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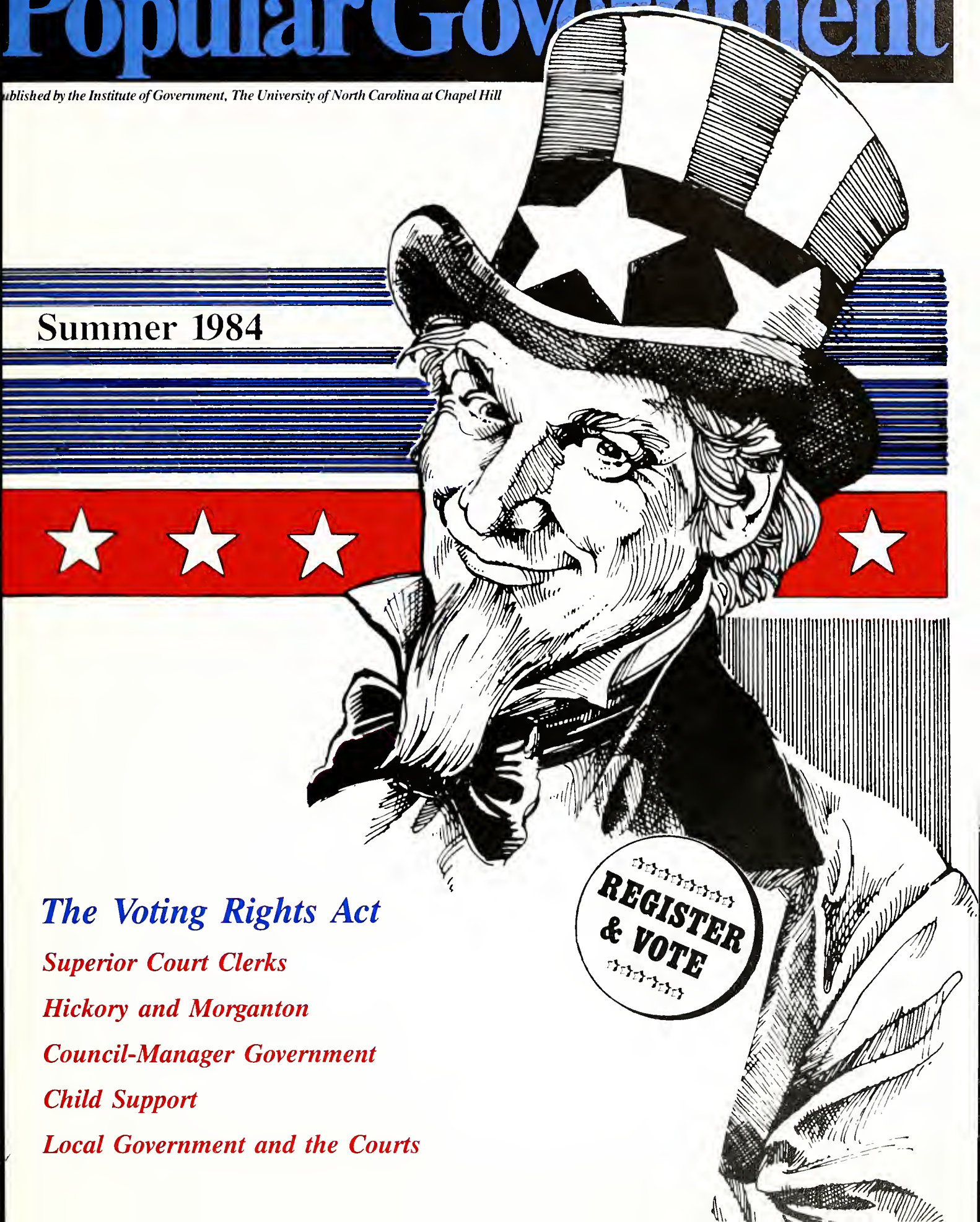

The Voting Rights Act

Superior Court Clerks

Hickory and Morganton

Council-Manager Government

Child Support

Local Government and the Courts

Popular Government
Vol. 50/No. 1
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INSTITUTE OF GOVERNMENT
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The Voting Rights Act in North Carolina—1984

Michael Crowell

The television images remain clear to many of us: The earthen dam near Philadelphia, Mississippi, where the bodies of the three civil rights workers were found. The violence near the bridge at Selma. The long string of marchers on the road to Montgomery. All part of the tumultuous activities of the late '50s and early '60s, many aimed at restoring to blacks the fundamental right of voting.

After the Civil War, blacks had registered to vote in North Carolina—in 1868 about 80,000 of the 200,000 registered voters were black. Black participation and influence in elections varied, but it was always present to some degree until the beginning of the twentieth century. Then the adoption of a literacy test and a poll tax and the practice of a whites-only Democratic primary in much of the state effectively excluded most blacks from the franchise. In the 1940s the United States Supreme Court decided that political parties could not limit their primaries to white voters only, and in the early 1960s the State Supreme Court attempted to halt discrimination in the way the literacy test was applied. Still, in the mid-1960s it was clear that blacks were not as welcome at the polls as whites. In 1940 only about 10 per cent of the eligible blacks in North Carolina were registered. By 1960, only a third were on the rolls—a considerably larger percentage than in other southern states, but far smaller than for white North Carolinians.

In the 1960s a primary goal of the civil rights movement—more violent and more publicized in the Deep South states than in North Carolina—was federal legislation to assure for minorities the

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right to vote. On August 7, 1965, Congress responded by enacting the Voting Rights Act.

This article describes the Voting Rights Act and the changes that have occurred in blacks' voting and officeholding in North Carolina since the act was passed nearly 20 years ago. It summarizes the experience of the 40 counties that have been subject to the requirement in Section 5 of the act that they "preclear" all changes in election procedure with the United States Justice Department. The article gives particular attention to the 1982 amendments to Section 2, which changed the test for showing that an election procedure discriminates against a minority group. The recent legislative districting lawsuit, *Gingles v. Edmisten* (see page 3), shows that the 1982 amendments, which provide that a violation of Section 2 is shown by the *effect* of an election procedure rather than by its *purpose*, may jeopardize the at-large method of election used by cities and counties throughout the state.

History

The original Voting Rights Act attacked voter discrimination in several ways. Section 2 gave citizens and the United States Attorney General the right to sue states and local governments for using voting qualifications or procedures that denied the right to vote because of race. The Attorney General also was instructed to challenge the constitutionality of the poll tax. In 1964 the Twenty-Fourth Amendment to the Constitution had barred the use of poll tax as a prerequisite to voting in federal elections; after the Voting Rights Act passed, the Supreme Court banned the tax for state and local elections as well.

Part of the act applied to only some sections of the country. States and counties that had used literacy or other tests for voting and had fewer than half their total number of eligible voters registered or voting in 1964 were subject for five years to the additional, special provisions of Section 5 of the act. These "covered" states and counties—all of the Deep South states and forty North Carolina counties—were barred from using literacy tests or other voting tests, were subject to the appointment of federal examiners to register voters, and were prohibited from making any change in election law or procedure effective after November 1, 1964, without having it "precleared" (approved) by the United States Justice Department or the federal district court for the District of Columbia (virtually all preclearance in fact is through the Justice Department).

In 1970 Congress extended the temporary provisions of Section 5 for five more years and made them apply to states and counties that had less than 50 per cent registration or voting in 1968. The temporary ban on literacy tests was applied to the whole country. In 1975 that ban was made permanent and Section 5 was extended until 1982. At the same time the act was expanded to deal with discrimination against citizens who do not speak English. Election materials must be provided in the native language of certain minority groups—American Indian, Spanish heritage, Asian American, Native Alaskan—in states and counties where such a group constitutes more than 5 per cent of the voting-age population and has a lower than average literacy rate. The preclearance requirements of Section 5 were also extended to states and counties with significant language minorities (5 per cent or more of the population) and less than half of the eligible citizens registered or voting. Finally, the permanent prohibition in Section 2 against election discrimination was made applicable to the protected language minority groups.

When it extended the act in 1970 and 1975, Congress also lowered the voting age for federal elections to 18 (later made applicable to all elections by the Twenty-Sixth Amendment) and permitted citizens to vote in presidential elections regardless of state residency requirements.

In 1982 Congress amended both Section 2 and Section 5 significantly (see the discussion below). The preclearance requirement in Section 5 was extended until the year 2009. At the same time the act gave blind, disabled, and illiterate voters the right to choose anyone they wish to assist them at the polls, superseding any restrictions a state might have on who can provide assistance.

The act, then, has been revised to confront problems other than racial discrimination, but improvement of blacks' participation in politics remains its primary thrust.

Effect of the act

The South has changed dramatically in the last several decades. It is hard to convince today's children that blacks were once barred from going to school with whites, that drinking fountains were labeled "white" and "colored," that blacks who wished to vote could be asked to recite and explain obscure provisions of the Constitution. The 1965 Voting Rights Act helped accelerate the rate of change in southern society by opening the way for black participation in politics. The most obvious examples of the political change are the election in recent years of blacks as mayors of North Carolina's capital, Raleigh, and its largest city, Charlotte. But beyond those most visible events, how great are the differences?

Accurate voter registration statistics are hard to come by. Before 1966 the State Board of Elections did not publish figures. Any statement of black/white registration before then is just a guess, and for a while after 1966 the State Board grouped blacks with other racial minorities. Table 1 shows the increases in black and white registration since the early '60s—composite estimates based on the published figures of civil rights and voter education groups, Census Bureau publications, and State Board of Elections official registration statements.

The increase in black voter registration in North Carolina has been

The 1984 Application of the Voting Rights Act, Section 2, to North Carolina's State Legislative Districts

The plaintiffs in *Gingles v. Edmisten* (U.S. Dist. Ct., E.D.N.C., No. 81--803-CIV-5, filed 1/27/84) represented all blacks in North Carolina as a class. Their complaint was that the use of multi-member districts for six state House districts and one state Senate district violated Section 2 of the Voting Rights Act by submerging potential black-majority districts in large, predominately white, multi-member districts. They also argued that the drawing of two neighboring single-member Senate districts fragmented a potentially effective black majority for one district between the two and thus diminished blacks' chances of electing a representative in either district. In early 1984 the three-judge panel of the federal district court for the eastern district of North Carolina agreed with those contentions and invalidated the legislative districts, giving the General Assembly an opportunity to redraw the lines itself before the federal judges did so. The General Assembly drew new lines in March and submitted the changes to the court. Meanwhile the state still was pursuing an appeal of the court's decision to the United States Supreme Court. If upheld on appeal, the decision could have a significant impact on the at-large election method widely used by local governments in North Carolina. At a minimum, the decision is instructive in the way a Section 2 lawsuit is tried.

Most of the opinion was devoted not to the effect of at-large elections but to the other circumstances that affect black voting in the seven districts, the context in which the use of multi-member election districts must be considered. The judges traced the history of discrimination against blacks in North Carolina's election process—the use of the poll tax, the literacy test, and the whites-only primary to exclude blacks earlier this century. Voter registration figures similar to those shown on page 1 indicated the lingering effects of those discriminatory practices. The judges also reviewed the discrimination in schools and other public facilities and the resulting disadvantages that blacks have suffered in employment, education, housing, and health. They noted a long history of racial politicking, including subtle appeals to race in the early stages of the 1984 United States Senate campaign. Finally, the court reviewed the disproportionately low representation of blacks in elected offices in the state (see the discussion on p. 3) and in these seven districts and the statistical evidence that whites are far more likely to vote for white candidates than for blacks.

One characteristic of the North Carolina election system that drew particular attention from the court was the majority-vote requirement for party primaries. North Carolina is one of only nine states, mostly southern, with such a requirement, which is often cited as a barrier to the election of blacks to office. For example, in 1982 a black candidate led the Democratic first primary for the second congressional district with 44 per cent of the vote but lost the party nomination when forced into a one-on-one runoff with a white candidate who had only 33 per cent of the vote in the first primary. The court's description of the majority-vote requirement raises the possibility that that provision may be challenged in a separate Section 2 lawsuit. (The 1983 General Assembly rejected legislation to eliminate the majority-vote requirement, at least partly because of the uncertain effect that abolishing the requirement would have on the crowded 1984 Democratic primary for Governor. Proponents of the change did not stress the potential benefit to black candidates so much as the savings that would result from eliminating expensive runoffs in which few people vote and the first primary leader still wins.)

When the multi-member election districts and the two fragmented Senate districts were considered in light of the circumstances described above, the judges found that the districts as drawn had the effect of giving blacks less opportunity than whites to elect representatives of their choice, in violation of Section 2.

The remedy sought by the plaintiffs—and the logical one, considering the nature of their claim—was a requirement that the legislative district lines be redrawn to create single-member districts with substantial black majorities. Because the black percentage of voting-age population tends to be somewhat lower than the black percentage of total population and black registration tends to be lower than white registration, the definition of "substantial black majority" used by the plaintiffs and accepted by the judges was 65 per cent black population.

Unsuccessful in having the district court's order stayed, the General Assembly drew new districts in March. The multi-member House districts for Wake, Durham, and Mecklenburg counties and the Senate district for Cabarrus and Mecklenburg were split into several single-member districts, of which some were predominantly black. For the House districts for Nash-Edgecombe-Wilson and Forsyth, the legislature split off some single-member black districts but left the remaining territory in multi-member districts. The challenged Senate district in the east was reshaped to increase the percentage of blacks.

The new districts were submitted to the court and by mid-May had been approved except the House districts for Nash-Edgecombe-Wilson, which were still under review by the Justice Department for Section 5 preclearance.

When this article was written, the state was still pursuing an appeal of the district court's original decision, primarily because of the precedent the decision will set for challenges to other kinds of at-large elections.

Table 1. North Carolina Voter Registration 1962–84

	1962	1966	1972	1980	1984 (April)
Total voting-age population	2,580,000	2,840,000	3,460,000	4,220,000	4,500,000
White voting-age population	2,000,000	2,180,000	2,670,000	3,300,000	3,500,000
Number of whites registered	1,860,000	1,650,000	1,650,000	2,300,000	2,370,000
Percentage of whites registered	93	82	62	69	68
Black voting-age population	550,000	560,000	665,000	860,000	925,000
Number of blacks registered	210,000	281,000	298,000	440,000	565,000
Percentage of blacks registered	36	51	46	51	61
Percentage of registered voters who are black	10	14.5	15	16	19

Sources: Bureau of the Census; Voter Education Project, Atlanta, Georgia; United States Civil Rights Commission; North Carolina State Board of Elections, North Carolina Voter Education Project, Durham, North Carolina

steady but unspectacular. In other southern states, where registration was much lower to begin with and the civil rights struggle was more violent, the increase was faster and more dramatic. In Mississippi, for example, where black registration was about 6 per cent before the Voting Rights Act passed, registration climbed almost immediately to a third of eligible blacks, and in the next decade it rose to two-thirds. North Carolina, on the other hand, began that same period with a third of eligible blacks registered and gradually increased black registration to about half. Only with the surge in registration for the 1984 primary has the percentage gone appreciably above 50 per cent. Though the rise has not been spectacular, the numbers show that well over 300,000 blacks have been added to the voter registration rolls in North Carolina since the Voting Rights Act passed and that the black registration rate has steadily drawn closer to the rate for whites. (Almost certainly the white registration rate given for the early 1960s—estimated at 93 per cent—comes from out-of-date registration records and is incorrect. More systematic registration procedures and purges make current figures much more reliable.)

Although black registration in North Carolina has more than doubled in the last 20 years, while white registration increased by only a quarter, blacks are still less likely to be registered than whites. The lower black registration percentages are consistent with national studies that show that the more education and income a person has, the more likely he or she is to register and vote—and North Carolina blacks still have noticeably less schooling and lower-paying jobs than whites.

As the state's low level of schooling and low wage rates intimate, registration rates have been lower in North Carolina than elsewhere in the country. Registration in this state has been consistently around 55 per cent or a little higher, about 10 per cent less than the national average. Recent efforts by election officials and anticipation of the 1984 election have just this year brought the rate up to the national average. Although the state has had permanent, year-round registration for a number of years, active efforts on the part of election officials to increase registration have been limited until the current State Board of Elections made expansion of registration rolls its primary aim (State Boards of Election are appointed by each newly elected Governor). The Board appointed by Governor Hunt in 1981 has greatly increased the use of special registration commissioners and has added registration by driver license examiners and the use of library registration throughout the state. When combined with the natural increase in registration that takes place in presidential campaign years, these registration efforts pushed North Carolina's voter rolls to an all-time high in the spring of 1984. The numbers should go up even more for the general election in November. The percentage of eligible blacks registered will remain lower than the percentage for whites, but the gap keeps getting smaller.

The changes over the last 20 years in black officeholding have been much more dramatic than in voter registration. There were virtually no black elected officials in North Carolina when the Voting Rights Act passed. As Table 2 shows, many blacks hold office today. In 1984, when county commissioners from around the state meet, 35 blacks sit among their members— twenty years ago there were none. Similarly, the mere handful of black city council members and mayors in the 1960s has increased greatly to more than 150. But the numbers are not close to representing blacks' proportion of the state's population. The voting-age population of North Carolina has been around 20 per cent black for a number of years. Those 35 black county commissioners are only 7 per cent of all commissioners. Of the

Table 2. Number of Black Elected Officials in North Carolina

Office	1968	1971	1974	1983
Mayors and city council members	9	63	112	151
County commissioners	0	3	13	35
School board members	1	12	29	123
Sheriffs	0	—	2	4
Legislators	0	2	3	12
Judges (trial and appellate)	—	2	—	15
Council of State offices	0	0	0	0
Congress	0	0	0	0

Sources: United States Civil Rights Commission, *The Voting Rights Act: Ten Years After* (1975); North Carolina Association of County Commissioners; North Carolina School Boards Association; North Carolina Local Government Advocacy Commission; Voter Education Project, Atlanta, Georgia; Joint Center for Political Studies, Washington, D.C.

General Assembly's 170 members, 12 are black—only 7 per cent—even though three times as many blacks are serving as state legislators in 1984 as in 1981. The greatest gains have been made in school board elections; in 1983 blacks numbered 13 per cent of all elected school board members.

