outside North Carolina.

Prepaid Entertainment Contracts. Ch. 833 (S 617) enacts a new Article 20 of G.S. Ch. 66 to protect consumers who enter into prepaid entertainment contracts. A prepaid entertainment contract is a contract in which (1) the buyer is obligated to pay for the service before he receives all of the services, and (2) the services to be performed are dance lessons, dating or social club services, martial arts training, or health or athletic club services. The law does not apply if the seller is a licensed nonprofit school, college, or university; the state or any subdivision of the state; or a nonprofit religious, ethnic, or community organization. For example, the law does not apply if the buyer enters into a contract with the University of North Carolina at Greensboro to take dance lessons or with the YMCA for karate lessons. Ch. 833 requires prepaid entertainment contracts to be written, dated, and signed by the buyer and seller, and they must be for a specific length of time. The statute prohibits a seller from selling a prepaid entertainment contract with a duration of more than three years or one in which performance is not to begin within 180 days. The buyer has a right to give a written cancellation of a prepaid entertainment contract until midnight of the third business day after he signs the contract. The contract itself must notify the buyer of the right to cancel; the notice must be given in boldface type and must be located close to the place for the buyer's signature.

The seller must deliver to the buyer, within 30 days after a request, any personal or private information the seller has about the buyer, such as photographs, evaluations, and background information. The law also

requires the seller to refund at least 90 per cent of the pro rata cost of any unused services (1) if the buyer is unable to use the services because of death or disability; (2) if the buyer moves more than eight miles from his present location and more than thirty miles from the seller's facility; (3) if the seller relocates his facility more than eight miles from its present location; or (4) if the services provided by the seller are materially impaired. If the contract is for more than $1,500, the buyer may cancel for any reason, and the seller must refund the pro rata cost of any unused services. A contract for more than $1,500 may provide for a cancellation fee of up to 25 per cent of the unused services (but not more than $500).

The new law authorizes a buyer who brings an action for recovery of damages for violation of this act to recover reasonable attorney's fees. It also provides that a violation of the act constitutes an unfair trade practice, which means that a buyer is entitled to three times the amount of the damages he proves. Ch. 833 takes effect September 1, 1979.

Regulation of Collection Agencies. In 1977 the General Assembly enacted a new Article 2 of G.S. Ch. 75, which prohibited certain kinds of debt collectors from engaging in specific debt-collection practices. That law applied to persons and businesses that collect their own debts (J. C. Penney, for example), but did not apply to collection agencies (those in the business of collecting others' debts), which are licensed and regulated by the Commissioner of Insurance. The 1979 General Assembly rewrote the laws governing collection agencies (Ch. 835, S 774), effective June 7, 1979. The new law prohibits collection agencies from engaging in those activities that other debt collectors had been prohibited from engaging in by the 1977 General Assembly. Some of the prohibited acts in collecting debts include: (1) threatening to use violence or illegal means to harm the debtor; (2) representing that nonpayment of a debt may result in arrest; (3) threatening to take an action not permitted by law; (4) using profane or obscene language; (5) making harassing telephone calls; (6) communicating with the debtor at work contrary to his instructions; (7) communicating with anyone other than the debtor, his attorney, or his spouse without permission except for the sole purpose of locating the debtor; (8) using a fraudulent, deceptive, or misleading misrepresentation to collect a debt; (9) communicating with the debtor after the agency has been notified that he is represented by a specific attorney; and (10) using unconscionable means to collect a debt. If a debtor brings an action against the collection agency for engaging in an unlawful debt-collection act, the court must award, in addition to any actual damages, a penalty of $100 to $1,000.

LANDLORD AND TENANT

Appealing Summary Ejectment Cases. In Usher v. Waters Insurance & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977), Judge McMillan found several provisions of North Carolina's summary ejectment law unconstitutional. Ch. 820 (H 1324), effective September 1, 1979, codifies the Usher decision and generally conforms the statutes to the practice being followed since that

