Magistrates,
Clerks of Superior Court,
District Court Judges

Administration OF JUSTICE Memorandum

Published by the Institute of Government, The University of North Carolina at Chapel Hill

October 1987 No. 87/03

1987 CIVIL AND MISCELLANEOUS LEGISLATION OF INTEREST TO MAGISTRATES

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This memorandum will discuss legislation enacted by the 1987 General Assembly that affects small claims matters and miscellaneous duties of magistrates. Another memorandum written by Robert Farb and Benjamin Sendor discusses changes in criminal law and procedure.

SALARY AND JURISDICTION

Jurisdiction. The jurisdiction of magistrates or clerks to accept written appearances, waivers of trial and pleas of guilty in worthless check cases was increased to permit exercise of jurisdiction in cases involving checks up to $1,000 by Ch. 355 (H 145). Additionally, the new law allows those few magistrates who are assigned to hear not guilty pleas in worthless check cases to hear cases involving checks not exceeding $1,000. Ch. 355 applies to pleas entered on or after October 1, 1987.

Salaries. Magistrates received a five percent salary increase, effective July 1, 1987. With the increase, the current pay scale for magistrates is as follows:

Length of Service	Salary
Less than 1 year	$14,076
1 or more but less than 3 years	14,808
3 or more but less than 5 years	16,320
5 or more but less than 7 years	17,988
7 or more but less than 9 years	19,836
9 or more but less than 11 years	21,840
11 or more years	24,036

In addition, the General Assembly amended G.S. 7A-171.1(a) to provide that magistrates be given the same longevity pay as state employees covered by

the State Personnel Act. Longevity is given as a lump sum payment annually after 10 years of service. The amount of longevity pay given is a percentage of a magistrate's base pay ranging from 1.5% for ten years' service to 4.5% for 25 or more years of service.

A bill (S 897) that would have expanded the coverage of the current provisions regarding increased pay for full-time employees who meet certain educational or prior employment requirements did not make it out of the appropriations committees.

SMALL CLAIMS MATTERS

Procedure. Two bills deal with small claims procedure. In Atlantic Insurance & Realty Co. v. Davidson, 82 N.C. App. 251 (1986), r'vd 320 N.C. 159 (1987), a question was raised about the procedure for filing an appeal of a small claim from the magistrate to the district court. Neither of the two statutes dealing with in forma pauperis suits or appeals (G.S. 1-110 and -288) specifically cover the situation. Ch. 553, S 648 adds to G.S. 7A-228 a specific provision for appealing from a magistrate in forma pauperis. Within 10 days of entry of a judgment by a magistrate, a party wishing to appeal as a pauper must file an affidavit stating that he is unable by reason of his poverty to pay the costs of appeal and must prove, by one or more witnesses, that he has a meritorious cause of action or defense. Unlike the provisions in General Statutes Chapter 1, the party need not have an attorney sign an affidavit saying that the appellant has a good claim. Within 20 days after entry of the judgment, a judge, clerk or magistrate may authorize the appellant to appeal as a pauper. Usually an affidavit to appeal as a pauper is filed with the clerk of superior court, and magistrates should rule on whether the appeal may be made in forma pauperis only if the clerk sends them the application.

To allow the appeal in forma pauperis, the clerk, judge or magistrate must make findings of fact indicating whether the appellant is unable to pay the costs of the appeal by reason of his poverty and whether he has a meritorious claim or defense. In Atlantic Insur. & Realty Co., the affidavit of the litigant petitioning for appeal in forma pauperis indicated that she was unemployed; her only source of income was a monthly $340 disability payment; her monthly expenses for food, clothing, transportation, utilities and other necessities was $362; she owned an unencumbered home worth $27,150 and personal property worth $250. The district court judge denied the petition to file the appeal in forma pauperis because the defendant owned an unencumbered home. In reversing the finding, the Supreme Court stated: "It is not required that a litigant deprive himself of the daily necessities of life to qualify to appear in forma pauperis. The courts of North Carolina are not going to require a litigant to become absolutely destitute before being granted permission to appear as a pauper." Thus, the court official determining the question of poverty must not rely on one factor alone; he must look at the entire picture of income, expenses and assets in determining the litigant's ability to pay the filing fee.