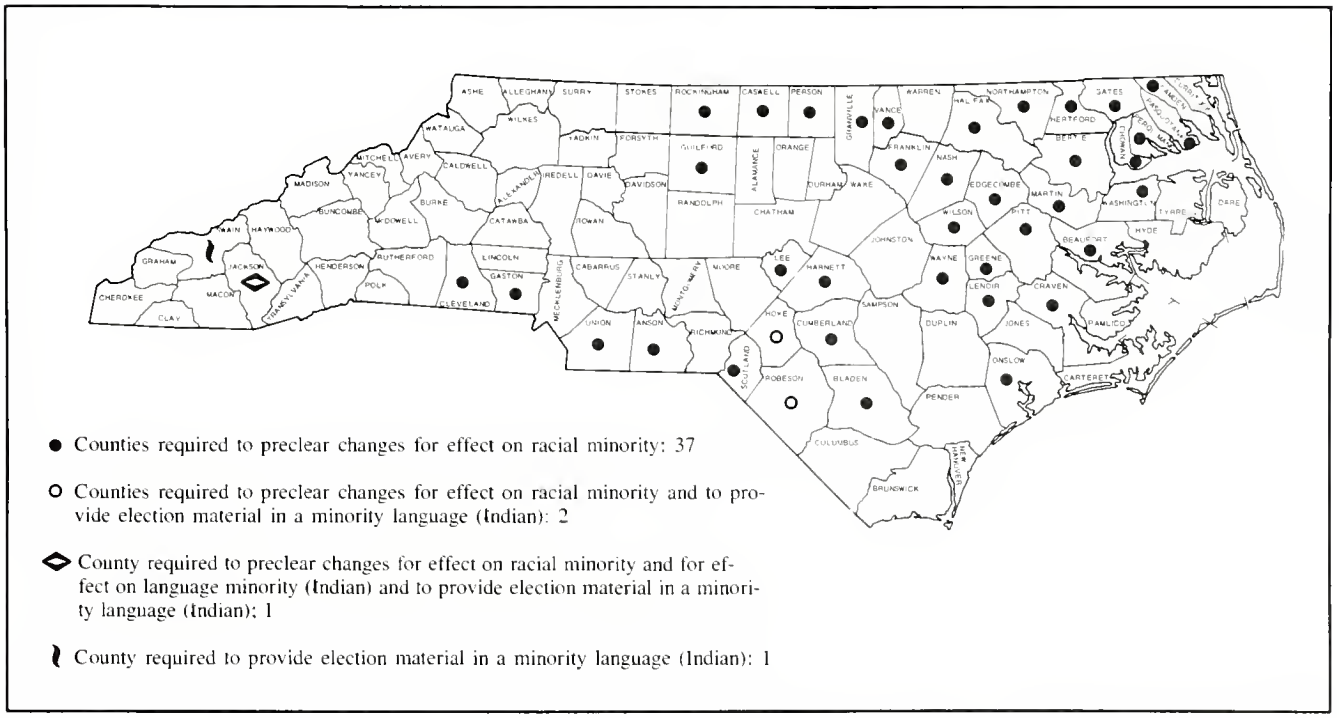
Still, no blacks have been elected to Congress from North Carolina in this century, and no blacks other than judges appointed to fill vacancies have held statewide elected office.

In sum, in the years since the Voting Rights Act passed, black voter registration has increased steadily but only now is beginning to reach its full potential. Because there were so few elected officials, the increase in black officeholding has been much sharper, though black elected representation does not yet come close to the black proportion of the population. Those numbers will change, however, as the number of black voters increases and perhaps (see the discussion of Section 2 below) as more elections are from single-member districts.

Preclearance under Section 5

Forty North Carolina counties are among the jurisdictions that must submit proposed changes in election procedure to the United States Justice Department for review before they may put the changes into effect. Those counties are marked on the map in Figure 1. The review is intended to assure that the changes will not adversely affect the voting strength of blacks. For Jackson County, an additional purpose is to determine the likely impact of the change on its American Indian population. An objection by the Justice Depart-

Figure 1. North Carolina Counties Subject to the Special Provisions of the Voting Rights Act



ment means that the proposed change may not take effect. That decision may be appealed to the federal district court for the District of Columbia, but usually the next step after objection is negotiation rather than appeal.

The preclearance requirement was originally imposed on states and counties that used literacy or other tests for voting and had fewer than half their eligible citizens registered or voting in 1964. North Carolina's statewide registration and voting rates were higher than 50 per cent, so the state as a whole was not—as other southern states were—made subject to Section 5, but registration and voting in 41 counties did fall below the cutoff line, and these counties were made subject to preclearance. One of them, Wake, was able to remove itself from the provisions of Section 5 (see below), leaving 40 covered counties. Later revisions of the Voting Rights Act extended coverage of Section 5 to counties with similarly low registration and voting in elections after 1964 and to those with significant numbers of citizens who do not speak English. The North Carolina counties with language minorities already were covered by Section 5.

Preclearance was instituted to guard against the introduction of new discriminatory practices. In effect, when the Voting Rights Act was enacted, it was presumed that the states and counties covered by Section 5 were discriminating in the election process and therefore should be closely watched to prevent the introduction of new discriminatory practices as old ones were being eliminated.

In the act's early years, the Justice Department was more concerned with provisions of the act other than Section 5, and the jurisdictions that were covered by Section 5 were given little guidance as to the kinds of changes that were subject to preclearance. But by 1970 active enforcement of Section 5 had begun, and the covered areas had to begin learning what was required of them. The Justice Department took a strict view of the kinds of changes that required preclearance, and that view was upheld in several court decisions. In 1965 the Justice Department received only one preclearance submission from all the covered states and counties combined. In 1969 it received only 134, but by 1971 over 1,100 changes were submitted. The national total exceeded 14,000 for 1982.

The Justice Department requires any change in election law or procedure in a covered state or county to be submitted for preclearance, no matter how unlikely it appears that the change will affect minority voting. This requirement includes changes in precinct lines, location of polling places, voting equipment, registration hours and places, qualifications for office, filing fees, voting hours, and registration records. Any proposed change in the terms of office—salary, length of terms, whether terms are staggered—must be submitted. Any change in the method of election (from ward to at-large elections, for example) or in the boundaries of election districts must be submitted, including city annexations. Even the calling of a special election like a bond referendum or a liquor election requires prior approval. The preclearance requirement applies not only to changes in the law but also to changes in policy or practice. Further, it applies to all governmental units and agencies within the covered counties—cities, school boards, and fire districts, for example—as well as to the counties themselves.

The Justice Department realizes that most such changes will not affect black voting strength, but it feels that it can better prevent the introduction of discrimination if it sees all proposed changes rather than allowing the covered jurisdictions to choose which ones are important enough to submit. By late 1983, over 65,000 proposed changes had been submitted for preclearance; only 518 drew objections.

North Carolina's experience with preclearance is much the same as the experience of other areas subject to Section 5. No submissions were made from the 40 covered counties until 1970, when two were made. The number steadily increased until 1975, when there were 293 submissions. Few were objected to. By late 1983 the covered counties had submitted for preclearance just over 2,000 proposed changes in election law and procedure; the Justice Department had objected to only 24 submissions that involved 74 changes. Table 3 indicates the kinds of changes that have drawn objections. The most common objection is to legislative redistricting (statewide redistricting must be submitted because it affects the 40 covered counties). Although 42 municipal annexations have been objected to, 36 of these involved the same city (Rocky Mount) and were made together in 1977. By the end of 1983 only two other cities—Greensboro in 1982 and New Bern in 1980 and 1982—had had annexations objected to. Changes in the method of election—switches from ward to at-large election or vice versa—have become more likely to draw objections in recent years.

What those figures do *not* show is the number of changes that were not submitted for preclearance but should have been. Although the State Board of Elections submits for preclearance changes proposed to be made statewide, most changes are initiated locally, and the burden of complying with Section 5 falls on the local officials in the 40 counties. Not surprisingly, there is inconsistency in the thoroughness with which the preclearance is observed. Many local officials are not aware of the Justice Department's strict interpretation of the preclearance requirement and do not submit changes. That raises the possibility that a later submission will prompt a Justice Department review that finds previous changes that were never precleared. There is no statute of limitations on objections; the Voting Rights Act is clear that any change in election law or procedure made since November 1, 1964, that was not precleared is invalid under federal law. Undoubtedly a number of

Table 3. Objections in North Carolina Under the Preclearance Provisions of the Voting Rights Act, 1965-83 (total of 2,001 changes submitted from North Carolina)

	Number of objections	Number of changes involved	Years
Annexations			
City annexations	4	42	1977, 1980, 1982
School district annexation	1	3	1975
Matters associated with legislative or congressional districting (district lines, numbered posts, crossing county lines)	6	12	1971, 1981, 1982
Local elections (county, city, school board)			
District lines	2	2	1975, 1983
Method of election (at large; majority vote)	7	7	1971, 1975, 1978, 1980, 1982, 1983
Staggered terms	4	4	1975, 1977, 1978, 1979
Voter qualifications	1	1	1975
State literacy test	2	2	1971
Location of polling place	1	1	1978
Totals	24*	74	

* The numbers in the column add to more than 24 because several objections fall into more than one category and are listed more than once.

Source: Civil Rights Division, United States Department of Justice.

changes—annexations, relocation of polling places, salary increases, etc.—have been made in the 40 counties but were not precleared, including those that surely were made between 1965 and 1970, when no changes were submitted from North Carolina.

Bailing out. The 1982 amendments to Section 5 give new reasons to comply with the preclearance requirement. That year Congress rewrote the criteria for a jurisdiction to "bail out"—that is, to remove itself from the coverage of Section 5. Previously, in order to bail out, a county had to show that it had not used a literacy or other test in a discriminatory manner since Congress outlawed such tests in 1965. Wake County, originally covered, bailed out under that statute; Gaston County tried and failed. But the 1982 amendments change the bail-out rules. Beginning August 5, 1984, a county will be able to remove itself from the preclearance requirements of Section 5 if it can show that for the preceding *ten years* each of the following is true:

—The county has not used any discriminatory voting test;
—It has not been found in violation of the Voting Rights Act;
—It has had no federal examiners appointed (federal examiners have been appointed for only one of the 40 counties, Edgecombe in 1984)
—It has submitted all election changes for preclearance;
—It has had no change successfully objected to;
—It has eliminated all discriminatory election procedures; and
—It has taken positive steps to increase participation of minority groups.

For the last of those requirements, the county must show increases in minority registration and voting. The statistics are favorable. From 1962 to 1984 black voter registration increased significantly in all forty counties. In 30 counties, black registration doubled; in seven of those it more than tripled. White registration decreased in five of the counties during the same period; in only two did it double. In three counties—Bertie, Hertford, and Northampton—blacks now are a majority of registered voters.

The hardest bail-out criterion for a county to meet will be the requirement that all election changes have been submitted for preclearance. But the chance to be relieved from submitting changes in the future should now be a strong incentive to comply fully with preclearance.

Section 2 and at-large elections

While Section 5 is an important factor in the conduct of elections in 40 North Carolina counties, the whole state may be affected dramatically by the other major provision of the act, Section 2, as it was rewritten in 1982.

Section 2 is a general prohibition, applicable nationwide, against election practices or methods that discriminate by race. It is the statute under which a citizen may sue a state or local government claiming that an election scheme puts blacks or a protected language minority group at a disadvantage. Before 1982, success in a Section 2 lawsuit required proof that the election provision in question had been adopted for the *purpose* of discrimination. That was the interpretation given the law by the United States Supreme Court in 1980 in *Mobile v. Bolden*, a lawsuit brought to challenge the at-large election of city council members in Mobile, Alabama. The challengers in that case argued that the use of an at-large elec-

tion system enabled whites, voting together, to keep blacks from electing their fair share of council members. What the challengers sought was election from wards, with the boundaries drawn so that blacks would be assured of a voting majority in a number of wards that was proportionate to their percentage of the population. Since the evidence did not show that the at-large system had been adopted with the intent to keep blacks from being fairly represented, the Court found no violation of Section 2.

In its 1982 deliberations on the Voting Rights Act, Congress rejected the Court's view of Section 2. The 1982 amendments provide that Section 2 is violated when an election method has the *effect* of discriminating, regardless of the *intent* in adopting the method. Discrimination under the statute means that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice."

Congress also decided that whether an election procedure discriminates should be judged not by the procedure alone but rather by its effect when all the other circumstances bearing on minority voting strength in the particular city, county, or district are considered. The congressional committee reports spelled out the most important circumstances to be considered:

—Whether there is a history of official racial discrimination in the election process in that jurisdiction.

—The extent to which voting is polarized by race, particularly the extent to which whites vote only for white candidates.

—The extent to which other aspects of the election system contribute to the opportunity for discrimination.

—The extent to which the minority group still bears the effects of discrimination in areas like health, education, and employment—disadvantages that affect the ability to participate effectively in the political process.

—Whether racial appeals have been used in political campaigns.

—The extent to which members of the minority group have been elected to office.

At issue, then, in a Section 2 lawsuit is whether a particular election scheme (say, at-large elections or the use of staggered terms), when considered in light of other circumstances in the jurisdiction (such as a history of racial discrimination, polarized voting, or lower socioeconomic status for blacks), results in blacks' having less opportunity than whites to participate in the political process and elect their candidates.

The potential impact of the new Section 2 is illustrated by *Gingles v. Edmisten* (see page 3), a challenge to North Carolina's legislative districts. The case is the first decision in the state involving the amended Section 2—and one of the first in the country. The federal district court's holding—that the use of multi-member districts for the election of state legislators dilutes black voting strength, in violation of Section 2, and that multi-member districts should be replaced with single-member districts—could be applied to invalidate the at-large method of electing most county commissioners and city council members in the state. The circumstances that affect black voting in almost any county or city in the state—the history of the literacy test and the poll tax and the whites-only primary, racial appeals in campaigns, lower socioeconomic status for blacks, etc.—will be the same as those described in *Gingles v. Edmisten*. And although the numbers will differ somewhat from county to county, the history of polarized voting and the poor record of electing blacks to office is fairly uniform throughout North Carolina.

Most North Carolina local governments use at-large elections. In fifty-five counties, boards of commissioners are nominated and elected at large, and another 34 counties require only that commissioners reside in particular districts and permit them to be elected at large. In 1983 only 17 of the 358 cities of more than 500 population used a straight ward system of election. Several others used a combination of ward and at-large elections, an increasingly popular system in the larger cities. For example, Charlotte elects seven council members from wards and four at large; Durham elects half of its 12 council members from wards; Greensboro, five from wards, three at large; and Raleigh, five from wards, two at large.

Local governments may expect more Section 2 lawsuits challenging their at-large elections or pressure from local citizens to make the change before a suit is brought. Suits have already been brought against three counties and two cities by the NAACP, and the issue of single-member districts has been raised in several other localities. Cities and counties have authority to switch to ward systems without action by the General Assembly. The county commissioners may do so by submitting the change to a county referendum. A city council may establish wards on its own, or may submit the question to a referendum, or may be forced to hold a referendum by a petition of city voters. The same kinds of changes could be made for cities and counties by the legislature, which may have to consider the issue if the number of challenges to at-large elections increases.

It might be noted that ward systems were fairly popular throughout the country until early this century, when reformers sought to replace them with at-large elections. It was thought that large city councils with members elected from wards tended to hinder the efficient operation of local government because the council members were interested only in the needs and views of their particular areas. The national reform movement believed

that the widespread adoption of smaller councils with the members elected at large represented more fully the interests of the entire community.

Summary

In the nearly twenty years since the federal Voting Rights Act was passed, black participation in North Carolina politics has gradually increased and in recent years has shown significant gains. Black voter registration, though it has grown more slowly in North Carolina than in Deep South states, is now close to the rate for white voters. But black candidates still have a significantly lower chance of being elected to office than do whites. In those forty counties that are subject to the preclearance requirements of the act, few changes in election procedure draw objections from the Justice Department, but it seems likely that many changes are not being submitted. Most likely to draw objections now are changes related to the at-large method of election. At-large systems already in place—as they generally are throughout the state—are also subject to challenge under Section 2 of the act, which applies to the entire state. The courts are just beginning to interpret the revised Section 2, but the first trial decisions indicate that it may be a powerful weapon for directing local government in North Carolina toward a ward system of politics. **pg**

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The Judicial Responsibilities of Clerks of Superior Court

Suzie Ross

The clerk of superior court in North Carolina is an integral part of the administration of justice, but most people know very little about the complexity or diversity of his[1] responsibilities (see the list that appears on page 15). Although clerks are elected officials, most voters would probably be surprised to learn that clerks have important judicial responsibilities, because the title "clerk" is misleading. The clerical task of filing and maintaining court records—the major function of clerks of court in other states—is only a part of the clerk of superior court's job in North Carolina.

In this state, the clerk has four major areas of responsibility. His most important role is that of judge. As a judicial officer of the superior court and ex officio judge of probate, he has many judicial responsibilities. In addition, he is a record keeper. He keeps the records for the court system and maintains custody of many other county records. He is an administrator. He manages an office that typically has a large staff and a high volume of transactions. Finally, he is a comptroller. He holds, manages, invests, and disburses large sums of money.

The clerical, administrative, and comptroller functions of the office are the jobs that clerks of court perform in other states. But the judicial responsibilities of the clerk in North Carolina are unique; clerks in other states do not have significant judicial authority. To understand what the clerk of superior court does and why he has this unique judicial responsibility, we need to look at the history of the office.

Origins of the clerk's office

The modern-day office of the clerk began in the North Carolina Constitution of 1868, which provided for a clerk of superior court to be elected in each county. The 1868 Constitution and the Code of Civil Procedure adopted by the General Assembly in the same year gave the clerk judicial jurisdiction in three major areas: (1) probate, estates, and guardianships; (2) special proceedings; and (3) ancillary civil jurisdiction, such as practice and procedure.

The clerk was well suited to assume these responsibilities, which required that the judicial official who would perform them have continuity in office and be available when needed. Because of North Carolina's judicial rotation system, which dates from 1790,[2] a superior court judge was present in each county to do the court's business for only a designated number of weeks a year. On the other hand the clerk, an elected judicial official of the superior court, was *always* present and ready to do business in each county. Since he served a term of four years and usually several terms, he also provided continuity. Looking at the areas legislated to the clerk, we see that the clerk's availability and continuity were helpful. For example,

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1. The masculine pronoun is used in this article only for the sake of simplicity. There are currently 45 female and 55 male clerks of superior court in North Carolina.

2. See Campen, *North Carolina's Judicial Rotation System*, POPULAR GOVERNMENT 23 (Spring 1981). For a historical background of the court system, see 24 POPULAR GOVERNMENT (March 1958).

as judge of probate, the clerk could authorize a decedent's personal representative (that is, the person named to administer the decedent's estate) to begin the administration of an estate, and also could audit the final account when the estate closed a year later. Similarly, the clerk could appoint guardians of minors or incompetents and be available to provide supervision and to audit the annual accounts submitted by the guardians. And in special proceedings, like partitions of property, the clerk could supervise the on-going procedure that was not disposed of in one hearing.

The clerk's civil jurisdiction was based primarily on his availability. The General Assembly made summonses returnable to the clerk and authorized the clerk to rule on procedural motions as a matter of convenience and economy to the parties. Rather than having to wait for a term of court, parties could submit pretrial motions to the clerk, factual disputes could be defined, and the case could be scheduled for trial by the judge. It made equal sense to give the clerk jurisdiction over pre- and post-trial remedies like claim and delivery and writs of execution. (These remedies are explained in footnote 11.)