court decision. It amends G.S. 42-32 to delete the provision granting a landlord double the amount of rent owed if the district court jury finds that the tenant's appeal of a summary ejectment action to district court was without merit and taken for the purpose of delay. Ch. 820 also amends Rule 62 of the North Carolina Rules of Civil Procedure to provide that execution may not issue on a summary ejectment case until ten days after the judgment is entered. Most important, Ch. 820 rewrites G.S. 42-34, which required a tenant to give a bond in an amount of at least three months' rent in order to stay execution of a summary ejectment judgment pending appeal to district court. Judge McMillan had held that bond requirement to be unconstitutional and ordered the clerk of superior court of Mecklenburg County to accept as a stay of execution bond the amount of contract rent as it becomes due. The Administrative Office of the Courts issued an order to all clerks to follow Judge McMillan's ruling. Ch. 820 rewrites G.S. 42-34 to provide that a defendant can stay execution pending appeal of a summary ejectment case to district court by paying to the clerk of superior court the amount of rent as it becomes due after the judgment has been entered. For example, tenant pays rent of $300 a month, due the first day of each month. He fails to pay rent for the month of June and landlord brings a summary ejectment action against him. Trial is held before the magistrate on June 25, 1979. The landlord is awarded a judgment for $250, plus court costs and ejectment. Tenant appeals the decision. Tenant can stay execution until the case is heard in district court by signing a bond with the clerk that he will pay each month's rent as it becomes due. He will have to pay $300 to the clerk within 5 working days of July 1 and each month thereafter. (The new law requires payment within five days. However, under Rule 6 of the North Carolina Rules of Civil Procedure, in counting those days, Saturdays, Sundays, and holidays are excluded.) Essentially, this bond requirement will preserve the status quo from the time magistrate enters his judgment until the district court acts: The amount of damages accrued before the magistrate's judgment remain unpaid because that is what is at issue in the appeal; but future rent must be paid as it becomes due, thereby assuring that the landlord will not suffer increased damages while the case is on appeal. If the tenant does not pay his rent to the clerk within five working days of its due date, the landlord can have the clerk issue an order of ejectment.

Ch. 820 also provides that if the summary ejectment action is based on nonpayment of rent and the magistrate's judgment is entered more than five working days before the next rent is due under the lease, the tenant must also pay to the clerk the prorated rent for the days between the date the judgment was entered and the next day the rent will be due. For example, tenant pays rent at a rate of $300 per month, due on the first day of the month. He fails to pay rent on June 1. Landlord files his complaint on June 15 and the trial is held on July 5. The magistrate awards the landlord possession and damages of $350, which is rent owed to the date of judgment. Tenant appeals the judgment. If he wishes to stay execution, tenant cannot wait until August 1 and post $300 with the clerk. Since there are more than five working days between July 5 and August 1, tenant must post $250--an amount equal to 25 days' rent--with the clerk within 10 days of entry of the judgment on July 5. Then within five working days of August 1 and each month after that, tenant must post $300 with the clerk in order to stay execution. This

additional payment of prorated rent for the period between judgment and the next rental due date is not required when the tenant is a pauper and files an affidavit complying with G.S. 1-288.

If the landlord or tenant disputes the amount of payment due by the bond or the date the payments are due, he can move for a hearing before the clerk or the district court judge to determine the issue. Ch. 820 allows the clerk, upon application by the landlord, to turn the rent over to the landlord as it is paid to the court rather than wait until the action is heard in district court. If there is a dispute over the amount of rent owed, only the undisputed portion can be turned over to the landlord. Without this provision the landlord would have to wait until the case was tried in district court--which could be more than a year--before he received any rents for the period during which the case was on appeal. An example of how the new law will work is as follows: Landlord brings a summary ejectment action against tenant, claiming that the tenant owes one month's back rent of $100. One of tenant's defenses is that landlord failed to keep the premises in a habitable condition and that tenant is entitled to damages of $50 a month and to a $50 per month rent-abatement order. Landlord wins and the tenant appeals to district court. While the case is on appeal, the tenant must pay $100 per month into the clerk of court in order to stay execution. Since only $50 of the rent payments are uncontested, the landlord is entitled to have the clerk pay that amount to him as the tenant pays to the clerk. The clerk will hold the contested $50 a month until the district court enters a judgment that orders him how to disburse any remaining funds. The bond form to be used by clerks in this matter and the new G.S. 42-34 appear at the end of this memorandum.

Residential Rental Agreements Act Changes. In 1977 the General Assembly enacted the Residential Rental Agreements Act (G.S. Ch. 42, Art. 5), which placed certain obligations on a landlord and tenant under a rental agreement for a residential dwelling unit, including an obligation on the landlord to keep the premises in a habitable condition and to make repairs. Ch. 880 (H 1213), effective on October 1, 1979, makes it clear that the act applies to mobile homes or mobile home spaces rented for residential use. It also clarifies that the term landlord includes any rental management company, rental agency, or any other person who has the actual or apparent authority of an agent to perform the landlord's obligations under the act as well as the actual owner of the premises. Therefore, when a tenant has been dealing with an agent, the tenant can give notice of needed repairs to that agent and the agent is responsible for making the repairs required by the law.

