THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1988 CUMULATIVE SUPPLEMENT

Volume 2A, Part II

Chapters 41A through 52B

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

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Annotated through 368 S.E.2d 309. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 2A, Part II contains the general laws of a permanent nature enacted by the General Assembly through the 1987 (Regular Session, 1988) Session which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P. O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 (Regular Session, 1988) Session affecting Chapters 41A through 52B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 322, p. 116.
North Carolina Court of Appeals Reports through Volume 89, p. 583.
South Eastern Reporter 2nd Series through Volume 368, p. 309.
Federal Reporter 2nd Series through Volume 846, p. 78.
Federal Supplement through Volume 683, p. 1410.
Federal Rules Decisions through Volume 119, p. 460.
Bankruptcy Reports through Volume 85, p. 182.
Supreme Court Reporter through Volume 108, p. 1762.
North Carolina Law Review through Volume 66, p. 837.
Wake Forest Law Review through Volume 23, p. 398.
Campbell Law Review through Volume 10, p. 352.
Duke Law Journal through 1987, p. 976.
North Carolina Central Law Journal through Volume 17, p. 118.
Opinions of the Attorney General.

The General Statutes of North Carolina
1988 Cumulative Supplement

VOLUME 2A, Part II

Chapter 42.
Landlord and Tenant.

Article 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

Legal Periodicals. —
For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.

CASE NOTES

Cited in Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984).

§ 42-3. Term forfeited for nonpayment of rent.

CASE NOTES

Section 42-33 construed in pari materia with this section. Charlotte Office Tower Assocs. v. Carolina SNS Corp., — N.C. App. —, 366 S.E.2d 905 (1988).

This section and § 42-33 remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply these statutory provisions. Charlotte Office Tower Assocs. v. Carolina SNS Corp., — N.C. App. —, 366 S.E.2d 905 (1988).

§ 42-4. Recovery for use and occupation.

CASE NOTES

Judge Did Not Have Authority to Assign No Rental Value at All. — In an action under this section, while the trial judge had the authority to believe all, any or none of the landowner's testimony, and so to decline to accept her estimate of reasonable compensation, he did not have the authority to refuse to assign any rental value to the land at all. Even if the house on the property was fallen down or demolished, the land would still have had a rental value. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Period of Limitations on Action for Fair Rental Value. — An action for the "fair rental value" of occupied property was brought upon a statutory liability under this section and was subject to the three-year statute of limitations provided for in § 1-52(2). Such a cause of action accrued continually, for each day the property was occupied. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Claim Against Administratrix for Reasonable Compensation Held Subject to Limitation Period in § 28A-19-3. — A landowner's claim under this section for "reasonable compensation" for occupation of her property, brought against one of the former cotenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (§ 28A-19-3) and was therefore not barred by the three-year statute of limitations (§ 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.

CASE NOTES

Quoted in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.

CASE NOTES

When title passes, the lessee ceases to hold under the grantor and he becomes a tenant of the grantee. In other words, privity is automatically established between the lessor's grantee and the lessee. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

The general rule is that the rights and liabilities existing between the grantee and lessee are the same as those existing between the grantor and the lessee, after the lessee is given notice of the transfer of the property. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

§ 42-11. Willful destruction by tenant misdemeanor.

CASE NOTES

Cited in Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

§ 42-14. Notice to quit in certain tenancies.

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least 30 days before the end of the current rental period, regardless of the term of the tenancy. (1868-9, c. 156, s. 9; Code, s. 1750; 1891, c. 227; Rev., s. 1984; C.S., s. 2354; 1985, c. 541.)

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, and applicable to leases entered into after that date, added the last sentence.

CASE NOTES

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under this section is that the parties are bound to a new term. The rule applies to agricultural tenancies, even those for fixed one-year terms under § 42-23. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Applied in Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

§ 42-14.1. Rent control.

No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property. This section shall not be construed as prohibiting any county or city, or any authority created by a county or city for that purpose, from:

(1) Regulating in any way property belonging to that city, county, or authority;

(2) Entering into agreements with private persons which regulate the amount of rent charged for subsidized rental properties; or

(3) Enacting ordinances or resolutions restricting rent for properties assisted with Community Development Block Grant Funds. (1987, c. 458, s. 1.)

Editor's Note. — Session Laws 1987, c. 458, s. 2 makes this section effective upon ratification. The act was ratified June 23, 1987.

Article 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (1876-7, c. 283; Code, s. 1754; Rev., s. 1993; 1917, c. 134; C.S., s. 2355; 1933, c. 219; 1985, c. 689, s. 11.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, deleted the last sentence of the first paragraph, which read: "A landlord, to entitle himself to the benefit of the lien herein provided for, must conform as to the prices charged for the advance to the provisions of the Article Agricultural Liens, in the Chapter Liens."