In the absence of the superior court judge, the clerk exercised the authority of the superior court in matters within his jurisdiction. But his authority was and still is circumscribed in two important ways. (1) When issues of fact were disputed by the litigants, the case had to be transferred to a judge for trial; and (2) judgments and orders of the clerk could be appealed to the judge. So although the clerk had the full authority of the superior court, the right to a jury trial was preserved by providing for the transfer of issues of fact, and the clerk's actions were always reviewable by the judge.

The office of clerk of superior court remains in essentially the same form as originally conceived. Although the clerk has many additional responsibilities today, he retains the basic jurisdiction granted to the office in 1868—estates and guardianships, special proceedings, and ancillary civil matters. When the court system was re-evaluated and reorganized during the court reform that began in the 1960s, the office of the clerk survived as designed over 100 years ago.

Having established the origins of the clerk's judicial responsibilities, let us look at the specific areas within the clerk's jurisdiction and examine his judicial role. We will then be able to understand one of the least understood and most confusing aspects of the clerk's office—his powers compared with those of the superior court judge.

The clerk as ex officio judge of probate

The administration of estates. The clerk's most important judicial responsibility is his jurisdiction over the probate of wills and the administration of decedents' estates. A will is a legal declaration of a person's wishes as to the disposition of his property after he dies. No person has a natural, inherent right to make a will; the right to devise property is granted and regulated by statute. Probate is the procedure required to prove the validity of a will. When a will is offered for probate, the clerk conducts a hearing to establish that the instrument in question was executed in a manner prescribed by law and constitutes the last will of the deceased.

When someone dies, the clerk appoints a person known as the personal representative to represent and administer the decedent's estate.[3] The personal representative's job is to collect and account for the estate's assets and to pay debts and taxes. He then distributes the property according to the decedent's will, if any, or according to the laws of distribution that apply when a person dies without a valid will. The personal representative must apply to the clerk for a certificate of authority, known as "letters of administration." If the clerk determines that the applicant's qualifications are legally sufficient, he issues the letters, which certify that the personal representative has the authority to receive and administer the assets that belong to the estate.

The clerk is responsible for supervising the personal representative's administration of the estate. He does this primarily by reviewing the reports that the personal representative is required by law to file while he is administering the estate. These include a preliminary inventory of assets, which the personal representative files with his initial application for letters; a 90-day inventory, a complete listing of the estate's assets that is due within 90 days of the representative's appointment; and a detailed final accounting of the estate—including all assets, income, disbursements, and distributions—which is filed when the administration of the estate is complete. The clerk carefully audits these reports for legal sufficiency and accuracy.

Auditing estate inventories and accounts is a difficult and extremely important job. In many cases, the clerk is the only person to review the accounting proposed by the personal representative. He is in a unique position to be watchful of the interests of the heirs, devisees, and creditors, who are generally not represented. Although the clerk does not interpret the will (that is the legal responsibility of the personal representative), as a practical matter he reviews and approves the personal representative's interpretation when he accepts the report on the distribution of assets.

In connection with approving these reports, the clerk performs another

3. Generally, an executor named in the will is appointed as the personal representative of a testate decedent (one who dies with a will) and an administrator is named as the personal representative of an intestate decedent (one who dies without making a will).

important judicial function—he is responsible for setting the personal representative's commission (fee).[4] The amount of the commission is within the clerk's discretion, subject to a statutory upper limit that is based on a percentage of estate receipts and disbursements. The clerk considers the time, responsibility, difficulty, and skill involved in managing the estate.

Nature of the clerk's jurisdiction over estates. By statute, jurisdiction over probate is vested in the superior court, to be exercised by the clerk of superior court as ex officio judge of probate. The clerk acts as a judicial officer of the superior court, not as a separate court, but his jurisdiction is original and exclusive. It is not shared with a superior court judge, except in the unusual case in which the clerk is disqualified to act because of a personal interest in the estate. A superior court judge has jurisdiction to hear estate and probate matters only on appeal or caveat (a challenge to the validity of the will that is transferred to the superior court for trial by jury).[5]

The judge is not authorized to retain and dispose of estate cases that are transferred on a caveat or appealed. When the issues are settled, he must remand the case (that is, send it back) to the clerk, who proceeds with the administration of the estate. As we shall see, this situation is unlike other areas within the clerk's jurisdiction, such as special proceedings and civil actions in which the judge retains the case and disposes of it as if it were originally before him. The clerk's special probate jurisdiction, which is derived from the office of judge of probate court,[6] is separate and distinct from his general duties and jurisdiction as clerk.

Incompetency proceedings and guardianships

The clerk has the important responsibility of conducting incompetency proceedings, which are statutory procedures to determine whether a person is competent to manage his affairs.[7] In some cases the clerk may decide competency by himself, but usually he empanels a jury[8] to hear evidence and decide whether the respondent (the person who is the subject of the proceeding) is indeed incompetent. The clerk or an assistant presides over the hearing, rules on the admissibility of evidence offered, and instructs the jury as to the law in the case. If the person is determined to be incompetent, the clerk appoints a guardian for him. The guardian is under the clerk's supervision and must file regular accountings, which are audited by the clerk.

Special proceedings

The clerk has statutory authority to hear numerous "special proceedings." The statute defines a special proceeding as every remedy other than an "action,"[9] but the nature of a special proceeding is best defined by illustration. For example, special proceedings include:

—*Partition of land:* A joint owner of property seeks judicial division of land owned with another.

—*Sale of land to create assets:* A personal representative seeks authority to sell estate property when liquid assets are insufficient to pay the debts of the estate.

—*Sale of an incompetent's property:* The guardian or spouse of an incompetent person seeks authority to sell his property.

—*Resignation of trustees and guardians:* A trustee resigns his trust and the clerk appoints a successor.

—*Boundary proceedings:* The owner of land seeks settlement of a boundary dispute.

—*Proceeding to determine ownership of surplus proceeds from a foreclosure sale:* The trustee who has conducted a foreclosure sale seeks determination of who is entitled to the funds that remain after the debt is satisfied.

—*Adoption:* The petitioner seeks to establish a legal relationship of parent with an adopted child.

—*Legitimation:* The father of a child born out of wedlock seeks to have the child declared legitimate and to establish his parental rights and obligations.

—*Change of name:* A person seeks to change his name by court order.

Special proceedings differ from civil actions in that they frequently are not contested—that is, no one opposes the relief sought by the petitioner. Most are not disposed of in

4. N.C. Gen. Stat. § 28A-23-3. The clerk, however, does not set attorney's fees for services rendered to the estate. Attorney's fees are an expense of administration that the clerk reviews and approves if they appear to have been reasonably necessary. But the personal representative is primarily obligated to pay attorney's fees by contract, and the fees are not legally a debt of the estate.

5. Estate of Adamee, 291 N.C. 386 (1976).

6. The Constitution of 1868 gave clerks of superior court general probate jurisdiction as judges of probate. The Constitutional Convention of 1875 struck out that provision, and since then the clerk's probate jurisdiction has been statutory. The office of probate judge was abolished by statute, which transferred the duties that the clerks had previously performed as judges of probate to them as clerks of court. Clerks now sign their orders and judgments "Clerk of Superior Court, Ex Officio Judge of Probate." Although the office of probate judge was abolished, the special probate powers and duties of the clerk have continued to be distinct and separate from their general duties as clerk of the court to which they belong.

7. There are two alternate procedures under G.S. Chapter 35 that apply to different types of alleged incompetents. G.S. Ch. 35, Art. 1A is a procedure for determining competency of the following kinds of adults: mentally retarded, epileptic, cerebral palsied, autistic, and mentally ill. G.S. Ch. 35, Art. 2A applies to persons alleged to be incompetent from want of understanding to manage their own affairs, or inebriate by reason of excessive use of alcohol, narcotics, and drugs (including the mentally ill).

8. In proceedings filed under Article 2, a jury is required. Under Article 1A, the respondent (that is, the person alleged to be incompetent) has a right to a jury trial on request, or the clerk may require a jury trial even if the respondent does not request a trial or affirmatively waives his right in writing. N.C. Gen. Stat. § 35-1.16(c).

9. *Id.* § 1-3.

one hearing but require the clerk to maintain continuing supervision. Also, many special proceedings—such as sales of land to create assets—are conducted during the course of administering an estate. In conducting special proceedings the clerk acts for the superior court, and his judgments are final judgments of that court unless they are revised on appeal. Because of the nonadversarial nature of most special proceedings, the clerk has a particular responsibility to examine all material presented to the court critically and carefully.

The judicial responsibilities of clerks of court in North Carolina are unique . . . responsibilities that the clerk historically has been well suited to fill.

Civil jurisdiction

In a civil action, one party prosecutes another party for the enforcement or protection of a right or the redress or prevention of a wrong.[10] Civil actions relate to and affect individual rights and include, for example, suits for breach of contract and personal injury. They are usually heard by judges of the district or superior court. Although the clerk hears some civil actions, his civil jurisdiction extends primarily to areas ancillary to civil actions.[11]

The clerk has broad jurisdiction in procedural matters, particularly before trial, as we will see later. He also has jurisdiction to enter judgments in uncontested cases including voluntary nonsuit, consent judgments, confession of judgment and default judgments—cases in which the judgment is either agreed on or not opposed.

Another civil matter commonly heard by the clerk is foreclosure under a power of sale.[12] The clerk's responsibilities with respect to foreclosures under a power of sale are typical of the civil actions that the clerk hears. A deed of trust, executed by a borrower to secure the repayment of a sum of money, places title to real property in a trustee and gives him the authority to sell the property (the "power of sale") if the borrower defaults on his obligation. The statutes empower the clerk to issue an order for sale that authorizes the trustee to sell property to satisfy the default. Before he issues the order, the clerk conducts a hearing to determine the right to foreclose. He must specifically find that (1) there is a valid debt; (2) there has been a default, usually failure to make a payment; (3) there is a right of foreclosure; and (4) proper notice has been given. If he can make these four findings, he then issues an order for sale. After the trustee conducts the sale, the clerk reviews the trustee's report of sale, orders resale when a higher bid is received, confirms resales, audits the trustee's final report, and records the sale.

The clerk's relationship to the superior court

The clerk is a judicial official in the Superior Court Division of the North Carolina General Court of Justice, not a separate court.[13] His jurisdiction in relation to the superior court and superior court judges is confusing, but it is important to understand this subject if we are to define the limits of the clerk's jurisdiction and the judge's authority to review and dispose of cases originally begun before the clerk.

Constitutional authority. A convenient way to begin discussing the relationship between the clerk and the superior court judge is to note the differences in the constitutional grants of jurisdiction to the court and the clerk. The North Carolina Constitution grants the superior court "original general jurisdiction throughout the state, except as otherwise provided by the General Assembly." The superior court is a court of *general* jurisdiction and has jurisdiction over all controversies that may be brought before a court, within the legal bounds of rights and remedies. It not only has the jurisdiction set forth by law but also has inherent common law and equitable jurisdiction—the nonstatutory body of law that originated in England and is an organic part of our jurisprudence unless modified by statute.[14]

In contrast, the Constitution provides that "the Clerks of the Superior Court have such jurisdiction and powers as the General Assembly prescribes by general law." The clerk,

10. *Id.* § 1-2.

11. That is, his jurisdiction extends primarily to proceedings that aid in the prosecution or enforcement of the principal action, either before the trial of the action or after judgment in the action. An example of an ancillary remedy before trial would be claim and delivery, in which a plaintiff seeks to recover possession of personal property that is the subject of the litigation. An example of an ancillary remedy after judgment would be an execution in which the prevailing party seeks to enforce the judgment by securing a judicial sale of the judgment debtor's property. Other ancillary remedies within the clerk's jurisdiction include attachment and garnishment, arrest and bail, supplemental proceedings, setting aside exemptions, and judicial sales.

12. See page 15 for a complete listing of the clerk's civil jurisdiction.

13. *Id.* § 7A-40.

14. N.C. CONST. art. IV, § 12(3); *In re* Estate of Smith, 200 N.C. 272 (1930).

then, has *limited* jurisdiction—he can do only what the statutes specifically authorize him to do.[15]

Statutory authority of the clerk. G.S. 1-7 and G.S. 1-13 make a broad grant of power to the clerk. These provisions were part of the original Code of Civil Procedure enacted by the General Assembly in 1868, and they have remained virtually unchanged. The statutes give the clerk the power to act for the superior court as follows:

> § 1-7. In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which case the judge of the court alone is meant.
>
> § 1-13. The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular session is expressly referred to.

These statutes give the clerk broad authority to act for the superior court. They implement the scheme of the 1868 Code of Civil Procedure in which cases were filed with the clerk outside of term time (that is, when a judge was not presiding in the county) by empowering the clerk of court to hear matters like procedural motions that the code authorized "the court" to hear.[16]

By virtue of these statutes, the clerk has the same authority today. Civil actions are instituted in the office of the clerk,[17] and the clerk may hear any matter that General Statutes Chapters 1 and 1A authorize "the court" to hear,[18] including motions for extension of time, to allow amended and supplemented pleadings, to order new parties to an action, to grant involuntary dismissal for failure to prosecute, and any other motion authorized by statute in which a judge is not specifically referred to.

Defining the limits of the clerk's jurisdiction. The statutes that authorize the clerk to act for the superior court are broad and sometimes confusing in the modern context. They say that, when jurisdiction is conferred on the superior court, "superior court" *means* the clerk and that the clerk has jurisdiction over all questions of practice and procedure and *all other matters over which jurisdiction is given to the superior court* unless a judge is specifically referred to. But does the clerk literally have jurisdiction of all matters over which jurisdiction is given to the superior court? In my opinion, the answer is "no."

In interpreting G.S. 1-7 and G.S. 1-13, one must begin with the historical context in which they were enacted in the original Code of Civil Procedure. The purpose of these statutes was to simplify procedure and speed up litigation by authorizing the clerk to act for the court so that the parties would not have to wait for a judge to come to their county.[19] The statutes' purpose was to empower the clerk to act for the superior court in the judge's absence.

Also, these statutes must be construed with the Constitution, which limits the clerk's jurisdiction to that prescribed by statute. G.S. 1-7 and G.S. 1-13 should be read to authorize the clerk to act for the court only if the court is given jurisdiction by statute; they should not be interpreted to give the clerk the court's general jurisdiction, which is constitutional. G.S. 1-7 specifically refers to later statutes with the qualification "[i]n the following sections which confer jurisdiction [on the superior court]," and G.S. 1-13 refers to "questions of practice and procedure and all other matters over which jurisdiction is given to the Superior Court"—that is, jurisdiction *given by statute.* In my opinion, these provisions do not to give the clerk the general common law and equitable jurisdiction of the superior court; such an interpretation would be inconsistent with the State Constitution and the historical background of the statutes' enactment. The authority conferred by G.S. 1-7 and G.S. 1-13 empowers the clerk to act for the superior court only in those areas where the superior court has specific statutory jurisdiction.

Transfer when facts are disputed. An *issue of fact* is considered "joined" (contested) whenever a material fact—one that constitutes a part of a person's legal claim—is maintained by one party and controverted by the other. For example, in a proceeding to partition land, the petitioner must establish that he is a co-owner of the property, while the respondent (his opponent in the pro-

15. N.C. Const. art. IV, § 12(3); McCauley v. McCauley, 122 N.C. 288 (1898); McDaniel v. Leggett, 224 N.C. 806 (1944).

16. Jones v. Desern, 94 N.C. 32 (1886).

17. N.C. Gen. Stat. § 7A-255.

18. Primarily these references are found in the Code of Civil Procedure; undoubtedly, as the code was originally enacted, it was intended that the effect of G.S. 1-7 and G.S 1-13 would be limited to that code. Since those statutes were passed, they have been cited as giving the clerk authority outside of Chapter 1, but the line of reasoning in the cases does not go beyond the underlying purpose of the statute. *See* Thigpen v. Piver, 37 N.C. App. 382 (1978); Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594 (1908); Tillett v. Aydlett, 90 N.C. 558 (1884).

19. An interesting historical footnote is found in the annotation to G.S. 1-13. Because of depressed financial conditions after the Civil War, the legislature suspended the effect of the provision almost as soon as it was enacted. Impoverished litigants did not want speedy justice. To prevent the clerk from having power to decide questions of practice, procedure, and other matters out of term time, the law provided that summonses in all civil actions should be made returnable to the court only during the time that the court was in session and that such questions should be determined during that period only. But it did not affect special proceedings, and the full effect of G.S. 1-13 was reinstated in 1919, when the Crisp Act (1919, c. 304) was passed.

WHAT DOES THE CLERK OF SUPERIOR COURT DO?

(This list will give you an idea.)

The clerk, as a judicial officer of the superior court, has *judicial* responsibilities in the following areas:

—Probate of wills, administration of decedents' estates. G.S. 7A-240, -241; G.S. 28A-2-1.
—Incompetency proceedings. G.S. Ch. 35.
—Guardianships. G.S. Ch. 33; G.S. Ch. 35.
—Testamentary trusts. G.S. Ch. 36A.
—Settlement of partnership affairs of surviving partners. G.S. Ch. 59, Art. 3.
—Administration of small estates. G.S. 28A, Art. 25.
—Temporary estate administration by collectors. G.S. Ch. 28A, Article 11.
—Special proceedings (more than 40 different proceedings). G.S. 1-3; G.S. 1-393.
—Attorneys-in-fact (i.e., persons with power of attorney). G.S. 32A-11.
—Writs of execution. G.S. 1-305.
—Attachment and garnishment. G.S. 1-440.1.
—Arrest and bail. G.S. 1-411.
—Supplemental proceedings. G.S. 1-352.
—Claim and delivery. G.S. 1-474.
—Setting aside exemptions. G.S. 1C-1601.
—Foreclosure under power of sale. G.S. 45-4.
—Summary remedy of surety against principal. G.S. 26-3.
—Judicial sales. G.S. 1-339.1.
—Foreclosure of tax liens. G.S. 105-374.
—Voluntary dismissals. G.S. 1-209; G.S. 1A-1, Rule 41(a).
—Consent judgments. G.S. 1-209.
—Default judgments. G.S. 1-209; G.S. 1A-1, Rule 55.
—Confessions of judgment. G.S. 1A-1, Rule 68.1.
—All questions of practice and procedure and other matters over which jurisdiction is given to superior court except when a judge or a regular session is referred to. G.S. 1-13.
—Any power or duty conferred on the superior court by statute ("court" means the clerk of superior court unless reference is made to a regular session). G.S. 1-7.
—Written appearances, waiver of trial, and pleas of guilty in certain traffic offenses. G.S. 7A-180(4).
—Issue warrants of arrest valid throughout state, search warrants valid in the county. G.S. 7A-180(5).
—Initial appearance and pretrial release. G.S. 7A-180(6); G.S. 15A, Art. 24, Art. 26.
—Execution of bond forfeitures. G.S. 15A-544.
—Approval of sureties. G.S. 15A-533.
—First appearances when the judge is not available. G.S. 15A-601.
—Determinations of indigency. G.S. 7A-452.
—Written appearances, waivers of trial, pleas of guilty for violations of worthless-check statute. G.S. 7A-180(8).
—Waiver in extradition proceedings. G.S. 15A-746.