Retaliatory Evictions. One matter left unclear after the 1977 General Assembly enacted the Residential Rental Agreements Act was whether a tenant could raise as a defense to a summary ejectment action that he was being evicted in retaliation for asserting his rights under the law. Some district court judges have held that the law, by implication, prohibited retaliatory evictions. Ch. 807 (H 1021), effective June 7, 1979, has given the tenant the statutory right to raise retaliatory eviction as a defense. The new law protects the tenant from reprisals for the following activities: (1) a good-

faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is required to repair; (2) a good-faith complaint to a government agency about a landlord's alleged violation of any health or safety law or any code or ordinance regulating premises used for dwellings; (3) a government's issuance of a formal complaint to a landlord concerning premises rented by a tenant; (4) a good-faith attempt to exercise, secure, or enforce any rights existing under a valid lease or rental agreement or under state or federal law; or (5) a good-faith attempt to organize, join, or become involved with an organization promoting tenants' rights. A tenant may raise as an affirmative defense to a summary ejectment action that the landlord's action is substantially in response to the occurrence within the previous twelve months of one or more of the five protected activities mentioned above. Since retaliatory eviction is an affirmative defense, the tenant must raise it as a defense at the trial (and if he files a written answer, he must allege it in that answer), and he has the burden of proving by the greater weight of the evidence that the eviction was retaliatory. To win on his defense, tenant must prove (1) that one or more of the protected activities occurred (for example, that he gave the landlord notice of needed repairs); (2) that the activity took place within 12 months before the summary ejectment complaint was filed; and (3) that the summary ejectment action was substantially in response to the occurrence of the activity. It is important to note that the tenant is not required to prove that retaliation is the "sole" purpose for eviction--he need prove only that the ejectment action was "substantially" in retaliation. The tenant might prove the third element--motive--by evidence that the landlord told the tenant or someone else that he wanted to get rid of the tenant because he undertook a protected activity. The tenant might also show that the landlord's motive was retaliation by pointing out the proximity of the occurrence of a protected activity to the summary ejectment action. For example, evidence that the landlord gave notice to terminate a month-to-month lease two days after tenant complained to the city housing inspector about conditions might be evidence that the eviction was substantially in retaliation for complaining about conditions.

However, the act specifies that the landlord may prevail in his summary ejectment action if he proves one of the following:

(1) The tenant breached the covenant to pay rent or any other substantial convenant of the lease for which the tenant may be evicted and such breach is the reason for eviction. For example, if a lease includes a covenant not to sublease (and a right to re-enter for breach) and the landlord proves breach of that condition, he must also show that tenant's subletting was the reason for the ejectment action. Tenant might still prevent eviction if he can prove that many other tenants had subleased their premises, that landlord had never evicted them, and that the reason for his eviction was not that he sublet the premises for one month but rather that he demanded that the landlord make needed repairs.

(2) In a case of tenancy for a definite period of time in which the tenant has no option to renew and he holds over after expiration of the term, landlord may prevail even if tenant can show some retaliatory motive. For example, the landlord can win his case if it is being brought for holding over after the end of the year in a one-year lease. This exception

does not apply to holding over after a periodic tenancy such as a week-to-week or month-to-month lease or a tenancy for years with an option to renew.

(3) The violation of the Residential Rental Agreement Act that the tenant complained of was caused primarily by the willful or negligent conduct of the tenant, his family, or his guests.

(4) Compliance with the building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant.

(5) The landlord gave the tenant a good-faith notice to quit the premises before any of the protected activities occurred. For example, a landlord decides that he wants to rent the premises to someone else and gives the tenant notice to quit the premises at the end of the month. Two days after receiving notice to quit, the tenant files a complaint about the conditions of the premises with the local housing authority. Landlord can prevail in the summary ejectment action because good-faith notice was given before the complaint was filed.

(6) The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own dwelling.

(7) The landlord seeks in good faith to make major alterations or remodeling of the dwelling that requires the tenant's displacement.

(8) The landlord seeks in good faith to demolish the dwelling.