CASE NOTES

I. IN GENERAL.

Landlord's Priority in Bankruptcy Proceedings. — Although landlord's claim for rent of 250 acres pursuant to the statutory landlord's lien of this section would be denied, since the bankruptcy trustee could properly avoid that lien pursuant to 11 U.S.C. § 545(3), the landlord had an administrative expense priority claim for rent in the amount of $12,073.39 pursuant to 11 U.S.C. §§ 364(a) and 503(b)(1). In re Harrell, 55 Bankr. 203 (Bankr. E.D.N.C. 1985).

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

Where lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, the landlord or his assigns shall have a lien on all the insurance procured by the tenant or cropper on the crops raised on the lands leased or rented to the extent of any rents due or advances made to the tenant or cropper.

The lien provided herein shall be preferred to all other liens on said insurance, and the landlord or his assigns shall be entitled to all the remedies at law for the enforcement of the lien. (1959, c. 1291; 1985, c. 689, s. 12.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, deleted the second paragraph, which read: "To be entitled to the benefit of the lien herein provided, the landlord must conform as to prices charged for advances under the provisions of Article 10 of Chapter 44 relating to agricultural liens."

§ 42-23. Terms of agricultural tenancies in certain counties.

CASE NOTES

Applicability. — For a lease to fall within this section it must be both (1) for an agricultural purpose, and (2) for a period of one year or from year to year. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

When Notice Must Be Given. — Because this section prescribes December 1 as the expiration of the lease year, notice must be given by the preceding November 1. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

This section requires that notice to quit be given, in accordance with § 42-14, one month before the expiration of the tenancy, even if the tenancy is an estate for years. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under § 42-14 is that the parties are bound to a new term. This rule applies to agricultural tenancies, even those for fixed one-year terms under this section. Lewis v.

Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

ARTICLE 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

CASE NOTES

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to §§ 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

§ 42-25.9. Remedies.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 44A-2(e) or 42-25.9(d), the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S. 42-36.2 or G.S. 44A-2(e), deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, inserted "or 42-25.9(d)" in subsection (b) and added new subsections (d), (e) and (f).

CASE NOTES

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to §§ 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

CASE NOTES

I. IN GENERAL.

This section only intended to apply to case in which tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. Jones v. Swain, — N.C. App. —, 367 S.E.2d 136 (1988).

Under this section, no longer necessary to allege landlord-tenant relationship exists between parties as jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the summary ejectment remedy may be properly granted. Jones v. Swain, — N.C. App. —, 367 S.E.2d 136 (1988).

Remedy. —

The remedy given by this section is restricted to the case where the relation between the parties is simply that of landlord and tenant. Jones v. Swain, — N.C. App. —, 367 S.E.2d 136 (1988).

Quoted in Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed 10 days from the issuance of the summons to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed one thousand five hundred dollars ($1,500), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c.

1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1.)

Effect of Amendments. —
The 1985 amendment, effective October 1, 1985, substituted "one thousand five hundred dollars ($1,500)" for "one thousand dollars ($1,000)" near the middle of the second sentence.

Legal Periodicals. —
For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant at his last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful, the officer shall make at least one visit to the place of abode of the defendant at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102.)

Effect of Amendments. —
The 1985 amendment, effective April 18, 1985, substituted "The officer may attempt" for "The officer shall attempt" at the beginning of the second sentence and substituted "If the officer does not attempt to telephone the defendant or the attempt" for "If a telephone call is not possible or" at the beginning of the third sentence.

§ 42-30. Judgment by confession or where plaintiff has proved case.

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if the plaintiff proves his case by a preponderance of the evidence, or the defendant admits the allegations of the complaint, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding one thousand five hundred dollars ($1,500), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev.,

s. 2004; C.S., s. 2369; 1971, c. 533, s. 5; 1973, c. 10; c. 1267, s. 4; 1979, c. 144, s. 5; 1981, c. 555, s. 5; 1985, c. 329, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, substituted "one thousand five hundred dollars ($1,500)" for "one thousand dollars ($1,000)" near the middle of the section.

Legal Periodicals. —

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

§ 42-31. Trial by magistrate.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

§ 42-33. Rent and costs tended by tenant.

CASE NOTES

This section construed in pari materia with § 42-3. Charlotte Office Tower Assocs. v. Carolina SNS Corp., — N.C. App. —, 366 S.E.2d 905 (1988).

Section 42-3 and this section are remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply these statutory provisions. Charlotte Office Tower Assocs. v. Carolina SNS Corp., — N.C. App. —, 366 S.E.2d 905 (1988).