Ch. 628 (H 1138) was enacted because of an apparent misunderstanding about the law. G.S. 7A-220 had provided that there are no pleadings in assigned small claim actions other than the complaint and answer. G.S. 7A-218 states that an answer is not mandatory while G.S. 7A-219 provides that

counterclaims that would make the amount in controversy exceed $1,500 are not allowed. Apparently it had been argued that counterclaims are not allowed in small claims court because a counterclaim is a pleading other than a complaint and an answer. That argument overlooks the fact that Rule 7 of the Rules of Civil Procedure specifies that the types of pleadings in North Carolina are complaints, answers, reply to counterclaims, answers to a cross claim, third party complaint, and third party answer. Thus, a counterclaim is part of the pleading designated the answer even if the person filing it does not designate it as such. However, Ch. 628 makes it perfectly clear that a defendant in a small claims action may file a counterclaim as long as the amount in controversy does not exceed $1500. It amends G.S. 7A-220 to specify that a complaint is the only mandatory pleading in small claims cases, but that an answer and counterclaim may be filed.

Summary Ejectment. Several bills deal with summary ejectment cases. One issue not answered by the statute in the past has been whether a real property lease provision requiring a late fee is enforceable, and, if so, whether there is any limitation on the amount of the fee. Generally, it has been thought that late fee provisions are enforceable if they are liquidated damages clauses and not penalties. Ch. 530 (H 1126) adds G.S. 42-45 to provide for residential rental late fees. It makes it clear that a lease for rent of residence may include a provision permitting a late fee to be charged if the rent is paid at least five days late, but it limits the fee to the greater of $15 or 5% of the rental payment. The new law also provides that any lease provision contrary to G.S. 42-45 is void and unenforceable. The bill applies to leases entered into on or after July 1, 1987.

Ch 478 (H 1064) also adds G.S. 42-45. (The codifier of statutes will renumber Ch. 530 or Ch. 478 so that one of them will have a different statutory section than the bill indicates.) Ch. 478 allows any serviceman who is transferred more than 50 miles from his current dwelling or who is prematurely or involuntarily discharged or released from the armed services to terminate his residential lease. The serviceman-tenant must give the landlord written notice at least 30 days before terminating the lease. The notice must be accompanied by a copy of the military orders or a written verification signed by the tenant's commanding officer. (An underlying assumption of the new law seems to be that the lease is for one year; however, the termination provisions are not restricted to one year leases and applies to any tenancy for years. It would also apply to a tenancy from period to period if the period was for longer than one month; if the parties had agreed to more than 30 days notice to terminate the tenancy; or if the tenant wanted to leave in the middle of a month when the period was from the first of the month to the end of the month.)

Although the tenant does not have to pay rent past the termination period, he must pay liquidated damages in two instances if his tenancy is for longer than nine months: (1) If he has completed less than nine months but at least six months of the tenancy and the landlord has suffered actual damages due to the loss of the tenancy, the tenant must pay one-half of one month's rent as liquidated damages. (2) If the tenant has completed less than six months of his lease and the landlord has suffered actual damages due to the loss of the tenancy, the tenant must pay liquidated damages in an amount equal to one month's rent. For example, if the tenant had a one year lease and terminated it after three months, he would be required to pay one month's rent

as liquidated damages. However, if the tenant had terminated the lease at the end of nine months, he would not have to pay any liquidated damages. If the tenant has not yet occupied the dwelling and he terminates the lease at least 14 days before he was to occupy the premises, no damages or penalties are due. Ch. 478 applies to rental agreements executed or renewed on or after October 1, 1987. Therefore, it applies to any periodic tenancy as the period begins again on or after October 1. For example, if the tenant has a month to month tenancy beginning or the first of the month, this new law now applies to him. If he has a one year lease ending November 1 with a provision that if the tenant stays after November 1 a new one year lease is created, the new law begins to apply to that lease on November 1.