The clerk has many responsibilities besides judicial ones. Here is a list of *some* of his other functions.

—Operates unified record-keeping system of all civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and numerous other records required by law. G.S. 7A-109; G.S. 7A-180(3); G.S. 7A-255.
—Maintains judgment docket. G.S. 1-233; G.S. 1-239; G.S. 1-245; G.S. 1-246; G.S. 1-280.
—Keeps public documents for use in the county, including acts of the General Assembly and appellate division reports. G.S. 14-241; G.S. 147-51.
—Issues summons. G.S. 1A-1, Rules 3 and 4.
—Issues subpoenas. G.S. 1A-1, Rule 45.
—Invests money received and held by his office in trust. G.S. 7A-112.
—Receives and administers insurance or other money on behalf of minors and incapacitated adults. G.S. 7A-111.
—Can act as guardian of an incompetent's estate when no other suitable person will serve. G.S. 35-6.
—Can receive funds when a guardian is removed. G.S. 33-53.
—Acts as custodian of funds for upkeep of cemetery plots. G.S. 65-7.
—Administers oaths, takes acknowledgments and proof of execution of instruments. G.S. 7A-103.
—Certifies documents. G.S. 7A-103.
—Maintains a register of licensed bail bondsmen in county. G.S. 85C-29.
—Keeps a list of prisoners with pertinent data compiled from information the sheriff is required to furnish. G.S. 7A-109.1; G.S. 153A-229.
—Acts as agent for the Division of Motor Vehicles to receive driver's licenses that are required to be surrendered. G.S. 20-24.
—Provides the Secretary of Revenue with a list of attorneys who practice law in the county. G.S. 7A-110.
—Sends a report of all divorces and annulments granted in the preceding month to the State Registrar of Vital Statistics. G.S. 130A-111.
—Notifies the Commissioner of Motor Vehicles of commitments of mental incompetents and inebriates. G.S. 20-17.1.
—Notifies the secretary-treasurer of the North Carolina State Bar when an attorney is convicted of any criminal offense, is disciplined, or is found in contempt. G.S. 84-36.1.
—Furnishes county commissioners with a list of licensed sureties. G.S. 109-18.
—Acts as arbitrator when called on to rule on disputes over the school budget between the county commissioners and the county board of education. G.S. 115C-431.
—Fills a vacancy on the county board of commissioners when the board itself does not fill it. G.S. 153A-27.
—Draws panels of jurors and provides clerical assistance to the county's jury commission in compiling the county's list of prospective jurors. G.S. 9-1; G.S. 9-5.
—Nominates candidates for appointment as magistrates. G.S. 7A-171(b); N.C. Const. art. IV, § 10.
—Appoints public administrators and public guardians. G.S. 28A-12-1; G.S. 33-44.
—Is authorized to receive court-ordered child support payments; maintains records of payments due, mails notice of delinquency, calendars hearings, and issues orders to show cause when required. G.S. 50-13.9; G.S. 15A-1344.1.
—Maintains a registry of out-of-state child support orders under the Uniform Reciprocal Enforcement of Support Act; receives and transmits support payments. G.S. 52A-1.
—Maintains a registry of out-of-state child custody decrees and proceedings. G.S. 50A-16.

ceeding) could defend the action by challenging his title.

The clerk acts as the superior court when the statutes specifically authorize him to do so, but he may not be the superior court when issues of fact are contested in proceedings before him.

> All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding session.[20]

This statutory provision is a significant limit to the clerk's jurisdiction. Its purpose is to preserve a party's right to a jury trial.[21] The clerk can, however, decide preliminary questions of fact—those that do not form the basis of the case. For example, in a partition proceeding, if title to the land is not in issue, the clerk may decide whether there should be partition of the land itself or a sale and partition of the proceeds, which is a statutory alternative.

Furthermore, there are two exceptions to the rule that issues of fact before the clerk must be transferred. The first is incompetency proceedings, in which issues of fact are by statute decided before the clerk. Second, in probate and estate administration, for reasons of history and convenience, issues of fact are determined by the clerk subject to review by a judge on appeal. The reasons for this practice are discussed in *In re Estate of Lowther*,[22] which notes that there is no historical right to a jury trial in probate matters and that, in view of the clerk's original and exclusive probate jurisdiction, it made more sense for the clerk to make a full determination of the issues before him.

Appeals from the clerk. All orders and judgments of the clerk may be appealed by an aggrieved party.[23] Appeals lie to the judge of superior court. A judge has the right to review the clerk's decisions, but as a general rule in order for the judge to acquire jurisdiction to hear the case, appellate procedure required by statute must be followed.[24] A formal appeal must be filed unless the judge has concurrent jurisdiction (that is, the statute gives both the clerk and judge jurisdiction, so that the judge has an independent basis to exercise jurisdiction). This means that the correct appellate procedure must be followed in estate matters, special proceedings, and in many areas of the clerk's civil jurisdiction, but it would not be required for matters of procedure or entry of judgments by default, in which the judge has specific statutory jurisdiction to hear the matters.[25]

Although the procedure by which the judge reviews the clerk's orders and judgments is described as an "appeal," the judge functions more as a trial court than as an appellate tribunal; he is not limited to reviewing the record for errors of law and determining whether the facts support the judgment. In all cases except estates, the judge may hear the case de novo—that is, anew—and dispose of it as if it had come originally before him. In estate cases, a judge's power is more circumscribed, but the permitted scope of review is equally broad—as we shall see.

Civil actions and special proceedings. A superior court judge's power on appeal with respect to special proceedings and civil actions is governed by G.S. 1-276. Under that section, ". . . whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction."

By virtue of this section, once the case is sent from the clerk to a judge— generally by transfer or appeal—the judge may "retain and dispose of the case as if originally before him.[26]" This means that he may hear the matter de novo as to the facts and law. The judge may rely on the evidence presented with the appeal papers, he may require presentation of evidence, or he may submit issues to a jury.[27] G.S. 1-276 authorizes the judge to retain and determine the entire controversy; in fact, it *requires* him to do so if requested by a party unless he concludes that justice would be more "cheaply and speedily" administered by remand to the clerk.

G.S. 1-276 gives the judge jurisdiction to hear and determine all cases begun before the clerk subject to two limitations: (1) the case must be a civil action or special proceeding; (2) the case must be *sent* to the judge. Subject to these two qualifications, a superior court judge has jurisdiction over any action or proceeding begun before the clerk.

The requirement that a case be *sent* to the judge is not strictly construed, but it does mean that in some formal way the action or proceeding must be properly presented to the judge—by proper motion or agreement of the parties; by appeal from the clerk, or by formal order or transfer for any ground whatever by the clerk to the judge.[28] G.S. 1-276 does not give the court jurisdiction if the parties fail to

20. N.C. GEN. STAT. §§ 1-174, -273.

21. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594 (1908).

22. 271 N.C. 345 (1967).

23. N.C. GEN. STAT. § 7A-251; id. § 1-272.

24. The procedure for taking appeals from the clerk to the judge is set out in G.S. 1-272 through 1-274, but the detailed provisions contained therein are universally ignored. For example, most clerks do not prepare a statement of the case as required—probably because the judge does not generally function as an appellate tribunal but hears the matter de novo.

25. Muse v. Edwards, 223 N.C. 153 (1943); Gravel Co. v. Taylor, 269 N.C. 617 (1967); Questor Corp. v. DuBose, 45 N.C. App. 612 (1980); Moody v. Howell, 229 N.C. 198 (1948); Freeman v. Hardee's Food Systems, 267 N.C. 56 (1966).

26. McDaniel v. Leggett, 224 N.C. 806 (1944).

27. Hiscox v. Shea, 8 N.C. App. 90 (1970); Deanes v. Clark, 261 N.C. App. 467 (1964); Cody v. Hovey, 219 N.C. 369 (1941).

28. MCINTOSH, N.C. PRACTICE AND PROCEDURE § 193 (Supp. 1970).

take an appeal, but the judge has jurisdiction even if an appeal is premature.

The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him.[29]

The judge has jurisdiction to hear motions brought before him by agreement of the parties. He even has jurisdiction when the clerk has *exceeded* his authority or has no jurisdiction and the case for any good reason is sent to the judge.

G.S. 1-276 clearly gives the superior court judge broad powers of review over special proceedings and civil actions begun before the clerk. But that power of review does not apply to estates. In that area the relationship between the judge and the clerk is more structured because of the nature of the clerk's historical jurisdiction.

Administration of estates. The superior court judge's jurisdiction on appeal from an order of the clerk acting as ex officio judge of probate is described as "derivative." This term means that the judge has no original probate jurisdiction.[30] Except as discussed above in regard to caveat, jurisdiction in probate matters can be exercised by the superior court judge only on appeal. However, the judge's jurisdiction is not derivative in any sense that prevents him from hearing the matter entirely or partly de novo; he may hear evidence and determine the issues anew. Review on appeal even in estate cases is not necessarily limited to review of the record for errors of law. Issues of fact can be heard de novo, but because of the derivative nature of the judge's jurisdiction, the appellant must make a specific exception to the fact contested in order to give the judge jurisdiction. When the clerk is acting as ex officio judge of probate, the permitted scope of the judge's review on appeal is determined by the formal basis of the appeal.

On *appeal from the order alone*, the judge must confine his review to whether the clerk's findings support the order. If he determines that the findings do not sustain the clerk's order, the judge can overrule the clerk's conclusions and substitute new conclusions. But if an appeal is based on an *exception to a finding of fact*, the judge may (a) review the sufficiency of the evidence to support those findings or, (b) determine the facts challenged de novo with or without a jury. He may then affirm, reverse, or modify.[31]

When the judge has resolved the issues of fact and law properly raised for his review, he must then remand the matter to the clerk with an appropriate order or judgment. G.S. 1-276, which gives the judge jurisdiction to retain and determine the entire controversy when a case is sent to the superior court applies only to civil actions and special proceedings; it does not give the superior court jurisdiction in probate matters beyond its authority to hear appeals and caveats.[32]

Summary. In analyzing the jurisdictional relationships between the judge and the clerk, it is helpful to keep in mind three types of cases:

(1) Cases in which the clerk has exclusive original jurisdiction and the judge's jurisdiction on appeal is therefore "derivative" (e.g., probate and estates). In these cases the judge is authorized to determine challenged facts de novo but not to retain and dispose of the case.

(2) Cases in which the clerk is designated by statute as the official before whom the proceeding should be filed, but the judge's jurisdiction on appeal is not derivative because of G.S. 1-276 (e.g., special proceedings). In these cases, if the case is properly transferred, the judge is authorized to hear the case de novo, retain it, and dispose of it as if it were originally before him.

(3) Cases in which the clerk's jurisdiction and the judge's are concurrent (e.g., procedural matters and certain civil areas designated by statute—for example, supplemental proceedings and attachment). In these cases, the judge has an independent basis for exercising jurisdiction and has complete authority to hear a case de novo. **pg**

29. Redevelopment Comm. v. Grimes, 277 N.C. 634, 638 (1971); *see also* Potts v. Howser, 267 N.C. 484 (1966); McDaniel v. Leggett, 224 N.C. 806 (1944); *In re* Nixon, 2 N.C. App. 422 (1968); Perry v. Bassenger, 219 N.C. 838 (1941); Hudson v. Fox, 257 N.C. 789 (1962).

30. *In re* Estate of Adamee, 291 N.C. 586 (1976).

31. *In re* Estate of Lowther, 271 N.C. 345 (1967).

32. *In re* Estate of Styres, 202 N.C. 715 (1932); *In re* Will of Spinks, 7 N.C. App. 417 (1970).

SOME IMPORTANT DATES FOR VOTING IN THE 1984 GENERAL ELECTION

Friday, September 7. Absentee ballots become available by mail.

Monday, October 8. The last day to register to vote and still be eligible to vote in the November election.

Tuesday, October 9. One-stop absentee voting available at the board of elections' office.

Thursday, November 1. 5:00 p.m. deadline for issuing absentee ballot applications and for one-stop absentee voting. A voter who becomes sick after this time may still apply for an absentee ballot until noon on Monday, November 5.

Monday, November 5. All absentee ballots must be returned by 5:00 p.m.

Tuesday, November 6. ELECTION DAY. Polls open from 6:30 a.m. to 7:30 p.m.

Hickory and Morganton

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Trailblazers in Council-Manager Government

Terry A. Henderson

The article by Donald B. Hayman on page 24 of this magazine celebrates the wisdom and courage of North Carolina local governments in adopting the council-manager form of government. Two of these units, Hickory and Morganton, were particular pioneers. They put the new plan into operation almost simultaneously in May 1913, preceded by only two other governmental units in the entire nation—and then by only a few months. This article examines how these two small North Carolina cities happened to become such early leaders.

HICKORY. At the turn of the century, Hickory was known as "The City That Does Things." This booster phrase may have been an understatement. Incorporated in 1874, Hickory had grown faster both industrially and commercially than any of the other comparatively new towns in North Carolina. In 1900 it had a population of 8,000. In the first four years of the new century, many manufacturers and commercial endeavors located there, and the city began an ambitious program of public works. The mayor at that time, J. D. Elliott, was a general contractor with the railroad. His experience was invaluable to the city as it began to build water and sewer systems, install concrete sidewalks, macadamize and improve city streets, organize a city fire department, and fully electrified the town. A local telephone system had been operating since 1888.

With this record of accomplishment, why did Hickory in 1913 establish a form of government, the council-manager plan, so different from its previous form? In good part because of Charles W. Bagby, Hickory's young city attorney and chairman of the committee that drafted the original provisions of the plan adopted in Hickory. Early in 1912 Bagby was reading widely. He was disturbed by the criticism of American municipal government contained in Lord Bryce's *American Commonwealth*. He was also impressed by the success of the burgomaster concept in Germany, in which a single trained professional was responsible for administering the city's affairs.[1] Place this personal interest against the strong nationwide Progessive movement of the time, which had worked for governmental reform at all levels and had spawned such measures as the referendum, recall, and initiative and such administrative innovations as the city manager plan itself. Small wonder that Bagby was persuaded that these new ideas held great promise for Hickory.

Aided by a number of friends, Bagby set out to get the new idea before the public in the municipal election in May 1912. J. A. Lentz, a

The author, assistant executive director of the Western Piedmont Council of Governments, wishes to thank Miss Myra McFall of the *Hickory Daily Record*, Mr. Charles Bagby, Jr., Mrs. C. I. Baucom, and Mr. Charles Penny for their help in the preparation of this manuscript.

1. E. H. Smith, Jr., Charlotte Observer, November 30, 1939, p. 6; Hickory Daily Record, July 25, 1931, p. 7.

local businessman and civic leader, was induced to run for mayor on a platform that pledged to institute the manager form of city government. His opposition was J. D. Elliott, Hickory's most popular political leader and many times mayor, and the race was hotly contested.

Lentz was crucial in the adoption of the council-manager plan. Let's look at his background. In 1915 he helped found the *Hickory Daily Record*, becoming its vice president. Later he founded a successful lumber company. Born in 1859 in Rowan County and an orphan of the Civil War, he had come to Hickory to live with relatives. He served many times as alderman and as a school board member but ran for mayor only once—primarily because of his strong support for the new plan for managing the town's business.

The sponsors of the manager plan believed that the mayoral election would be a strong indicator of public sentiment on the plan. When Lentz won by only five votes (after a recount),[2] they realized that most voters hardly knew what the plan was all about, and they had better remedy that fact. The Chamber of Commerce appointed a committee with Bagby as chairman both to draft a proposed new city charter and to launch a campaign to educate the community about the plan. The committee worked for six months to draft the proposed charter, which was printed and distributed throughout the city. It then held a series of public meetings to hear citizens' comments and answer questions. Perhaps surprisingly, after this public scrutiny the drafters changed only one provision—they struck the clause providing that former mayors automatically serve on the board of aldermen for two years after their terms ended.

The sponsors persuaded Judge W. B. Councill, then state senator from Hickory, to introduce in the 1913 session of the General Assembly a special act that called for submission of the city manager plan, along with other provisions in the new charter, to the voters of Hickory in a referendum to be held on March 17. (In later years, Bagby recalled that that date was suggested by a staunch Irish supporter of the city manager plan who insisted that for bringing good luck at the polls nothing could equal St. Patrick's Day.) The new charter carried by a majority of 35.[3]

The first mayor under the new plan was C. H. Geitner, who had been a council member, a member of the committee that drafted the new city charter, and a strong supporter of the manager plan. Indeed, he had been

2. Hickory Daily Record, July 25, 1931, p. 1.

3. E. H. Smith, Charlotte Observer, November 30, 1930, p. 6.

Hickory's Main Street about 1918.

suggested as a candidate for the first manager. Instead, however, he chose to run—successfully—for mayor under the charter of 1913.

The second choice as manager was George R. Wootten. The year before, he had been appointed city clerk under the Lentz council. When asked to serve as acting manager under the new charter, he reluctantly agreed. Wootten served only one month in the job. (Interestingly, the man who succeeded him as manager, C. M. Sherrill, was the son-in-law of J. D. Elliott, who had campaigned so hard against the plan. Sherrill's brother, C. O. Sherrill, later became a nationally recognized manager in Cincinnati in the 1930s.) Wootten was born in 1875 in Wilson, N.C., and educated there. He later graduated from the Maryland School of Pharmacy in Baltimore. He married a Hickory woman and went to work at Menzies and Harris Drug store in Hickory. He was also a certified public accountant, which explains his appointment as city clerk, a part-time position. After his brief service as manager, Wootten went into the wholesale grocery business; later he became a pharmaceuticals salesman and then an officer of the local savings and loan association.

Hickory received much national publicity as one of the first small cities in the country to try the new system. A full-page picture of Wootten appeared in *World's Work* magazine as part of a series on "Pioneers in Simpler Government." That series included Cordell Hull, then a member of Congress from Tennessee and later Secretary of State under Franklin D. Roosevelt, and Hiram Johnson, at that time governor of California and later a senator from that state. Wootten later recalled that he received letters from fifteen different countries regarding the governmental experiment in Hickory.

The powers given the manager in the charter that established Hickory's council-manager plan differed from those generally granted managers across the country today. For example, today the General Statutes call for the manager to hire and fire all subordinate personnel not otherwise elected or appointed by law and to act as budget officer.[4] The Hickory manager of 1913 could suspend, fine, or dismiss only members of the police, fire, waterworks and sewerage, and street departments in the interest of discipline,[5] but these decisions could be reviewed and reversed by the council. The language about hiring in the 1913 charter provided that the council would appoint officers and certain other employees of the departments for one-year terms from a list submitted by the city manager. If the council refused to choose from these lists or was unable to do so, the manager had to furnish other lists.