(9) The landlord seeks in good faith to terminate the use of the property as a rental dwelling unit for at least six months.

Essentially, the last two provisions give the landlord the option of removing the premises from the housing market rather than making needed repairs. For example, if tenant notifies the housing inspector that the premises are not habitable, landlord may end the tenancy at the end of the month and demolish the premises rather than make the necessary repairs.

The new law provides that a tenant may not waive his right to raise a defense of retaliatory eviction. Therefore, any waiver given by a tenant is void and cannot be enforced. If the magistrate finds that an ejectment action is retaliatory, he must deny the request for ejectment. The tenant would be entitled to remain on the premises under the existing rental agreement, but he must of course continue to pay rent.

Another provision of Ch. 807 states that the rights and remedies granted by the act are supplemental to those already existing. One of those already existing rights and remedies is to bring a claim under North Carolina's Unfair Trade Practices Act, G.S. 75-1.1. That law makes unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce unlawful. In Love v. Pressley, 34 N.C. App. 503 (1977), the North Carolina Court of Appeals held that the rental of residential housing is trade or commerce under the unfair trade practices act. In that case the jury found that the landlord trespassed upon the premises rented to the tenant and converted the personal property of the tenant. The defendant was renting around 76 units at the time the lawsuit was filed. After the jury found for the tenant, the judge ruled, as a matter of law, that the conduct constituted an unfair trade practice and tripled the damages the jury awarded. If the court has held that rental of residential housing is within commerce, then

it is quite likely that the appellate courts will hold that in some situations a retaliatory eviction is a violation of G.S. 75-1.1. In three unreported superior court cases and two district court cases, judges have held that a retaliatory eviction is an unfair trade practice.

Two major questions are left unresolved by this new statute. One, which really does not directly affect magistrates, is whether retaliatory eviction may be raised only as a defense to a summary ejectment action or whether the tenant can raise it affirmatively by seeking injunctive relief. Other states are split on the issue. [See Hosey v. Van Courtland, 299 F. Supp. 501 (S.D.N.Y. 1969) (defense only); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971) (injunctive relief allowed).] In the three unreported superior court cases in North Carolina, the Attorney General's Office, in bringing actions on the grounds of unfair trade practice, has been successful in having retaliatory evictions enjoined.

Another unresolved issue is whether a tenant who reports unsafe conditions or engages in one of the other protected activities can prevent a landlord from retaliating against him by raising his rent to an artificially high level. In Schweiger v. Superior Court of Alameda County, 476 P.2d 97 (1970), the California Supreme Court said that retaliatory acts such as diminution of services or disproportionate rent increases are prohibited as much as a direct retaliatory eviction is. [See also E & E Newman, Inc. v. Hallock, 281 A.2d 544 (N.J. 1971).] The court reasoned that public policy prohibits increasing rent in retaliation for tenant's exercising his statutory right to obtain repair. (Neither California nor New Jersey had statutes prohibiting retaliatory evictions.) North Carolina's new retaliatory-eviction law states that it is the state's public policy to protect tenants who seek to exercise their rights to decent, safe, and sanitary housing. That public policy should apply to prevent the landlord from raising the rent artificially high to evict the tenant as well as to prevent him from retaliating by actual eviction. If the courts do not protect tenants from retaliatory rent increases, then the landlord will be able to violate the public policy of the state by doing indirectly what he is prohibited by law from doing directly.

INVOLUNTARY COMMITMENT

The standard for involuntary commitment of a person has been that he be mentally ill or inebriate and imminently dangerous to himself or others or that he be mentally retarded and, because of an accompanying behavior disorder, imminently dangerous to others. In hearings before the Mental Health Study Commission during the last year, many mental health professionals, law enforcement officers, and advocates for mental health patients contended that commitments were too difficult to obtain because the standard of "imminent danger" was being interpreted very narrowly and was difficult to prove. The Mental Health Study Commission recommended a change in the standard to the General Assembly, which acted by abandoning the "imminent danger" standard for one of simple dangerousness.

Under the new law (Ch. 915, S 324), effective October 1, 1979, a magistrate can issue a custody order for involuntary commitment if he finds

probable cause to believe that the respondent is mentally ill or inebriate and dangerous to himself or others or is mentally retarded and, because of an accompanying behavior disorder, is dangerous to others. He will have to determine whether probable cause exists on the basis of definitions contained in the new law.