Ch. 542 (H 1181) deals with the problem of how to remove a person who does not leave a dwelling after it has been condemned as unfit by the city or county. It amends G.S. 160A-443 to create a civil action in the nature of summary ejectment before the magistrate to remove the defendant from a dwelling that has been declared unfit. At least 30 days before filing the complaint, the governing body must serve the occupant with a notice that it has ordered the public officer to proceed to carry out his duties regarding vacating and closing or demolishing the dwelling. Upon the filing of the complaint, the clerk must set the case within ten days of issuance of the summons. The magistrate must enter judgment ordering that the dwelling be vacated and that all persons be removed if the public officer produces a certified copy of an ordinance adopted by the city or county governing board ordering the public official to proceed to carry out provisions of G.S. 160A-443 with respect to the particular piece of property involved. The ordinance must describe the property. The magistrate's judgment must be enforced in the same manner as a summary ejectment judgment, which means that the sheriff must give notice of eviction to the occupant and the city or county must either pay the costs of removal and and one month's storage of the occupant's personal property or give the sheriff a written request to padlock the premises with the defendant's property left inside. The occupant may appeal to district court for a trial de novo. The normal summary ejectment stay of execution bond does not apply to appeals in this case; rather, the occupant must give an bond signed by at least one surety that if judgment is finally entered against the occupant, he will pay the amount of judgment with costs. (That bond provision is probably meaningless since the judgment is not for money but is instead an order to leave the premises.)

Interest Rates on Contract Cases. Ch. 758 (S 428) rewrites the law on the rate of interest on judgments arising out of contract actions to distinguish between consumer and other types of contracts. It amends G.S. 24-5(a) to provide that, for actions filed on or after October 1, 1987, if the judgment is based on a contract under which credit was extended for personal, family, household, or agricultural purposes, interest on the judgment is at the lesser of the contract rate or the legal rate of interest. (In almost all cases, this means that the judgment will draw interest at the legal rate of interest, which is 8%.) However, the new law provides that a contract for the extension of consumer credit that was entered into between October 1, 1985 and October 1, 1987 may draw interest at the contract rate if the contract specifically provides that post-judgment interest is to be awarded at the contract rate. (G.S. 53-173(c) and -176 provide that finance companies may not collect more than 8% interest post-judgment; therefore, even if they have a consumer contract calling for post-judgment interest at the contract rate, that provision would not be enforceable.) If the contract is for non-consumer

purposes, the judgment draws interest at the contract rate if the contract specifically provides that post-judgment interest will be at the contract rate; otherwise, the judgment draws interest at the legal rate.

Since most small claims contract actions are based on the extension of credit for personal, family, household or agricultural purposes, post-judgment interest usually will be at the legal rate. The new judgment form (AOC-CVM-400 Rev. 9/87) specifies that "the plaintiff recover interest at the legal rate on the principal sum from this day until judgment is satisfied." The magistrate should strike through "legal rate" and replace it with "contract rate of x%" in only two instances. First, the contract rate should be awarded if the contract involves the extension of credit for business purposes (in other words the buyer is buying goods for his nonagricultural business) and the contract specifically provides for post-judgment interest to be collected at the contract rate. Second, the contract rate should be awarded if the contract was entered into between October 1, 1985 and October 1, 1987; it was for the extension of consumer credit (but not by a finance company); and it specifically provided that post-judgment interest would be at the contract rate.

Miscellaneous. Chapter 519 (S 818) adds G.S. 1-538.2 to increase the civil liability for shoplifters and employees who steal from their employers. If the shoplifter is an adult, the owner of the property is entitled to recover the value of the goods, if the goods have been destroyed, or to recover any loss of value to the goods if they were recovered. In addition the owner is entitled to recover any consequential damages (damages the owner incurs as a consequence of the shoplifting) and punitive damages, together with reasonable attorneys fees. If actual and consequential damages are assessed, the magistrate must treble those damages. But the statute places a cap of $1,000 total damages for actions based on G.S. 1-538.2. Therefore, if the plaintiff proves that the value of the goods taken was $300 and he claims punitive damages of $500, the magistrate could only award $1,000 instead of $1,400 ($300x3 + $500). In order to collect damages under this new law, the place of business from which the merchandise was taken must have posted a sign in a conspicuous place indicating that civil liability for shoplifting and for theft by an employee is authorized by law.