George R. Wootten

Moreover, while the manager was authorized to serve as tax collector (with full powers of the sheriff to collect) and purchasing agent and also was authorized to represent the city in contracting, the charter gave the council tight control by requiring that numerous monthly reports be made to the council and that all bills and contracts be individually approved by the council.

But in other respects—including presenting an annual budget, supervising departments, attending all council meetings, recommending and advising on matters before the council, and seeing that laws were carried out—the manager's job in 1913 closely resembled that of managers who serve throughout the state today.

The charter also contained three other provisions that were reforms being promoted nationwide at that time: the ability to recall local officials, the ability to require a referendum on local ordinance provisions that were received unfavorably, and the ability to introduce and bring before the electorate measures that the council had not seen fit to pass (the initiative). These provisions reflect the skepticism concerning the previous forms of local government. They were included in some charters later adopted in North Carolina and have been popular in larger cities, particularly on the Pacific Coast.[6]

MORGANTON. In the early 1900s Morganton had already been a town for more than 125 years, with experience as a social, economic, and political anchor in western North Carolina. With the westward expansion, extension of the railroad, and political awareness of western interests in the state legislature, Morganton was coming of age.

In the Civil War Morganton, like the rest of the South, had suffered a loss of raw materials, young manpower, capital, and leadership. Any substantial progress had to wait until these problems could be overcome. Time served that purpose.

Much development occurred in Morganton just after the turn of the century. Between 1900 and 1906 the local newspaper contained many reports of businesses and industries

4. N.C. Gen. Stat. § 160A-148.

5. N.C. Private Laws of 1913, Ch. 68—the Charter for Hickory.

6. International City Managers Association, *The Municipal Yearbook* (1980), pp. 179-80.

Ralph W. Pipkin

founded or expanded, including lumber yards, tanneries, furniture factories, steam laundries, and wagon makers—a level of activity out of proportion to Morganton's 2,100 population. The city was already the site of two important state institutions, the School for the Deaf and Dumb and the Western Hospital for the Insane (Broughton Hospital). In addition, the State Supreme Court held its summer session there. Other improvements that followed were the city-owned and -operated electric system, a public water works, and substantial renovation of the courthouse and grounds. Morganton received statewide attention as a progressive community.

Against this strong development, what key events or people would have caused Morganton to abandon its traditional form of municipal government and accept the radically new council-manager plan? Why so early among its sister cities in the state and nation? What relationship did Morganton have with Hickory in their almost identical efforts?

While the cities of Hickory and Morganton are only 25 miles apart and likely would have followed each other's current events of the time, there is no strong and definitive tie between the two that shows a common interest in their early efforts to establish the council-manager plan. Certainly Morganton did not appear to have the keen political interest at the mayoral level that Hickory experienced. In fact, when the General Assembly passed the special legislation that established Morganton's manager system, it did not require an election on the charter, as it generally does when a local issue is so controversial.

Both cities would have been aware of the national Progressive Movement, and both were blessed with active and interested public leaders. Perhaps Morganton's council-manager plan came from the need for a business manager. Perhaps the impetus came simply from conversations among the respective legislators from Hickory and Morganton. Contemporary newspaper accounts are unclear regarding the origin of the plan in Morganton. Two articles—one a straight news story and the other an editorial comment by the publisher, who was also serving as the Chief Clerk to the House of Representatives in the General Assembly—give us a glimpse of some of the local thinking at the time:

> *December 12, 1912.* BRIEF NOTES FOR THE BUSY MAN: . . . that the operating departments of a city government should be manned by a force selected and retained solely because of competence was a suggestion contained in the joint committee report of the National Municipal League and the National Service Reform League, presented at the annual meeting of the latter organization at Milwaukee, Wisconsin.[7]

> *January 23, 1913.* We suppose the next thing to come will be a bill to establish a recorder's court for Burke and to change the charter of Morganton giving it a commission form of government judging from reports received down here (Raleigh). Well, we are trusting the wise heads.[8]

The main actor when the new plan began seems to have been the mayor, W. C. Ervin. Ervin was born in nearby Marion in 1859. He graduated from high school in Lenoir and later studied law at the University of North Carolina. By all accounts, he was a remarkably able writer. His talents in this respect caused him to divide his early efforts between journalism and law. He was editor for the weekly *Topic* in Lenoir, where he served as mayor in 1887-89, and for the *Mountaineer* newspaper in Morganton. In 1889 he established his permanent home in Morganton and founded the *Morganton Herald*, which he edited. His writing continued to make him favorably known in newspaper circles throughout the state. The next year, however, he gave up his newspaper work to devote his entire attention to his growing law firm, which he had also established in 1889. In the years that followed, though known as a public-spirited individual, Ervin steadfastly refused public office and held no official positions until he served as Morganton's mayor in 1911-1913.[9]

The *News-Herald* for May 15, 1913, carried the following notation: "The first thing in order was the election of a City Manager. Applicants for this place were Messrs. R. W. Pipkin and J. D. Boger. Mr. Pipkin was elected and his salary was fixed at $90 per month for the first six months, $100 per month thereafter, with an allowance for clerk hire of $35 per month, for first six months, $25 thereafter. The bond of the city manager was fixed at $7,500."[10]

With that council action, Morganton appointed its first manager, Ralph

7. News-Herald, December 12, 1912, p. 6.

8. News-Herald, January 23, 1913, p. 2.

9. Burke County Historical Society, *Heritage of Burke County* (1981), p. 170 (guest biographer, Sam J. Ervin, Jr.).

10. News-Herald, May 15, 1913, p. 3.

Waldo Pipkin. Pipkin came to his job as an insider and a professional. Born in 1884, he received his early education from his father, who was headmaster of a private school in Alabama. He found his way to Morganton in 1908 as a young engineer, planning to stay only long enough to complete his job with the waterworks department, which was built under his direction. He stayed for the rest of his life.[11] Pipkin served as the water system's first superintendent. As the city continued to grow and take on additional public works (such as an electric system and sewers), he added these to his areas of responsibility. No doubt his appointment as manager was attributable to this experience.

Pipkin remained manager only for a short while in order to see the plan off the ground. In the same year that he became city manager, he started the local Ford Motor Company dealership, which operated in Morganton for many years. He later served as mayor (1923) and was active in many other civic endeavors.[12]

The Morganton charter gave the town manager significantly more authority to hire and direct subordinate employees than Hickory's manager enjoyed. As was customary at the time, the charter provided for additional positions of town clerk, treasurer, police and fire chiefs, and superintendents of waterworks, streets, and health. The manager also served as tax collector and assessor, purchasing agent, and director of committees for carrying out any city services.[13]

One important difference between the Hickory and Morganton charters was in the manner of choosing aldermen. The original Morganton plan called for a mayor and two aldermen and for only one man to be elected each year—the mayor. After a year's term he would become an alderman, replacing an alderman who rotated off the council. This provision, originally a part of the Hickory

11. *Heritage of Burke County*, p. 352 (guest biographer, Mary Cameron Phillips Dillingham).

12. *Ibid.*

13. Charter of the Town of Morganton, N.C. Private Laws of 1913, Ch. 104.

Early days on Morganton's Union Street. Note the power lines for the city-owned electric company and the location of the Avery and Ervin law office (second story, building on the right).

plan, was deleted from Hickory's charter before the charter was voted on. Otherwise the charters are virtually identical except for certain local circumstances (such as Morganton's involvement in its own electrical works); this parallel language suggests that there may have been collaboration at the General Assembly level in formulating the two plans, perhaps on the basis of a national model. Both provided for referendum, local initiative, and recall of officials.

Although we cannot establish a direct link between the two city plans, the timing and other factors seem more than coincidental at every juncture. Consider, for example, the communities themselves. Both were leading, progressive towns for the state at the time—Hickory as the economic hub for the larger area; Morganton as a burgeoning manufacturing town and purveyor of raw materials and as a major site for state institutions. The mayors were the same age, and both were formally educated. Neither was native to the town. Both served only one term. Both were businessmen and entrepreneurs. Both had alternate newspaper careers. Neither was a strong, charismatic political leader.

The first managers were professionals—one an engineer, the other a pharmacist and certified public accountant. Neither was native to the town. Both came to their manager jobs as city government "insiders." Both were later entrepreneurs and respected businessmen. Both stayed in the profession only long enough to see the plan provided for on a permanent basis.

With only relatively minor differences for local circumstances, the charters are identical—perhaps after a model, but certainly reflecting national political sentiment.

THE EVENTS that led to the creation of the council-manager plans for Hickory and Morganton seem to fit this pattern:

> The rapid growth of urban areas in the time period from the Civil War to the second decade of this century; the impact of new technologies of travel, communications, heating and lighting upon the qualities of urban living and the conditions of work and leisure; the failures of traditional governmental arrangements to respond to these new conditions, and the inadequacies of the political party-urban boss machinery as a substitute delivery system for the faltering traditional government. The needs were great and the existing municipal systems largely were incapable of responding to these needs.[14]

To varying degrees, these were the forces that compelled Hickory and Mortanton more than 71 years ago to lead the state and nation in a new order. **pg**

14. International City Management Association, *Public Management* (October 1983), p. 7.

North Carolina Pioneers of the Council-Manager Plan

Donald B. Hayman

Last October 27, the governing officials from Region E Council of Governments met in Morganton to honor two long-ago mayors and councils of Hickory and Morganton for their foresight in adopting the first council-manager form of local government in North Carolina.

Seventy-one years ago—on February 17, 1913—the North Carolina General Assembly authorized (Ch. 68) the voters of Hickory to vote on a revised charter that provided for a council-appointed manager to be the administrative head of city government. On March 17, 1913, the referendum was held and the new charter adopted. On May 5, 1913, Hickory became the first North Carolina city to appoint a city manager.

On February 24 of the same year, the General Assembly enacted (Ch. 104) for the Town of Morganton a new charter that required the council to appoint a town manager. The charter was effective immediately. On May 12, 1913, after its newly elected mayor and aldermen took office, Morganton appointed its first manager. It was the first town in North Carolina for which the manager plan was authorized, and Hickory was the first city—by five days—to employ a manager.

The elected officials and citizens of these two municipalities were pioneers in the organization of local government. Their willingness to experiment is suggested by the fact that only two other cities in the United States had then adopted the mayor-council-manager plan—Sumter, South Carolina, and Fredericksburg, Virginia, in 1912. (Five other cities across the nation adopted the mayor-council-manager plan later in 1913.)

In 1915 the North Carolina Municipal Code was rewritten to make the mayor-council-manager plan an alternate plan that any city might adopt without securing General Assembly approval. Four other North Carolina towns adopted the plan before 1920—High Point and Thomasville in 1915, Goldsboro in 1917, and Gastonia in 1919. Twenty-four North Carolina municipalities had managers by 1933; then adoptions slowed until after World War II. An average of two cities and towns a year adopted the manager plan during the 1950s and 1960s, and three cities a year during the 1970s. Today all North Carolina cities over 10,000 and all but five of the 69 cities over 5,000 population have managers—a total of 143.

North Carolina counties recognized the advantages of employing a governmental manager, and this state has led the nation in the adoption of the county manager plan. In 1917 the General Assembly authorized Catawba and Caldwell counties to appoint a manager. Neither county used that authority, but in the next decade seven counties designated the chairman of the county commission as a full-time chairman, chief executive officer, or manager. In 1927 a statewide act authorized counties to adopt the manager plan. Robeson County appointed a county manager on April 1, 1929, and Durham County adopted the plan in 1930. These two counties have had the manager form of government longer than any other counties in the nation. As of July 1, 1984, 88 of the state's 100 counties had appointed managers; two others have

The author is an Institute faculty member whose special field is personnel administration.

Excerpts from the Fourth Manager Charter in the United States and the First Manager Charter in North Carolina, Effective February 24, 1913

The Charter of the Town of Morganton, North Carolina
Chapter 104, Private Laws of North Carolina, 1913

Article V

THE TOWN MANAGER

Section 1. There shall be chosen by the town council an officer to be known as the town manager, who shall be the administrative head of the town government . . . .

Sec. 3. The term of the town manager shall be at the pleasure of the town council, and said council shall determine and fix his compensation or salary.

Sec. 4. The town manager shall not be personally interested in any contracts to which the town is a party, for the supplying the town materials of any kind.

Sec. 5. It shall be his duty to attend all meetings of, and to recommend to, the town council, from time to time, such measures as he shall deem necessary or expedient for it to adopt, and to furnish it with any necessary information respecting any of the departments under his control. He shall accurately keep the minutes of the town council.

Sec. 6. He shall transmit to the heads of the several departments written notice of all acts of the town council relating to the duties of their departments, and he shall make designation of officers to perform duties ordered to be performed by the town council.

Sec. 7. He shall sign all contracts, licenses, and other public documents on behalf of the town, . . .

Sec. 10. He shall have authority and charge over all public works . . .; he shall have control of the location of street car tracks, telephone and telegraph poles and wires . . . . The town manager shall also have full management and control of the electric light plant belonging to the said town . . .; shall appoint all employees, fix their compensation . . .; he shall also have full management and control of the waterworks plant . . . .

Sec. 11. The town manager shall have power to suspend, fine, and dismiss any member of the police, fire, waterworks, and sewer and street departments, in the interest of discipline . . . .

an elected commissioner-chairman as manager, and two have a commission member serving in that capacity. Eighty-seven per cent of all North Carolina municipal residents now live in a mayor-council-manager city or town, and 96 per cent of all North Carolinians live in a county that has adopted the plan.

An idea that started in Virginia and was modified in South Carolina before spreading to North Carolina has now been adopted in 2,513 cities and 642 counties recognized by the International City Managers' Association.

The importance of what Hickory's and Morganton's governing bodies helped to pioneer cannot be calculated by the statistics of adoption or the number and percentage of population in manager cities and counties. It may be seen in what citizens began to expect of councils, what councils expect of employees, and what city and town employees expect of themselves. The greatest effect has been in the increased professionalism in local government. Employees are hired more often because they are qualified and needed to do assigned duties and less often because of whom they know or what political debts must be paid off. This situation produces higher expectations of quality and impartiality in the delivery of municipal services. Professionalism means that problems are more likely to be anticipated and solutions suggested before crises develop; that there is a greater likelihood that future community needs for water, waste disposal, fire and police protection, recreation, and industry will be recognized and planned for; and that there is likely to be a wiser and more honest use of financial resources.

(continued on page 41)

Child Support
in North Carolina

Janet Mason

In North Carolina, as in the rest of the country, a strong sentiment has arisen that something must be done about parents who do not support their children. The state of child support in this country has been called both a crisis and a national disgrace,[1] and proposals to reform child support laws have come from a variety of sources.[2] Every child has a right to support from his parents,[3] and most parents voluntarily support their children. But the increased attention—by the media, Congress, state legislatures, and advocacy groups—to the problem of parents who shirk this responsibility is clearly justified if reported statistics accurately reflect the child support situation.

An estimated two million fathers aren't paying all or part of what they owe for child support. In welfare cases alone, child-support nonpayments total more than $8 billion . . . .

About 40% of the 8.4 million U.S. households with absent parents don't have the court orders for child support that they probably need. In cases where orders have been issued, only half the absent parents are making payments on schedule.[4]

The Bureau of the Census reports that nearly a third of all the support awarded is in fact not paid and that child support, when it *is* paid, constitutes only about 20 per cent of the total family income for children and the parents who have custody of them.[5]

In its March 1984 report entitled "The State of the Child in North Carolina," the North Carolina Child Advocacy Institute reported that 1,774,415 young people under age 19 live in North Carolina. Some 299,000 of them live in poverty, including about 79,000 children under five. Although the number of poor children declined by 100,000 between 1970 and 1980, the 18 per cent poverty rate for children remains 2 per cent higher than the national average. An estimated half of all children born today will spend part of their childhood in a single-parent family.

Some of the increased attention to child support problems is related to what has been called the feminization of poverty—the extent to which women, often with children, are represented among the poor. In its 1983 report[6] looking toward the year 2000, the Commission on the Future of North Carolina described children and families headed by women as

The author is an Institute of Government faculty member whose fields include social services law.

1. See, for example, Laurie Woods, "Child Support: A National Disgrace," *Youth Law News* 4, no. 5-6 (November-December, 1983), 5; and David Lauter, "The Custody, Support Crisis," *The National Law Journal* 6, no. 25, (February 27, 1984), 1.

2. For examples of recent proposals for changes in North Carolina law, see *Women's Needs: Report to the 1981 General Assembly of North Carolina, 1982 Session* (Raleigh: Legislative Research Commission), May 20, 1982; *Women's Needs: Report to the 1983 General Assembly of North Carolina* (Raleigh: Legislative Research Commission), January 12, 1983; *Women and Financial Security*, Preliminary Report of the Financial Security Task Force of the North Carolina Assembly on Women and the Economy (Raleigh: N.C. Department of Administration, 1983).

3. A child's right to support from his parents is generally considered both a legal and a moral right, but some writers have questioned the continued justification for a system of compulsory child support based only on the biological relationship of parent and child. See David L. Chambers, "The Coming Curtailment of Compulsory Child Support," *Michigan Law Review* 80, no. 8 (August 1982), 1614-34; and writers cited in Harry D. Krause, "Reflections on Child Support," *Family Law Quarterly* 17, no. 2 (Summer 1983), 110-13.

4. Burt Schorr, "States Cracking Down on Fathers Dodging Child-Support Payments," The Wall Street Journal, January 26, 1983, p. 33.

5. Bureau of the Census, U.S. Dept. of Commerce, *Child Support and Alimony* 1978, Series P-23, No. 112 (1981).

6. *The Future of North Carolina: Goals and Recommendations for the Year 2000*, Report of the Commission on the Future of North Carolina (Raleigh: North Carolina Department of Administration, 1983).

groups that are disproportionately represented in North Carolina's poor population. In 1979, 36 per cent of the state's poor were children. From 1970 to 1980, the percentage of North Carolina families in poverty that were headed by women increased from 30 to 41 per cent. According to the Commission's report, if present trends continue, the state will have 150,000 more families headed by women in the year 2000 than it had in 1980, and almost a third of these will have incomes below the poverty level.[7] While one out of every three single-parent households headed by a female is poor, only one out of 10 single-parent families headed by a man is poor. Only one out of 19 two-parent families headed by a male has an income below the poverty level.[8] To the extent that families headed by women are entitled to child support that is not being paid, one inescapable response to the larger problem of women's and children's economic status is a call for better ways to enforce child support requirements.