The first step of determining whether the respondent is mentally ill or inebriate or is mentally retarded and has an accompanying behavior disorder is essentially unchanged. Effective October 1, 1979, the definition of mentally ill is changed to distinguish between minors and adults. Ch. 171 (S 291) makes only a minor change in the present definition of mental illness and makes that definition apply to adults. Ch. 171 provides that when applied to a minor, mental illness means a mental condition, other than mental retardation alone, that so lessens or impairs the youth's capacity either to develop or exercise age-appropriate or age-adequate self-control, judgment, or initiative in the conduct of his activities and social relationships as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The definition of inebriate remains the same. Effective January 1, 1980, the definition of mentally retarded will be changed to be "a person who has significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during his developmental period" (Ch. 751, H 549). This new definition conforms the legal definition of mental retardation to the current definition being used by mental health professionals, but as a practical matter it will not result in any changes in the kinds of people who can be involuntarily committed because of mental retardation.

As to the second step of determining whether the respondent is dangerous to himself or others, the magistrate will have to apply the following new definitions of the terms dangerous to himself and dangerous to others.

A person is dangerous to himself if, within the recent past, he has:

(1) Acted in such a manner as to evidence (a) that he would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and (b) that there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded under the involuntary commitment laws. (A showing of behavior that is grossly irrational or of actions that the person is unable to control or of behavior that is grossly inappropriate to the situation or other evidence of severely impaired insight and judgment creates a prima facie inference that the person is unable to care for himself); or

(2) Attempted suicide or threatened suicide and there is a reasonable probability of suicide unless adequate treatment is afforded under the involuntary commitment laws; or

(3) Mutiliated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is afforded under the involuntary commitment laws.

A person is dangerous to others if, within the recent past, he has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another and there is a reasonable probability that such conduct will be repeated.

Another change made by the 1979 General Assembly deals with involuntary commitments to private hospitals. In 1973, when the General Assembly enacted the new involuntary commitment laws, no changes were made to Article 10 of G.S. Ch. 122, dealing with involuntary commitment to private hospitals. Ch. 164 (H 443) rewrites that article to provide that commitment to a private hospital must be accomplished in accordance with the provisions of involuntary commitments to public facilities. The magistrate should follow the same procedure when committing a respondent to a private hospital as he would if he were committing him to a regional hospital. The custody order would require the law enforcement officer to take the respondent to named private hospital if the qualified physician determines he is subject to commitment. However, before committing a respondent to a private hospital, the magistrate should have some assurance that the hospital will receive the patient. Also, the magistrate might want to red-flag any custody order to a private hospital so that the clerk of court will be sure to pick up the fact that the respondent is at a private hospital rather than the regional hospital.

Two changes in Ch. 915 affect transportation of respondents to and from a qualified physician, a community mental health facility, or regional mental health facility. New G.S. 122-58.14(c) allows a law enforcement officer or other governmental employee who is transporting a respondent to use reasonable force to restrain him if this step appears necessary to protect the officer, the respondent, or others. The officer may not be held liable in civil or criminal actions for assault, false imprisonment, or any other tort or crime for using reasonable force when necessary. New subsection (d) of G.S. 122-58.14 authorizes a magistrate to let the family or immediate friends of the respondent, if they so request, transport him to a qualified physician and regional hospital. The family member or friend who transports the respondent bears the cost of transportation. The magistrate may allow the family or friends to transport a respondent only when the danger to the public, the family or friends, and the respondent himself is not substantial.

Finally, the new law provides for four new assistant attorneys general to be hired by the State. One of these new assistant attorneys general will be assigned full time to each of the four regional psychiatric hospitals and will represent the state's interest at involuntary commitment hearings in district court. Magistrates should find out the name, address, and telephone number of the attorney general who will be working at the regional hospital to which they send respondents. (It might be a while before these new people are hired.) Coordination with this new attorney will make the involuntary commitment procedure work smoother.

STATE OF NORTH CAROLINA

File #_____
Film #_____
In the General Court of Justice
District Court Division

County of _____

_____
Plaintiff

vs

_____
Defendant

BOND TO STAY EXECUTION
ON APPEAL TO DISTRICT COURT

NOW COMES THE DEFENDANT in the above entitled action and respectfully shows the Court that judgment for summary ejectment was entered against the defendant and for the plaintiff on the _____ day of _____, 19____, by the Magistrate. Defendant has appealed the judgment to the District Court.