The new law also holds parents liable for the acts of their children who shoplift if the parents know or should have known of the propensity of the child to commit such an act, had the opportunity to control the child, and made no reasonable effort to correct or restrain the child. However, no punitive damages may be awarded against parents for the acts of their child. Ch. 519 makes it clear that a criminal action or conviction for the same conduct does not bar the civil lawsuit.

Chapter 147 (S 215) amends G.S. 25-3-512 to increase from $10 to $15 the fee merchants may charge for dishonored checks if they post a conspicuous sign indicating the fee for returned checks.

INVOLUNTARY COMMITMENTS

Two bills that affect magistrates amended the commitment law. The major change is found in Ch. 596 (S 841), a bill pushed by the Alliance for the Mentally Ill and other organizations representing family members of mentally

ill persons. The proponents of the bill wanted to provide a method of initiating an involuntary commitment that bypassed the magistrate. Many family members were concerned about the length of time it sometimes took to get a custody order issued by a magistrate and the manner in which they were treated. Also they thought that mental health professionals, not court officials, should be making the initial decision about commitment. Ch. 596 rewrites the emergency admissions law. It does not replace the regular commitment procedures but merely adds a new emergency procedure, deleting the old procedure for handling violent patients. Ch. 596 allows anyone who knows of a person who is (1) mentally ill, (2) dangerous to himself or others and (3) requires immediate hospitalization in order to prevent harm to himself or others to transport the individual (respondent) directly to an area facility or other place, including a state facility, for examination by a physician or eligible psychologist. The physician or eligible psychologist will conduct an examination in accordance with G.S. 122C-263(a). If the examiner finds that the respondent meets the criteria for inpatient commitment and requires immediate hospitalization to prevent harm to himself or others, the examiner is to sign a certificate to that effect. (Presumably if the physician or eligible psychologist to whom the respondent is taken determines that the respondent meets the criteria for commitment but is not in need of immediate hospitalization, he will follow the regular commitment procedure.) The certificate must be notarized by a notary public or sworn to before some other person authorized to administer oaths. Upon issuance of a notarized certificate, the client could then be taken directly to a 24-hour facility. The certificate takes the place of a petition and custody order. When the client is taken to the 24-hour facility, he receives a second examination in accordance with G.S. 122C-266 just as if he had been brought to the facility on the basis of a petition and custody order.

The law requires a physician or psychologist who issues a certificate to send a copy to the clerk of superior court immediately. (Presumably, he will send it to the clerk in the county where he issues the certificate, not the clerk in the county where the facility is located.) The statute provides that upon receipt of a certificate, the clerk in the county where the 24-hour facility is located shall submit the certificate to the Chief District Court Judge. (If the 24-hour facility where the respondent is held is located in a different county from the one where the certificate was issued, the 24-hour facility should send a copy of the certificate to the clerk in its county as soon as the respondent is admitted to the facility.) The chief district court judge of the district where the respondent is being held must review the certificate within 24 hours of its receipt (excluding weekends and holidays) to determine whether it shows reasonable grounds to believe the respondent meets the criteria for commitment. If the court finds reasonable grounds, the respondent has his district court hearing within 10 days after he was taken into custody. (It is unclear whether the respondent was taken into custody when the certificate was issued, when he was taken to the 24-hour facility or when he was admitted to the 24-hour facility. However, an Attorney General Opinion takes the position that the issuance of the certificate begins the running of the 10-day period. Opinion to Judge Patrick Exum, October 2, 1987 by Wilson Hayman, Assistant Attorney General)