The Aid to Families With Dependent Children (AFDC) program provides financial assistance for needy children who live with a parent or other specified relative and are deprived of parental support because of a parent's death, disability, or absence from the home. In December 1983, North Carolina's AFDC caseload was 68,541. The Department of Human Resources (DHR) expects the program to grow. For 1984-85, the estimated total budget for the AFDC program in North Carolina is $180.8 million, of which the state and county shares will total almost $59.7 million.[9] When the AFDC program was started in the 1930s, the major basis for eligibility was death of the father. Now most families that qualify for AFDC benefits do so because one parent is absent from the home and provides inadequate support or no support at all.[10] Some absent parents are minors themselves or are precluded by their own poverty from paying support. But research has indicated that very few absent fathers (1 to 3 per cent) are unable to contribute something to the support of their children.[11] The willful failure of one or both parents to provide adequate support does not occur only in low-income families, and it is not the sole reason that many North Carolina children live in poverty. But it is a significant, identifiable problem that warrants attention.

North Carolina law provides both criminal and civil procedures for establishing and enforcing child support obligations. Legislation passed in 1983 aims to expedite enforcement procedures and improve access to the courts for people who seek to enforce support orders. Other measures for enforcing child support have been introduced but not enacted; still others have been proposed and may yet come before the General Assembly. Imminent changes in federal law will affect all states' child support practices. This article describes North Carolina's present child support laws, points out changes that occurred in 1983, and indicates areas in which further change may come. It is intended both to inform the reader about existing child support rights and remedies and to provide a context for evaluating changes that may be proposed.

What is the parents' duty to provide child support?

Since June 1981, the parents of a child in North Carolina have had an equal duty to support the child. Before that date, North Carolina law made the father primarily responsible for the child's support and made the mother liable only when it was not reasonable or possible to expect the father alone to support the child. Although parents now share equal responsibility for support, they are not necessarily obliged to make equal financial contributions. The amount of support required from each parent must take into account their relative abilities to provide support and the hardship caused to each by the required contribution. It is no longer

7. *Id.*, pp. 83-85. According to a formula developed by the Social Security Administration and adopted and applied by the Census Bureau, an income below the poverty level is one that is inadequate to provide the minimum requirements of subsistence. See Joel Schwartz, "Poverty in North Carolina," *Popular Government* 48, no. 4 (Spring 1983), 18, for a discussion of the development and use of the formula.

8. Schwartz, *supra* note 7, p. 21, citing *Current Population Reports*, Publication 60, No. 133, p. 2, and *North Carolina Census Data Release* (Raleigh, N.C.: North Carolina Data Center), May 1982, p. 4.

9. North Carolina Department of Human Resources 1984-85 Budget Estimates, February 14, 1984. Of the estimated AFDC program cost of $157,269,740, federal funds will provide 69.54 per cent and the state and the collective counties will provide 15.23 per cent each. Of the estimated administrative cost of $23,519,544, half will come from federal funds and half from the counties.

10. Chester H. Adams and Dennis C. Cooper, with Athena M. Kaye, *A Guide For Judges in Child Support Enforcement* (Washington, D.C.: National Institute for Child Support Enforcement, Federal Office of Child Support Enforcement, U.S. Dept. of Health and Human Services, 1982), p. 5. The proportion of AFDC families that qualify for this aid because of a parent's absence from the home rose from 45 per cent in 1948 to almost 87 per cent in 1979. Social Security Administration, *1979 AFDC Recipient Characteristics Study* (June 1982), Table 18.

11. Adams and Cooper, *supra* note 10, p. 7, quoting from Judith Cassetty, *Child Support and Public Policy* (Lexington, Mass.: D. C. Heath and Co., Lexington Books, 1978), p. 82.

A summary of 1984 legislation on child support appears on page 34.

necessary that the father be unable to provide all of the support before some contribution can be required from the mother. But there may still be instances in which a large discrepancy in the parents' incomes will dictate that most or all of the support be provided by one parent.

Generally the parents' legal duty to support continues until the child reaches 18. The duty ends earlier if the child marries or is declared emancipated in a court proceeding brought by the child.[12] The duty to support also ends if the parent's rights are terminated by a court or if the child is adopted after the parent voluntarily relinquishes his or her rights. A parent can legally bind himself or herself—in a separation agreement, other contract, or consent order filed with the court—to provide support after the child becomes 18. Pursuant to legislation that became effective on October 1, 1983, if the child is in primary or secondary school when he turns 18, the court may order that support from the parent(s) continue until he graduates, stops attending school regularly, or reaches age 20, whichever occurs first.[13]

Before 1979, a child who was mentally or physically incapable of self-support when he reached age 18 continued to have a right to support from his parents for as long as he could not support himself. The legislature deleted that provision in 1979.[14] Now, a parent has no legal duty to support a handicapped or incapacitated child after he becomes 18 unless the court orders support under the school-attendance exception or the parent voluntarily assumes the obligation.

A law that became effective on October 1, 1983, may have the effect of expanding parents' duty to support for one particular type of expense. When the court appoints an attorney or guardian ad litem for a person who is under 18 or is at least 18 and dependent on and domiciled with a parent or guardian, the court is required to summon the parent, guardian, or trustee to a hearing to determine whether one of them should reimburse the state for the fees of the attorney or guardian ad litem.[15] For minors, such fees were probably already chargeable to the parents, and the new law adds a procedure that will aid in collection. However, for persons 18 or older who are "dependent on and domiciled with a parent or guardian," except for the statute the parents would generally have no responsibility for such fees. Attorneys or guardians ad litem (guardians appointed for the specific purpose of providing representation in a civil court action) may be appointed in criminal cases or in proceedings related to juveniles, terminations of parental rights, guardianships, involuntary commitments, or similar matters.

Is the duty different for parents of a child born out of wedlock?

The duty of support belongs to the child's biological or adoptive parents. While the husband of the child's mother is presumed to be the father of any child that is conceived or born during the marriage, he can defend against a claim for support by proving that he is not the biological father. The biological father of a child born out of wedlock, whether the mother is unmarried or married to someone else, has a duty to support the child. But that duty can be enforced only after paternity has been either acknowledged by the father or judicially established. In addition to improved blood-testing techniques to establish the likelihood of paternity, two relatively recent legislative changes make it easier to determine paternity in court proceedings. First, amendments in 1979 made blood-test evidence admissible to establish paternity,[16] whereas it had been available only to *disprove* paternity. Second, a 1981 law repealed a long-standing rule that had prohibited the mother and the presumed father (the husband) from testifying to certain matters relevant to paternity, such as whether they had access to each other at the time of conception.[17]

How is the amount of support determined?

The only statutory guidance as to the amount of child support a parent has a duty to provide, or can be ordered to pay, is as follows:

Payments ordered for the support of a minor child 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.[18]

Even with complete and accurate information about the parents' resources and the child's needs—something the court and even the parties often lack—applying such a standard leaves the amount of support largely to the discretion of individual judges. The amorphous nature of that standard makes it difficult to predict the

12. G.S. Ch. 7A, Art. 56, sets forth the procedure whereby a sixteen- or seventeen-year-old can petition the court for a declaration of emancipation. This procedure and marriage are the exclusive means of emancipation for a minor in North Carolina.

13. N.C. GEN. STAT. § 50-13.4(c)(2) (1983 Supp.).

14. N.C. Sess. Laws 1979, c. 838, s. 29, amending G.S. 50-13.8.

15. N.C. GEN. STAT. §§ 7A-450.1, -450.2, -450.3 (1983 Supp.).

16. *Id.* § 8-50.1; *id.* § 49-7.

17. *Id.* § 8-57.2. *See* Settle v. Beasley, 309 N.C. 616 (1983), for one example of the significance of these changes for litigants.

18. N.C. GEN. STAT. § 50-13.4(c) (1983 Supp.). Similar guidance applicable to criminal cases for nonsupport of an illegitimate child directs the court to take into account "the circumstances of the case, the financial ability to pay and earning capacity of the defendant, and his or her willingness to cooperate for the welfare of the child." *Id.* § 49-7 (1983 Supp.).

A standard method of determining amounts of child support, arrived at either by an administrative agency or the General Assembly, would both reduce inequities in the child support system and provide a sounder basis for negotiating and settling child support claims.

amount of support that will be required or to achieve consistency among cases.

Some states have statutory guidelines or formulas for determining the amount of support a parent should pay. The North Carolina Court of Appeals approved and encouraged trial courts' use of formulas to determine amounts of support by objective criteria, as long as the formulas take into account the child's needs and the parents' needs and resources.[19] But neither the North Carolina courts nor the legislature has devised a particular formula for figuring the proper amount.

In court actions the trial judge sets the amount of child support. The judge is required to make specific findings of fact about the child's needs and the parents' estates, earnings, needs, and conditions. On appeal, his order will be overturned only if the evidence does not support the findings, or if the order is not supported by sufficient findings, or if the judge has clearly abused his discretion.

In one case,[20] the trial court had ordered a noncustodial mother to pay $150 of her $180 available monthly income (gross income minus legally required withholdings and reasonable expenses) for child support. The court reasoned that since the mother's available income of $180 per month was approximately one-fourth of the father's available income of $886 per month, she should pay one-fourth of the child's needs of $625 per month. The Court of Appeals reversed the order, finding that the trial court had "abused its discretion in basing the amount of defendant's contribution on a mathematical equation rather than her relative inability to provide support . . ." In another case,[21] the State Supreme Court disapproved the use of a method that set the amount of support by dividing the father's income by the number of people dependent on him for support.

A number of more acceptable formulas or guidelines for determining amounts of support have been developed, and district court judges in some judicial districts routinely look to one support schedule or another for guidance in setting amounts. A schedule used in Wake County specifies the percentage of the parent's net monthly income that is payable for child support; it ranges from 18 per cent for a parent with a net income of less than $300 who is paying support for one child to 50 per cent for a parent with a net income of $500 or more who is paying support for four or more children. The schedule applies to both parents if both are employed, regardless of who has custody. It notes the following exceptions: (1) when alimony is to be paid; (2) in unusual situations in which fairness requires a departure from strict adherence to the schedule; or (3) when the child's or children's needs do not equal in cost the amount called for by the schedule. Other schedules specify amounts, rather than percentages of income, on the basis of the number of children to be supported and the size of the parents' incomes.

Differences in formulas or guidelines may result in a wide variation of amounts of child support. One author applied seven different systems to the fact situation of a hypothetical middle-class family and arrived at monthly support amounts for two children that ranged from $364.53 to $602.95.[22] In North Carolina, reliance on different guidelines or on only the judge's discretion results in discrepancies among cases that often lead parties to view the judicial system as both arbitrary and unfair. A standard method of determining amounts of child support would both reduce inequities in the child support system and provide a sounder basis for negotiating and settling child support claims.

In an effort to achieve those goals, the district court in Mecklenburg county began in late 1983 both to examine how amounts of support were being determined in the district and to collect information from a variety of sources about approaches to determining amounts of support. Several formulas, tables, and guidelines that were found to be consistent with North Carolina law were tested by applying them to a sample of actual cases and to a group of hypothetical cases. The results were compared with the results obtained by applying the judges' customary methods of setting support amounts to the same cases. That process revealed that there was a high level of con-

19. Hamilton v. Hamilton, 57 N.C. App. 182 (1982).

20. Plott v. Plott, 65 N.C. App. 657 (1983), *disc. rev. allowed*, 310 N.C. § 625 (1984). A decision by the State Supreme Court, which has agreed to review this decision by the Court of Appeals, may provide further guidance as to the use of formulas to set support amounts.

21. Fuchs v. Fuchs, 260 N.C. 635 (1963).

22. N. Hunter, "Child Support Law & Policy: The Systematic Imposition of Costs on Women," *Harvard Women's Law Journal* 6 (1983), 10-11.

Some Perspectives on North Carolina's Child Support System

1 ***The Honorable J. B. Allen, Jr.***
Chief District Court Judge
Judicial District 15A

Judge J. B. Allen, Jr., like many judges, was apprehensive about the effect on district court of the 1983 child support legislation, especially because it became effective the same day as the Safe Driving Act (the new DWI law with which the courts would have to cope). In his district, child support cases that come into court for enforcement under the new procedures consume from one-half to three-quarters of a day of court time each week; the effect in some districts has been even greater. In the office of the clerk of superior court in Alamance County, child support work that before the 1983 legislation was handled by one or one and a half people now requires four or five. But the law is paying off. People realize that the court means business, and money that was not being collected before is now being paid.

Child Support Collections in Judicial District 15A

Before 1983 Legislation		*After 1983 Legislation*	
Oct., 1982	$180,000	Oct., 1983	$222,000
Nov., 1982	190,000	Nov., 1983	242,000
Dec., 1982	188,000	Dec., 1983	249,000
Jan., 1983	189,000	Jan., 1984	253,000
Feb., 1983	180,000	Feb., 1984	243,000

"IV-D" child support cases, which are handled separately from other support cases, require a half-day of court time each week. In 1983, IV-D collections in the district totaled over $386,000.

While he believes that formulas or guidelines for determining amounts of support are a good idea, Judge Allen also thinks each case must stand on its own: "No formula by itself can determine what is fair in a case. I have never tried two child support cases that were exactly alike."

2 ***Lynne G. Schiftan***
Attorney for the Rockingham County
Department of Social Services

From her experience as the attorney for IV-D child support cases in Rockingham County, Ms. Schiftan observes that the enforcement procedures that became effective in October 1983 have been very useful to people who have incomes just above the poverty level but are not financially able to seek enforcement remedies on their own. The procedures have been instrumental in collecting support from absent parents as well as in clearing delinquent cases from the court docket. In Rockingham County, collections have increased from approximately $13,000 per month in late 1980 to $55,000-$60,000 per month in 1984. One factor in this increase has been the acceptance by employers and the court system of voluntary wage assignments and garnishments.

Ms. Schiftan says that North Carolina has made remarkable progress in its child support laws since the Child Support Enforcement Program began in 1975, but she believes that one major problem in enforcing support orders is the way the judicial system handles child support cases. These cases are given low priority, she says, and judges merely give verbal reprimands to the delinquent parent instead of adjudicating contempt and confining the person until he or she pays the arrears. "It is amazing to me that people who have failed to pay as ordered suddenly have the ability to do so when faced with spending time in custody."

Ms. Schiftan believes that there should be stricter guidelines to determine the support to be paid by the absent parent and more consistency in the amounts that are ordered. An absent parent who earns only the minimum wage may be ordered to pay a much greater proportion of his earnings than another parent who earns much more. She also feels that enforcement officers should monitor the amounts ordered more closely and file motions to increase amounts of support more

frequently. Often no attempt is made to explore possible increases in the minimal support obligation that was set on the basis of 1970s earnings. "It is only through a strong judicial system and a community dedicated to the support of the program that the counties and state can continue to progress in the area of child support enforcement," says Ms. Schiftan.

3 *John M. Syria, Director*

Division of Social Services
North Carolina Department of Human Resources

John Syria, Director of the Division of Social Services, is proud of the state's progress with its Child Support Enforcement Program. In 1983-84 the program collected about $35 million. Three years ago it collected just over $15.1 million. Soon after Mr. Syria was appointed Director of the Division, he said that within three years the state should be collecting between $30 million and $35 million annually. He credits the accomplishment of that objective to "tremendous support of the governor's office and the General Assembly in providing the necessary resources to do the job" and to the "hard work and dedication of our IV-D (Child Support) agents, law enforcement officials, judges, attorneys, and clerks of court."

In fiscal year 1982-83, IV-D child support collections totaled over $29.3 million. Since expenditures were just under $12 million, $2.46 was collected for every dollar spent to administer the program. In 1983, the state's AFDC payments were reduced by over $13 million as a result of child support collections by the Child Support Enforcement Program. Mr. Syria expects the automatic enforcement mechanism through the offices of clerks of court, in coordination with the efforts of the local child support enforcement agencies, to continue to increase the rate of payment on child support orders.

Automation of the Child Support Enforcement Program is expected to improve efficiency and cost effectiveness. Having reviewed systems in several other states, the Division arranged to transfer the Oregon system to North Carolina. The system is now being evaluated to determine how it must be modified to fit the North Carolina program.

The intercept of state and federal income tax refunds during 1982 produced almost $5 million in child support collections. From 23,657 cases submitted to IRS, 11,126 matches were obtained, and over $4.2 million was collected. In the same year, from 27,126 cases submitted to State Revenue Department, 6,765 matches were obtained and over $635,000 was collected. But as Mr. Syria notes, child support collection is about more than money: "Children supported adequately now will result in caring and productive adults. Consequently, we need to continue to find new and better ways to assure that all children receive the support to which they are entitled and which they deserve." He stresses that the Division of Social Services is committed to that end.

These observations are based, with permission, on Mr. Syria's article "Progress in IV-D Program," which appeared in *North Carolina Child Support Council News* 3, no. 1 (1984).

4 *James L. Carr*

Clerk of Superior Court
Durham County

James Carr, Clerk of Superior Court in Durham County and former president of the North Carolina Child Support Council, believes that one major reason for the low percentage of collections of court-ordered child support payments in North Carolina has been that the court system, particularly the clerks' offices, have not had the wherewithal to monitor or enforce child support court orders adequately. Especially in larger counties, effectively implementing automatic child support enforcement procedures will depend on a comprehensive computer system in the superior court clerks' offices and on the approval of a new accounting system by the State Auditor. When the enforcement procedures went into effect in October 1983, Carr considered working with Durham County to use its computer—into which cases handled through the county's Child Support Enforcement (IV-D) Program were already programmed—as a stop-gap measure until automation becomes available. That arrangement was abandoned when Durham was designated as the pilot county for the new system being developed by the Administrative Office of the Courts and the State Auditor. That system is expected to be operating in Durham County in late summer or early fall of this year.

Carr, who strongly supported the 1983 legislation, favored a later effective date so that money spent on hiring temporary employees could have been spent instead on automation. Still, he believes that even with total automation, extra personnel will be needed in offices of clerks of superior court. The heavy court load resulting from the enforcement procedures will continue, in Carr's view, until those who have been ordered to pay child support realize that the courts in North Carolina intend to enforce their orders regarding child support. As more parents start paying child support, fewer court appearances will be required. But until full automation and a leveling of caseloads take place, the processing of child support cases will be a considerable burden on the offices of clerks of superior court and on the courts.

sistency among judges in the district and that two of the tested approaches were consistent with how awards were being made. In June 1984, the District Court in Mecklenburg County adopted the Wisconsin Percentage of Gross Income Standard for Setting Child Support Awards (legislatively mandated in Wisconsin in 1983) as a guideline for determining minimum levels of child support.

Number of Children	*Percentage of parent's income*
1	17
2	25
3	29
4	31
5 or more	34

The percentages apply to both parents and are intended to be a practical, not a legally binding, guide for judges. Chief District Court Judge James E. Lanning, in a memorandum to attorneys, noted the following factors that could make strict application of the percentages inappropriate: (1) very low or very high income; (2) shared custody arrangements; (3) extraordinary medical, dental, educational, or child-care expenses; (4) support obligations to another child or children; or (5) the deliberate reduction or suppression of income.