Pursuant to the terms of the lease between plaintiff and defendant, defendant is obligated to pay rent in the amount of $_____ per _____, due on the _____ day of each _____.

Where an additional undertaking is required by G.S. 42-34(c), the defendant hereby tenders $_____ to the Court as required.

Defendant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid terms of the lease and moves the Court to stay execution on the judgment for summary ejectment until this matter is heard on appeal by the District Court.

This _____ day of _____, 19____.

_____
Defendant

ORDER

Upon execution of the above bond, execution on said judgment for summary ejectment is hereby stayed until the action is heard on appeal in the District Court. If defendant fails to make any rental payment to the clerk's office within 5 days of the due date, upon application of the plaintiff, the stay of execution shall dissolve and the sheriff may dispossess the defendant.

This _____ day of _____, 19____.

_____
Assistant Clerk of Superior Court

G.S. 42-34
AOC-L Form 83
6-79

APPEAL OF SUMMARY EJECTMENT CASES

§ 42-34. Undertaking an appeal; when to be increased.-- (a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it.

(b) It shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant sign an undertaking that he will pay into the office of the clerk of superior court the amount of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below. Any magistrate, clerk, or district court judge shall order stay of execution upon such undertaking. If either party disputes the amount of the payment or the due date in such undertaking, the aggrieved party may move for modification of the terms of the undertaking before the clerk of superior court or the district court. Upon such motion and upon notice to all interested parties, the clerk or court shall hold a hearing and determine what modifications, if any, are appropriate.

(c) In an ejectment action based upon alleged nonpayment of rent where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal. Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease. Notwithstanding, such additional undertaking shall not be required of an indigent appellant who prosecutes his appeal with an in forma pauperis affidavit that meets the requirements of G.S. 1-288.

(d) The undertaking by the appellant and the order staying execution may be substantially in the following form:

State of North Carolina,
County of _____

_____, Plaintiff

vs.

_____, Defendant

Bond to
Stay Execution
On Appeal to District Court

Now comes the defendant in the above entitled action and respectfully shows the court that judgment for summary ejectment was entered against the defendant and for the plaintiff on the ____ day of ____, 19__, by the Magistrate. Defendant has appealed the judgment to the District Court.

Pursuant to the terms of the lease between plaintiff and defendant, defendant is obligated to pay rent in the amount of $___per ___, due on the _____day of each ____.

Where an additional undertaking is required by G.S. 42-34(c), the defendant hereby tenders $_____to the Court as required.

Defendant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid terms of the lease and moves the Court to stay execution on the judgment for summary ejectment until this matter is heard on appeal by the District Court.

This the ____day of ____, 19__.

_____

Defendant

Upon execution of the above bond, execution on said judgment for summary ejectment is hereby stayed until the action is heard on appeal in the District Court. If defendant fails to make any rental payment to the clerk's office within five days of the due date, upon application of the plaintiff, the stay of execution shall dissolve and the sheriff may dispossess the defendant.

This _____day of _____, 19__.

_____

Assistant Clerk of Superior Court

(e) Upon application of the plaintiff, the clerk of superior court shall pay to the plaintiff any amount of the rental payments paid by the defendant into the clerk's office which are not claimed by the defendant in any pleadings.

(f) If the defendant fails to make a payment within five days of the due date according to the undertaking and order staying execution, the clerk, upon application of the plaintiff, shall issue execution on the judgment for possession.

(g) When it appears by stipulation executed by all of the parties or by final order of the court that the appeal has been resolved, the clerk of court shall disburse any accrued monies of the undertaking remaining in the clerk's office according to the terms of the stipulation or order.

Article 4

Retaliatory Eviction.

§ 42-37. Defense of retaliatory eviction.--(a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:

(1) a good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42;

(2) a good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;

(3) a government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;

(4) a good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or

(5) a good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.

(b) In an action for summary ejectment pursuant to G.S. 42-26, a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

(c) Notwithstanding subsections (a) and (b) of this section, a landlord may prevail in an action for summary ejectment if:

(1) the tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or

(2) in a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or

(3) the violation of G.S. 42-42 complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or

(4) compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or

(5) the landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; or

(6) the landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit.

§ 42-37.1. Remedies.--(a) If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment.

(b) The rights and remedies created by this Article are supplementary to all existing common law and statutory rights and remedies.

§ 42-37.2. Waiver.--Any waiver by a tenant or a member of his household of the rights and remedies created by this Article is void as contrary to public policy.