What happens when a district court judge holds the commitment hearing before the chief district judge has determined whether there are reasonable grounds for the issuance of the certificate? That situation is very likely to

occur. Assume a certificate is issued for a respondent on Saturday. He is taken to Cherry Hospital and the certificate is mailed to the clerk immediately. The clerk receives it Monday morning. The chief district court judge is holding court in another county that week so the clerk mails the certificate to the judge who receives it on Thursday. He has 24 hours to review the certificate. However, the respondent will be scheduled for his court hearing on Thursday. Should the judge at the court hearing dismiss the case because the chief district judge has not yet ruled on the issue of reasonable grounds or may the trial judge hear the evidence and based on the evidence, determine whether to commit the respondent? The first issue is whether the statute would be unconstitutional (on due process grounds) if a respondent were held for up to ten days without any judicial involvement in the commitment. If the reasonable grounds finding is constitutionally required, the judge at the full hearing might be required to dismiss the case and release the defendant if no reasonable grounds finding had been made. The Attorney General Opinion mentioned above adopts this position. (Another possibility would be for the district judge holding the hearing to rule on reasonable grounds set out in the certificate before proceeding to the full hearing. It seems to me that the real argument is that judicial involvement is required sooner than 10 days, that the respondent must be released after that specific time period if no judicial involvement has occurred, and that since our current statute does not set out a specific time by which that earlier judicial involvement must occur, the statute is unconstitutional.) It is also possible, however, to argue that no judicial involvement before the 10-day hearing is constitutionally required. Several states, including Massachusetts, New Mexico, and New York, have emergency commitment statutes authorizing commitment on a physician's certificate with no judicial involvement until seven days or longer after admission. Massachusetts and New York's statutes have been upheld by the courts. (See 427 F.2d 667 (1970), cert. den. 400 U.S. 882; 722 F.2d 960 (1983). If the procedure were constitutional without the reasonable grounds finding, then the purpose behind the reasonable grounds finding--to release a patient at the earliest point that either a physician or a judge determines there are not sufficient grounds for his commitment. By the time of the hearing, if the a judge has not yet had time to determine reasonable grounds under the time set out in the statute, the judge should rule on the merits of the case, committing the respondent if he meets the criteria and releasing him if he does not.

Another common problem in commitment laws is who must transport the respondent to the physician and to the 24-hour facility. In the regular commitment procedure law enforcement officers are designated to transport respondents under a custody order. The new emergency procedure allows, but does not require, a law enforcement officer to transport the respondent directly to the area facility or other place for examination by a physician or eligible psychologist. The law also allows, but does not require, a law enforcement officer to transport the respondent to a 24-hour facility after a certificate has been issued. (One sentence in the statute provides that if there is no area 24-hour facility and the respondent is indigent, the law enforcement officer or other designated person providing transportation shall take the respondent to a state facility. But that sentence, in my opinion, seeks to identify the facility to which the respondent should be taken, not the person who has the responsibility for transporting the respondent.) Many law enforcement officers will be very cautious about using this new statutory provision since they will have no custody order issued by a court. Therefore,

the procedure will be used mostly when family members take the client directly to the physician and then transport him to the state hospital or other 24-hour facility, if necessary.

The second bill of particular interest to magistrates is Ch. 750 (S 475). Formerly, if a person who was committed as a substance abuser failed to comply with his outpatient treatment, the mental health center could request the clerk to order a law enforcement officer to take the respondent into custody and deliver him to the center for examination. If the respondent needed to be placed in a hospital, he then could be admitted without a new petition and custody order (since he was already under a commitment). The practical problem with the former law was that if the mental health center wanted to have an order issued in the evening or on a weekend, the clerk's office was closed. Therefore, in many instances, magistrates had to re-start the commitment process in order to have the respondent picked up and examined. Ch. 750 now allows the magistrate as well as the clerk to issue the order to the law enforcement officer. If a magistrate receives a written request for an examination order from the local mental health center and the order indicates that the respondent has been committed as a substance abuser and is not complying with his outpatient treatment, the magistrate must issue an order to a local law enforcement officer to take the respondent into custody and deliver him to the facility requested by the center for examination. The Administrative Office of the Courts form order--AOC-SP-204--to be used for this purpose is being revised by the Forms Committee and should be distributed in November.