When is nonsupport a criminal offense?

A parent's willful neglect or refusal to provide adequate support for a child is a misdemeanor punishable by a fine and/or imprisonment—up to six months for a first offense and up to two years for a second or subsequent offense. A charge of willful failure or refusal to support can be brought at any time before the parent's youngest living child reaches 18.[23] A parent may be guilty of a felony if he or she, without just cause or provocation, (1) willfully abandons a child for six months, and (2) willfully fails or refuses to provide adequate support during the six months, and (3) attempts to conceal his or her whereabouts with the intent to escape the lawful support obligation.[24] In 1983 the maximum penalty for this offense was reduced from 10 years to five years of imprisonment. These offenses relate only to the legitimate children of a marriage and to children born out of wedlock whose paternity has been judicially established.

A parent's willful failure or refusal to support a child born out of wedlock is also a misdemeanor punishable by up to six months' imprisonment.[25] However, prosecution of the putative father of a child born out of wedlock can occur only within the following time periods:

(1) Three years following the child's birth; or
(2) If paternity has been judicially established within three years after the child's birth, at any time before the child becomes 18; or
(3) If the putative father has acknowledged paternity by paying support within three years after the child's birth, then at any time within three years from the last payment (regardless of when made) until the child reaches 18.[26]

Similar limitations on bringing a civil action to establish paternity—a prerequisite to seeking support—were repealed in 1981. In part because the alternate civil procedure is available, the Court of Appeals upheld the limitation on criminal prosecutions against a claim that it discriminated unconstitutionally between legitimate and illegitimate children.[27]

The court can order a defendant who is convicted of willful failure or refusal to support a child to do so.[28] In addition, one regular condition of probation that applies to any criminal defendant placed on probation (unless he is specifically exempted by the judge) is that he satisfy whatever child support and other family obligations the court may require.[29]

How else can the support obligation be established?

Voluntary agreements. A separation agreement or other contract can create a binding obligation to provide support according to agreed-on terms. Although such agreements are enforceable in a court action, a court will not uphold a parent's attempt to contract away his legal duty to support, and the court will not be bound by the parents' agreement if it prejudices or sacrifices the child's rights.

A parent's written, acknowledged agreement to make child support payments, if it is filed with and approved by a district court judge, has the same force and effect as an order for support entered by the court.[30] Paternity of a child born out of wedlock may be legally established in the same way if the father's acknowledgement of paternity is filed with the mother's sworn affirmation that he is the child's father.[31]

Civil court action for support. A claim against the responsible parent for child support can be made in a civil action in district court by a parent, by anyone who has or is seeking custody of the child, or by the child himself through a guardian. An action may be filed solely for the purpose of seeking support, or the claim for support may be made in an action brought by either party for divorce, custody, alimony, or other relief.

A civil order for child support usually takes the form of a require-

23. N.C. GEN. STAT. § 14-322.

24. *Id.* § 14-322.1 (1983 Supp.).
25. *Id.* §§ 49-2, -8.
26. *Id.* § 49-4.
27. State v. Beasley, 57 N.C. App. 208, *cert. denied*, 306 N.C. 559 (1982).

28. N.C. GEN. STAT. § 14-322(e); *id.* § 49-8.
29. *Id.* § 15A-1343(b)(4) (1983 Supp.).
30. *Id.* § 110-133 (1983 Supp.).
31. *Id.* § 110-132.

ment that the responsible parent make periodic payments of a specified amount through the court or directly to the child's custodian. Such orders can be modified if either party files a motion seeking modification and shows a change of circumstances that justifies the requested change in the amount ordered. Orders for child support are not limited to periodic payments. The court can order (1) payment of a lump sum; (2) the transfer of title to or possession of personal property; or (3) possession of or a security interest in real property. Thus the custodial parent may be awarded possession of the parents' jointly owned home as a form of child support. A person who is ordered to pay child support may be required to secure the obligation by a bond, a mortgage, a deed of trust, or an assignment of wages or other expected income. A judgment for child support can also be made a lien on the responsible parent's real property if the judgment (a) expressly makes that provision, (b) specifies the amount, and (c) adequately describes the property that is affected.

In a civil child support action (whether an original case or a motion filed in a pending case), the court may require one party to pay a reasonable attorney's fee to another party who is acting in good faith and cannot afford to pay the expense of the action. If the court action does not also involve custody, the court may award attorney fees only after finding that the party who is ordered to pay support had refused to provide adequate support at the time the action was brought. If the party that is obliged to pay support brings a frivolous action, the judge can order that he or she pay the other party's attorney fees, as the judge finds appropriate.[32] There is not a comparable provision for assessing attorney fees against a party seeking or receiving support who brings a frivolous action.

Uniform Reciprocal Enforcement of Support Act (URESA). In 1951 North Carolina enacted URESA (G.S. Chapter 52A), which is now law (with some variations) in all 50 states. URESA provides procedures and encourages cooperation among states for the enforcement of child support obligations. When a party that seeks support is in North Carolina and the party from whom support is sought is in another state, an action may be begun here, sent to the other state, and pursued there for the establishment or enforcement of a support order. Similarly, North Carolina processes claims sent here from other states. Neither party is required to go to the other state. URESA also provides for support orders from other states to be recorded and enforced here or for North Carolina to have its orders filed and enforced in other states. Although URESA actions are civil rather than criminal, URESA in North Carolina designates the district attorney in each judicial district as the person responsible for representing any person in that district to whom support is owed in a URESA proceeding. For counties in which the board of commissioners has appointed or designated a special county attorney for social services matters, however, another statute makes that attorney responsible for representing the person to whom support is owed in all URESA actions.[33]

URESA is not a completely satisfactory solution to interstate enforcement of support obligations. Variations in states' laws sometimes cause confusion. Difficulty in locating parties and parties' mobility result in delays and other problems with enforcement. Because the case of the party who is seeking support is usually presented through affidavits rather than live testimony, accurate findings of fact may be difficult to reach. Also, in courts with heavy dockets, the claim of an absent party for child support may simply not receive as high priority as other cases with which the district attorney and the court must deal.

URESA procedures apply between counties within North Carolina just as they do between North Carolina and another state.[34] Although the state's geography and URESA's provision for legal representation suggest that URESA would be much used within the state, it is most often used *between* states and is often characterized only in that regard.

How is an order for the payment of child support enforced?

1983 "automatic" enforcement procedures. Legislation that became effective on October 1, 1983, requires that a delinquency notice be issued or a hearing scheduled any time support payments are in arrears under a civil or criminal order that requires them to be made to the clerk of court.[35] Before this law was passed, criminal defendants whose support payments were in arrears were brought back to court only if the district attorney took the initiative in bringing them back. In civil cases, the burden (and usually an attorney's fee) fell on the party to whom support was owed to file a motion to bring the case back before the court for enforcement. Now, when a party who has been ordered to pay support through the court is delinquent in payments, the clerk of superior court is authorized to send the party a delinquency notice demanding payment of the amount due. The clerk is *required* to send the notice only in civil cases in which the party has not previously been found in contempt of court for nonpayment. In practice, notices will probably be sent in all cases in which payments are in arrears, since a response to the notice may obviate the need to schedule a hearing. If the arrearage is

32. *Id.* § 50-13.6.

33. *Id.* § 108A-18.

34. *Id.* § 52A-23.

35. *Id.* § 50-13.9 (1983 Supp.); *id.* § 15A-1344.1 (1983 Supp.).

1984 Child Support Legislation

The following measures affecting North Carolina's child support laws were enacted by the 1984 session of the 1983 General Assembly:

1. When wages are garnished under G.S. 110-136 or assigned under G.S. 110-136.1 for child support, each support payment is increased by a $1 processing fee to be retained by the employer. (Senate Bill 514, enacted as Ch. 1047, effective August 1, 1984.)

2. Restrictions on the assignment of state employees' wages are made inapplicable to assignments to meet child support obligations under G.S. 110-136.1. (House Bill 1701, enacted as Ch. 1036, effective June 29, 1984.)

3. Effective January 1, 1985, boards of county commissioners are responsible for administering or providing for the administration of the Child Support Enforcement Program and will no longer have the option of requesting the Department of Human Resources to assume that responsibility. (House Bill 80, enacted as Ch. 1034, s. 76)

4. The Department of Human Resources (DHR), the Administrative Office of the Courts, and the Department of Justice are to report to the 1985 session of the General Assembly on the administration of the Child Support Enforcement Program. DHR is to recommend a single, uniform method for administering the program in all counties, changes in state law needed to conform to new federal requirements, and ways to make the program operate more effectively. The report is to be submitted by March 1, 1985. (House Bill 80, enacted as Ch. 1034, s. 77).

5. Court-related appropriations for 1984-85 included funds for 53 new deputy clerks of superior court positions; $600,000 for equipment to upgrade accounting systems in the offices of clerks of court; and $1.7 million to expand court computer information systems. Changes were also made in the process by which the Administrative Office of the Courts must obtain approval for changes in clerks' bookkeeping and accounting systems. Under the new statute, the Office of State Budget and Management instead of the State Auditor is to approve the changes. (House Bill 1551, enacted as Ch. 1109.)
as Ch. 1109.)

6. The "automatic enforcement" procedures for criminal cases were amended to make clear that they apply to cases of suspended sentences as well as to cases of supervised and unsupervised probation. (Senate Bill 790, enacted as Ch. 1100 becomes effective July 6, 1984, and expires June 1, 1985.)

not paid within 21 days after a notice is sent or—if no notice is sent—within 30 days after the party becomes delinquent, the following steps must be taken:
—If the delinquent party owes support as a condition of probation in a criminal case, the clerk must certify the amount due to the district attorney and probation officer, who must begin proceedings for revoking probation.
—In civil cases, an order is issued directing the delinquent party to show cause why he should not be held in contempt, and notice of a hearing is given to both him and the party to whom support is owed. The show-cause order may be withdrawn only if full payment is made. No show-cause order will be issued if (a) the recipient of the support payments requests that an order not be issued *and* (b) the judge finds it to be in the child's best interest that this request be honored.

In civil cases under the 1983 legislation, the judge must appoint an attorney (from a list maintained by the clerk of superior court) to represent the party to whom support is due if the judge finds that such an appointment would be in the child's best interest, *unless* (1) an attorney of record for the party has notified the clerk that the attorney will appear, or (2) the party requests that an attorney not be appointed, or (3) an attorney from the Child Support Enforcement Program (see the discussion of this program below) is available. It is not altogether clear when a judge should consider an attorney from the Child Support Enforcement Program "available" in deciding whether to appoint an attorney.

The only provision in the new law regarding payment of attorney fees authorizes the court to award fees under the same conditions as apply to any civil support action—that is, to a party who is acting in good faith and cannot pay the costs of the action, if the party who is ordered to pay support had refused to do so. The statute does not address the payment of fees when counsel is appointed in cases that do not meet those criteria. It does not authorize the court to require payment from the party for whom the attorney is appointed, even if he or she is able to pay. Apparently appointed counsel will go unpaid in cases in which the court lacks authority to award fees. The clerk's list of attorneys consists only of those who volunteer to represent parties that seek support. In smaller counties there may be too few volunteers to make the appointment system workable. Some judges have implemented the provision for appointing an attorney by naming an "attorney of the

day" to represent all parties that seek payment in support cases covered by the provision that are scheduled for a given date. Cases in which fees are recoverable from the responsible party may then balance those cases in which there is no source of attorney fees.

Contempt proceedings. The 1983 legislation mentioned in the previous section provides in civil cases for a determination of whether the responsible party is in contempt of court. Contempt proceedings have long been the most common enforcement procedure for nonpayment of court-ordered support. While a finding of contempt is a remedy used in civil cases, contempt itself may be either civil or criminal. Criminal contempt in the child support context involves the willful disobedience of a court's lawful order, directive, or instruction. A party who is able to pay the support as ordered and willfully refuses to do so may be found guilty of criminal contempt and punished by a fine of up to $500, imprisonment for up to 30 days, or both.[36] Civil contempt involves the failure by a person to whom a lawful order is addressed to comply with the order when he is capable of either complying or taking reasonable measures to become able to comply. Though one can be imprisoned for civil contempt, such imprisonment is not punishment for misconduct; it is aimed at coercing the party to comply with the court's order. Thus a party who is found in civil contempt for nonpayment of child support may not be imprisoned unless he is able either to pay the support or to take reasonable measures—such as selling property or ending his voluntary unemployment—to become able to pay the support. If he can pay however, he may be imprisoned for as long as he is able to pay and refuses to do so.[37] In some cases the same conduct may be treated as either civil or criminal contempt or both. A 1983 amendment makes the civil contempt remedy available while a child support order is being appealed unless the appellate court grants a motion to stay the contempt order.[38]

Garnishment. An employer or other person who holds funds that are owed to a debtor may be made a party (the garnishee) to a court proceeding (garnishment) and ordered to pay such funds into the court to satisfy the debt instead of paying them to the debtor. North Carolina law ordinarily does not allow garnishment of wages as a means of debt collection, but garnishment is specially authorized as a means of enforcing a child support order.[39] If a parent who is under a court order to pay support is delinquent in payments or has been erratic in making payments, the court can order garnishment of up to 40 per cent of his income—such as wages, salary, commission, bonus, or pension or retirement payments—that remains after the amounts required by law to be deducted have been removed. Garnishment may be an ineffective or frustrating remedy in regard to parents who change employment frequently, and it offers no help in cases of parents who are self-employed or have hidden income. Still, garnishment could probably be used more often than it is.

No provision has been made for reimbursing employers for the administrative costs they encounter as a result of garnishment. Some employers may wish to fire an employee rather than incur the cost and bookkeeping inconvenience of complying with an order for garnishment. The present law does not prohibit an employer's retaliating against an employee whose wages are garnished. The addition of both such a prohibition and some provision for reimbursing the employer for his costs would make the remedy of garnishment more effective.

The court, even at an initial child support hearing, may order the parent to execute an assignment of wages, salary, or other expected income.[40] But an employer is not required to recognize an assignment of future earnings unless the employer accepts the assignment in a written agreement to pay the wages as assigned.[41] The advantage of the garnishment procedure is that the employer is made a party and can be ordered to deduct an amount set by the court to be paid for child support.

Reduction to judgment. If court-ordered periodic payments for child support are past due, the party who is entitled to receive the payments can ask the court to reduce the past-due amount to a judgment that will be a lien on the responsible party's property. A judgment for child support can be enforced through procedures to secure payment of the amount owed out of the party's property, including property that is generally exempt from the claims of creditors.[42] Although the statute[43] places no restriction on when accrued arrears can be reduced to judgment, a 1983 decision by the North Carolina Court of Appeals indicates that the remedy is limited. Interpreting another, identically worded, statute that allows the reduction to judgment of past-due periodic alimony payments, the court held that the party that seeks the judgment must show that during the period of default the party who owes the payment had the means to comply with the order awarding alimony and/or child support.[44] Under that interpretation, the remedy of reduction to judgment is available only when it can be shown that the failure to pay was willful, as in cases of civil contempt.

36. *Id.* Ch. 5A, Art. 1.
37. *Id.* Art. 2.
38. *Id.* § 50-13.4(f)(9) (1983 Supp.).
39. *Id.* § 110-136 (1983 Supp.).
40. *Id.* § 50-13.4(f)(1).
41. *Id.* § 95-31.
42. *Id.* § 1C-1601(e)(9).
43. *Id.* § 50-13.4(f)(8) (1983 Supp.).
44. Wade v. Wade, 63 N.C. App. 189 (1983).

Other remedies. There are several other remedies for enforcing child support obligations in particular circumstances, though they are rarely used. The following procedures are available when an initial order for support is sought as well as for enforcing an existing order:

—Arrest and bail in cases in which the parent has removed or disposed of property, or is about to do so, with an intent to defraud (G.S. Chapter 1, Art. 34).

—Attachment or garnishment of the parent's property in cases in which the defendant (a) is a nonresident; or (b) is a resident who has left or is about to leave the state or is hiding in the state, with an intent to defraud; or (c) has removed or is about to remove property from the state with an intent to defraud; or (d) has assigned, disposed of, or hidden property, or is about to do so, with an intent to defraud (G.S. Chapter 1, Art. 35). (Garnishment under this general provision is in addition to garnishment to enforce an order for support, which is discussed above.)

—An injunction, if statutory prerequisites are met, to require or prohibit specified conduct, such as the disposal of property (G.S. Chapter 1, Art. 37; G.S. 1A-1, Rule 65).

—Appointment of a receiver to protect or dispose of property according to a court's judgment (G.S. Chapter 1, Art. 38).

What is the Child Support Enforcement (IV-D) Program?

Purpose and administration. The Child Support Enforcement Program,[45] which operates in every county in North Carolina, provides services to (1) locate absent parents for purposes of obtaining child support,[46] (2) establish paternity of children born out of wedlock, (3) establish child support obligations through voluntary agreements or through civil or criminal court action, and (4) enforce support obligations when amounts that have been ordered or agreed on are not paid. Begun in 1975 as a result of federal legislation, the program is designed to recoup some of the funds spent by federal, state, and local governments to support children through the AFDC program and to prevent families from becoming dependent by improving the overall enforcement of child support obligations. The program is often referred to as "IV-D" because it was established under Title IV-D of the Social Security Act.

In North Carolina, boards of county commissioners are responsible for providing for the administration of the program, and the Department of Human Resources (DHR) is responsible for supervising administration in accordance with federal law. A board of county commissioners that does not want this responsibility may notify DHR between July 1 and September 30 that it wishes DHR to assume responsibility for the program beginning July 1 of the following fiscal year. At present about two-thirds of the counties administer the program locally, usually through the county department of social services or the county attorney's office.

Services to AFDC recipients. The law considers that anyone who accepts AFDC benefits on behalf of a child whose eligibility is based on a parent's absence from the home has assigned to the county the right to any support (up to the amount of AFDC received) that is owed the child. Recipients are required to cooperate in efforts to obtain support from the parent who owes payments and in efforts to establish paternity when that is necessary, unless good cause can be shown for not cooperating. The child support program then must try to find the absent parent, establish paternity when necessary, and obtain support. Amounts that are collected are distributed—according to the percentage each pays for the AFDC program—to the federal, state, and county governments. Any amounts collected above the amount of the AFDC grant are applied to any debt for past AFDC payments or paid to the recipient for the child. If an amount greater than the AFDC payment is paid regularly, the child will be removed from the AFDC program.

Services to nonrecipients. The services of the child support program are not limited to families that receive AFDC. A law passed in 1983 makes it clear that all services available to AFDC recipients from the child support program must also be made available, on request and on payment of an application fee, to nonrecipients of public assistance, regardless of the applicant's income or ability to retain private legal representation.[47] Nonrecipients are charged a $20 application fee, up to $15 per hour for administrative costs, and up to $45 per hour for legal costs. These charges (but not the application fee) are collected by deducting 10 per cent of the support collected until the costs are paid. No costs are charged or collected, however, if the case involves a debt for past public assistance payments.

Other remedies available. The agency in charge of the Child Support Enforcement Program can initiate civil or criminal actions and pursue remedies for enforcement just as a custodial parent can. Civil actions are brought in the name of the county or state agency, on behalf of the client, by an attorney that represents the

45. North Carolina's Child Support Enforcement Program is established and governed by G.S. Ch. 110, Art. 9.

46. In 1983, parent locator services also became available for establishing or enforcing a child custody order. N.C. GEN. STAT. § 110-139.1 (1983 Supp.).

47. *Id.* §§ 110-130.1 (1983 Supp.).

In courts with heavy dockets, the claim of an absent party for child support may simply not receive as high priority as other cases with which the district attorney and the court must deal.

agency. Related disputes such as custody or visitation cannot be included in such actions, and the agency attorney will not provide representation in regard to those matters.

In addition to the remedies available to any party in a support action, the Child Support Enforcement Program can use several other enforcement measures: (1) The agency can accept voluntary assignments of unemployment compensation benefits and can reach such benefits through garnishment proceedings. (2) In AFDC cases, a state tax-intercept program allows the agency to reach state income tax refunds for the recovery of past-due child support. (3) In 1983, North Carolina implemented the federal tax-intercept program that became available in 1981 to collect past-due child support from federal income tax refunds in AFDC cases.

Are there other consequences of failure to support a child?

A parent who willfully fails or refuses to support his or her child risks not only criminal penalties or civil enforcement measures but also the complete loss of any relationship with the child. The law that permits the court to terminate a parent's rights[48] is usually invoked to free the child for adoption when a parent cannot be located or refuses to consent to adoption and the county department of social services or other petitioner believes that adoption is in the child's best interest. Nonsupport is a factor in four of the six grounds for terminating parental rights:

—The definition of "neglect" (which is one ground for termination) includes abandonment, and willful failure to support is an element of establishing abandonment.

—If a child is in the custody of a county social services department, a licensed child-placing agency, or a child-caring institution and the parent fails to pay a reasonable portion of the child-care cost for six continuous months, the parent's rights may be terminated.

—If one parent has custody of the child by court order or by agreement between the parents, the noncustodial parent's rights may be terminated if he or she fails for a year or more, without justification, to pay for the care, support, and education of the child as required by the court order or agreement.

—The rights of the father of a child born out of wedlock may be terminated if, before a termination petition is filed, he has not (a) established paternity in court, or (b) filed an affidavit of paternity with the State Department of Human Resources, or (c) completed or started a special court proceeding to legitimate the child, or (d) married the child's mother, or (e) provided substantial financial support or consistent care for the child and its mother.

Possible changes in federal law

H.R. 4325, the federal Child Support Enforcement Amendments of 1983,[49] passed the U.S. House of Representatives by a vote of 422 to 0 in November 1983. On April 25, 1984, the Senate unanimously approved a different version of the bill. At this writing, action by a House-Senate conference committee to resolve differences in the two versions is being awaited. If signed into law, either version of the bill—or a compromise between the two—would expand and strengthen federal requirements regarding the states' Child Support Enforcement Programs.[50] A review of H.R. 4325's requirements suggests that North Carolina is ahead of many other states in its child support laws. The following proposed procedures already exist here: a tax-intercept mechanism applicable to state income tax refunds for AFDC cases; authority for the court to impose liens against real and personal property; authority for the court to impose a security bond; a state law permitting the establishment of paternity until a child is 18; and a requirement that child support services be available for children who do not receive AFDC.

The most significant effect of H.R. 4325 on North Carolina would be a requirement for automatic wage deductions in cases in which the absent parent is delinquent in an amount equal to at least one month's support obligation. The amount withheld would include a fee to cover the administrative cost to the employer. Other parts of H.R. 4325 that would affect North Carolina include man-

48. *Id.* Ch. 7A, Art. 24B.

49. For a more detailed discussion of the provisions of H.R. 4325, *see* Nicky Gonzalez, "Child Support Reform Clears House," *Youth Law News* 5, no. 1 (January-February 1984), 1; Cliff Duke, "Congressional Legislation—Child Support and IV-D," *Newsletter of the North Carolina Association of Social Services Attorneys*, no. 3 (February 1984), 4-6.

50. Final action on the bill may well have occurred by the time this article is published. The provisions of the law, if enacted, may differ from those of the House-passed version discussed here. The Senate-passed version differs primarily in its financing provisions. It also requires the states to implement mandated enforcement procedures by October 1, 1984—a year earlier than the House-passed bill—but allows some leeway if state legislative action is required.

dates that the state provide for (1) informing consumer credit agencies when delinquent payments in a case total $1,000 or more; (2) publicizing the availability of child support enforcement services; (3) a Child Support Commission to examine child support services and report to the Governor on problems relating to child support; (4) the collection—but not the initial seeking—of support for a spouse (or ex-spouse) when a court order provides for support of both a child and its parent; (5) extending Medicaid eligibility for four months when support collection makes the child ineligible for AFDC; and (6) the requirement that medical support be included in support orders when health coverage is reasonably available to the absent parent.

In addition, H.R. 4325 as passed by the House would completely restructure federal financial incentives to address the imbalance that has rewarded states for collections on behalf of AFDC recipients but not for collections for nonrecipients of AFDC. The bill would also establish a $15 million fund to develop better programs for the interstate enforcement of child support orders.

Conclusion

While changes in federal law may result in several additions to North Carolina's child support statutes, the state already has an impressive array of procedures for establishing and enforcing support obligations. Legislation enacted by the 1983 General Assembly takes a large step toward alleviating a situation that too often renders children's right to support meaningless because they or their representatives lack affordable access to the courts to enforce those rights.

What have been the results of the "automatic" enforcement provisions of the 1983 state legislation? A complete answer to this question must wait. Because an automated record-keeping system was not yet in place when the legislation became effective in October 1983, all of the cases to be brought into court under the new provisions have had to be identified manually. Over 100 temporary positions were created in offices of clerks of superior court across the state to help review and update accounts. As a statewide automated system for tracking and processing support cases is developed and as the courts work through the large number of cases that have been included in the system, the effectiveness of the new law will be easier to measure.

Undoubtedly, too many children in North Carolina still do not receive the support to which they are entitled. In addition to whatever new legislation proves necessary, at least these developments need to occur:

—People who seek support and those involved in the child support system need to be aware of and make effective use of available procedures and remedies;

—Legislation that went into effect in 1983 should be evaluated for its effectiveness after being given a chance to work; and

—An assessment should be made of whether child support agencies and clerks' offices have adequate resources with which to provide the services the law now requires without inordinate backlogs and delays. **pg**

Questions I'm Most Often Asked

What is a local government's responsibility in providing financial support for the state court system?

James C. Drennan

Since North Carolina's court system was reorganized in the 1960s, most of the operating expenses of this unified, uniform system have been paid by the state. Until court reorganization, clerks of court, judges and prosecutors of inferior courts (county courts, city courts, mayor's courts, etc.), and justices of the peace were local officials who were paid by case fees or local governments. Since the occupants of those offices accounted for the majority of court personnel (as do their successors under court reform—district court judges, magistrates, and clerks of court and staff), the salary and operating expenses of those officials accounted for a large percentage of the cost of running the courts. An important part of the uniformity sought by those who supported court reform was the decision to make all court officials state employees. That decision meant that persons in similar positions were paid the same salaries, regardless of where they worked in the state. It eliminated the positions for which compensation was based on fees collected and relieved local governments of the duty to pay the salaries and related expenses of those officials. It also shifted the other costs of *operating* the courts to the state.

G.S. 7A-300 lists the court expenses to be paid by the state. It provides, among other things, that the Administrative Office of the Courts (AOC) is to pay from state funds the salaries, travel expenses, and the office expenses of the clerks of superior court and their employees, judges, prosecutors, magistrates, public defenders, juvenile court counselors, and supporting personnel. Specifically included in this duty is a requirement that the AOC pay for operating costs of those offices—such as supplies, materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items.

G.S. 7A-300 does not say who must provide the physical facility in which court sessions are held, but G.S. 7A-302 answers that question as follows: ". . . Courtrooms and related judicial facilities (including furniture), . . . shall be provided by the county . . . ." In certain limited circumstances, the statute also authorizes municipalities to provide court facilities. With one exception (High Point), municipal facilities are used for the operations of magistrates or the district court only. G.S. 7A-133 authorizes seats of court in 39 municipalities other than county seats, subject to approval of the AOC.

To help offset the costs of providing courtrooms and related facilities, the state allocates a portion of the court costs collected in each case to the unit of government that provides the facility. Those costs are called facilities fees. In fiscal year 1982-83, $5.8 million was collected and distributed to counties as facilities fees; $300,000 went to cities. The statute describes the state policy as follows: "To *assist* a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the cost of court" is returned to the county or municipality (emphasis added). The General Assembly clearly does not expect that the facilities fees will compensate the local government unit fully.

The use of facilities fees is limited by G.S. 7A-304(a)(2), which provides that the fees:

> *shall be used exclusively* by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors, and a law library (including books) . . . . [Emphasis added.]

Subject to this legal requirement of "exclusive" use of the fee for court purposes, the local government unit may decide specifically how the revenues from facilities fee are to be disbursed. The statute is silent, however, as to who, if anyone, is to audit the expenditure of the funds received.

G.S. 7A-304(a)(2) also provides:

> In the event the funds derived from the facilities fees exceed what is needed for these purposes [i.e., the purposes mentioned in the preceding quotation], the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess *to retire outstanding indebtedness incurred in the construction of the facilities*, or to reimburse the county or municipality for funds expended

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in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or *to supplement the operations of the General Court of Justice in the county.* [Emphasis added.]

In my opinion, a reasonable interpretation of the language emphasized in the preceding quotation is as follows: If, in a specific fiscal year, the facilities fees exceed what is necessary to maintain, furnish, and construct adequate courtroom and related judicial facilities, the excess may be used to repay prior construction debts or to "supplement the operation" of the courts.

The AOC must approve the amount spent when excess fees are used to repay construction debts or to supplement operations, but for practical reasons, that is rarely an issue. In many counties, just the costs of maintaining court offices, providing for libraries, and replacing furniture exceed the revenues from facility fees. In other counties, the fees are more than adequate but the local units simply allow the surplus fees to accumulate. In still other counties, the local practice is to maintain the courthouse from general funds rather than from facilities fee revenues; the facilities fees are used solely for improving court facilities, usually at the direction of such local court officials as the clerk of superior court, and those moneys are not treated as "excess" funds.

In cases in which excess revenues from the facilities fees are used to supplement the operation of the court system, some questions of interpretation arise. Supplementation may occur only after all basic facility needs are met, and then the amount used must be approved by the AOC. Determining whether basic needs have been met is often a matter of opinion. Often a clerk of court may believe that his office space is inadequate and his office furniture in need of replacement, while the county manager or the board of commissioners finds it adequate. Who prevails? As the cases discussed later suggest, the county's interpretation will prevail in the first instance, subject to political persuasion to the contrary or legal reversal by a court.

But it is not clear from the statute what the county may do if it has excess funds and wants to use them to "supplement" court operations. May it compensate such local officials as jury commissioners? May it aid the sheriff's office by purchasing for it equipment that will help the sheriff serve the court better? May it provide funds to supplement the jail's operation? While all of those functions have an effect on the court's operation, the legislature probably did not intend for facility fees to be used for such purposes. In my opinion, use of facility fees revenues for any purpose other than supplementing the operations of *agencies of the General Court of Justice* or repaying construction or renovation costs does not meet the statutory standard.

Under that interpretation, excess facilities fees may be used to pay operational costs for court agencies, with AOC approval as to amounts. In practice, the kinds of operating costs that have been paid have most often been nonrecurring costs like purchases of equipment. In some cases, however, recurring costs for such services as use of computers and expanded telephone coverage have been paid from facilities fees. It is interesting that all of these objects of expenditure are items for which the state is legally responsible under G.S. 7A-300.

As this discussion suggests, there is no single procedure for handling court facilities fees. Nevertheless some generalizations are possible. Most local governments have no facilities fees left over after paying for maintenance of the court building, replacement of furniture, library costs, utility expenses, and miscellaneous costs. Because of the relatively small amounts collected, facilities fees are not significant in financing the construction of court facilities. In the instances when there have been excess funds, AOC approval has almost been never obtained before the excess was spent. Some of those were used for items that did not directly supplement court operations.

These nonuniform practices have developed for two reasons. First, the facilities fee statute does not clearly answer several important questions, as this article explained earlier. Second, there is no single agency responsible for either auditing the expenditure of funds or providing binding interpretations of the statutory limitations on the use of the funds. The combination of those two factors produces a good deal of variety in the administration of the facilities fees.

These statutes, with all their gaps and with all the different interpretations that may be made of them, nevertheless provide a general description of a local government's duty in financing the court system and the role of the facilities fees in meeting that duty. But they still leave unanswered the troublesome question of who is to decide whether a local government has met its basic duty of providing *adequate* facilities and furnishings. There have been many disputes over that issue among local court and county officials, and twice legal action to force counties to act has reached the appellate courts.

In *Ward v. Commissioners of Beaufort County* [146 N.C. 534 (1908)], a superior court judge issued an order known as a writ of mandamus directing the county commissioners to provide "a sufficient courthouse for the county of Beaufort, and in good and sufficient repair." The county appealed the superior court's order. The Supreme Court indicated that while the county commissioners' failure to provide an adequate courthouse could be a criminal breach of duty, a writ of mandamus could not be issued on a complaint of a private citizen in a civil action. The Court indicated that the decision to construct or repair the courthouse was within the power of the county commissioners, and how that power was exercised was not for the courts to control. The Court's concluding statement is illustrative: "The remedy (other than by indictment of the commissioners for neglect of duty) must be sought in an appeal to the better judgment of the county authorities or by arousing the sound public opinion of a self-governing people and not by application of the courts." In two other cases,[1] the technique of using criminal prosecutions was implicitly approved.

1. State v. Justices of Lenoir, 11 N.C. 194 (1825), and State v. Leeper, 146 N.C. 655 (1908). In the *Justices of Lenoir* case, the justices of peace for the county (at that time the justices also administered the county government) were charged with the criminal offense of "negligently and unlawfully permitting the jail to go to ruin and decay." The Supreme Court, in reviewing the charge, held that it would be a criminal act not to levy the necessary taxes or order the jail built or repaired. But, the court held, the fact that the jail was in ruin or decay was not in itself a crime; unless the justices were in fact the cause of the ruin and decay, they were not criminally liable. In the *Leeper* case (which was decided the same year as the *Beaufort County* case), the Gaston County Board of Commissioners were charged with unlawfully neglecting "the duty of their office, in that they unlawfully and unwillingly omitted, neglected, and refused to erect and repair the necessary Courthouse . . ., and to raise by taxation the money therefore . . . ." (That crime is today codified as G.S. 14-230.) In reviewing the sufficiency of the charge, the Supreme Court held that the crime of neglect of duty could be established by proving either that the commissioners had failed to erect a courthouse as required by law or that they had failed to see that the courthouse was kept in repair. That case was sent back to the trial court for trial, and the results of the trial were not reported in the Supreme Court record.

A superior court judge attempted to deal with the issue in a different way in *In Re Board of Commissioners of Caldwell County* [4 N.C. App. 626 (1969)]. In that case the judge held the members of the Caldwell County Board of Commissioners in contempt for not complying with his earlier order to provide "adequate office space" for the "more orderly and efficient operation" of the clerk's office. The earlier order was issued after the grand jury had made 12 reports about the inadequate office space and after repeated negotiations between court and county officials had failed to bring about the court improvements that had been requested. The Court of Appeals vacated the contempt order for two reasons—the original order was too vague to indicate what the county officials had to do, and the subpoena directing the commissioners to appear did not indicate that they should be prepared to defend their actions implementing the court's order. Since this procedure was inadequate to hold the commissioners in contempt, the appellate court did not have to answer the question of whether the original procedures and order were lawful.

It is difficult, from these two cases, to find any general principles. But clearly the question of whether facilities are adequate must be resolved initially by the local government. If there is a dispute between a *city* and the courts about a district court facility, the AOC and the chief district judge have a significant advantage; under G.S. 7A-130 either of them may direct that the city facility no longer be used for court purposes (G.S. 7A-130). But if the a dispute is between a *county* and court officials and court action appears necessary to resolve the issue, the cases do not clearly indicate the proper procedure to follow. Implicit in both the *Beaufort County* and the *Caldwell County* cases is a strong preference for negotiated or political solution to the dispute. A criminal prosecution against the county commissioners under G.S. 14-230, since it would involve discretionary decisions about what is an "adequate" facility, would pose difficult issues and would not remedy the basic problem. Civil proceedings, enforced by contempt, address the problem more directly but have never succeeded. Still, the mere threat of litigation has often been successful. The Caldwell County case leaves open the possibility that the contempt power may be used when the proper procedure is followed.

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What of the future? It has been said that predictions are difficult, particularly about the future. Many political scientists in the 1960s said that managers are oriented more toward things than toward people, that the council-manger plan does not foster strong political leadership, that managers do not give citizens access to decision-makers, and that manager cities are hampered in dealing with state and federal officials. Some of these same political scientists concluded in the late 1970s that cities are ungovernable after watching some astute and charismatic mayors retire and be replaced by some inept and special-interest mayors.

The future of the mayor-council-manager plan will be determined by a combination of circumstances in many communities. Will concerned citizens become complacent about having achieved "good government" and retire to their living rooms to watch TV? Democracy and good government are perishable. They must be earned anew each year, each month, each day. Will managers help councils set wise policies by researching each problem, telling the council and the citizens the advantages and disadvantages of each alternate course of action? Will councils face up to hard community problems, make policies, and require managers and employees to administer the adopted policies and programs? Will managers set an example of high professional and ethical standards for their employees? Will the councils and managers create a work environment that will permit cities to attract and retain qualified and dedicated professionals who are challenged by the opportunity to make their communities better places in which to live for all citizens?

The mayor-council-manager plan of government is bigger than any single mayor, council, or manager. Even the most competent manager may be forced to make decisions that, though necessary for the local government, are unpopular with some citizens, council members, or municipal employees. The result may be a loss of the mutual trust, confidence, and good will between the mayor and the manager or between the council and the manager. The advantage of the mayor-council-manager system is that when this loss occurs, a manager can resign—and be available to move to a different city or county to continue his or her career of helping a mayor, council, and community to achieve their goals.

For those communities where the advantages of the mayor-council-manager plan are appreciated, the life expectancy of the mayor-council-manager plan may be considerably longer than the Biblical three score and ten that was celebrated in Hickory and Morganton last fall. **pg**

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