§ 42-34. Undertaking on appeal and order staying execution.

Legal Periodicals. —

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

Cited in In re Nexus Communications, Inc., 55 Bankr. 596 (Bankr. E.D.N.C. 1985).

§ 42-36.1. Lease or rental of manufactured homes.

The provisions of this Article shall apply to the lease or rental of manufactured homes, as defined in G.S. 143-145. (1971, c. 764; 1985, c. 487, s. 8.)

Effect of Amendments. — The 1985 amendment, effective June 27, 1985, changed the catchline and substituted "manufactured homes" for "mobile homes."

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

CASE NOTES

Cited in Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985).

ARTICLE 5.

Residential Rental Agreements.

§ 42-38. Application.

Legal Periodicals. — For note, "Property Law — A Fresh Look at Contractual Tenant Remedies Under the North Carolina Residential Rental Agreements Act," see 10 Campbell L. Rev. 167 (1987).

CASE NOTES

Implied warranty of habitability is co-extensive with this article. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

§ 42-41. Mutuality of obligations.

CASE NOTES

Rent Abatement Allowed for Unfit Apartment. — A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with § 42-42(a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Punitive Damages Recoverable Only Where Tortious Conduct. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

§ 42-42. Landlord to provide fit premises.

CASE NOTES

Subdivision (a)(2) of this section does not alter the commom law standard of ordinary and reasonable care. Bolkhir v. North Carolina State Univ., — N.C. —, 365 S.E.2d 898 (1988).

Subdivisions (a)(2) and (a)(3) contemplate repair or maintenance function and have no relevance to the construction and design of rented dwellings. Collingwood v. General Elec. Real Estate Equities, Inc., — N.C. App. —, 366 S.E.2d 901 (1988).

North Carolina cases construing subdivision (a)(3) have applied it in context of safety maintenance of common areas. Collingwood v. General Elec. Real Estate Equities, Inc., — N.C. App. —, 366 S.E.2d 901 (1988).

Compliance with subdivision (a)(1) insulates landlords from liability for building design or construction. Collingwood v. General Elec. Real Estate Equities, Inc., — N.C. App. —, 366 S.E.2d 901 (1988).

No Waiver of Rights to Recover for Defect by Taking Possession. — The trial court's suggestion that defendant had waived any rights to recover for the defect by taking possession of the premises with the knowledge of the heater's defect and repairs, constituted an incorrect statement of the law under this section. Mendenhall-Moore Realtors v. Sedoris, — N.C. App. —, 366 S.E.2d 534 (1988).

Defendant's subsequent acceptance of the premises while the hot water heater had not been repaired does not waive defendant's rights to recover for the defect. Mendenhall-Moore Realtors v. Sedoris, — N.C. App. —, 366 S.E.2d 534 (1988).

Tenant entitled to decline taking possession of leased premises where a landlord fails to provide and maintain any services agreed upon at the time the lease was contracted. Mendenhall-Moore Realtors v. Sedoris, — N.C. App. —, 366 S.E.2d 534 (1988).

Subdivisions (a)(2) and (4) means when landlord has either expressed or implicitly agreed to provide service to or appliance in demised property, same must be supplied or repaired in time for the tenant to take possession. In other words, this section entitles a tenant to the value of the bargain contained in the lease which includes full and adequate operation of services promised by the landlord. Mendenhall-Moore Realtors v. Sedoris, — N.C. App. —, 366 S.E.2d 534 (1988).

The statute does not per se require the furnishing of hot water in residential premises. Mendenhall-Moore Realtors v. Sedoris, — N.C. App. —, 366 S.E.2d 534 (1988).

A landlord has a duty to exercise due care in making repairs to leased premises. Bolkhir v. North Carolina State Univ., — N.C. —, 365 S.E.2d 898 (1988).

Rental of premises for price that is "fair" or below fair rental value does not absolve the landlord of his statutory obligation to provide fit premises. The implied warranty of habitability entitles a tenant in possession of leased premises to the value of the premises as warranted, which may be greater than the rent agreed upon or paid. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

"Switching" of screen and glass panels in door of apartment. — In action brought by plaintiff as guardian ad litem for his injured son for injuries suffered when he pushed through a glass panel installed by defendant's employee on storm door of an apartment rented by plaintiff, the Industrial Commission could find and conclude that the replacement of the screen panel with glass by defendant's employee was not reasonably prudent conduct under the circumstances presented, as defendant's employee had actual knowledge that plaintiff's children habitually opened the door in question by pushing forcefully on the middle panel, and the Court of Appeals erred in reversing the Commission's resolution of the question. Bolkhir v. North Carolina State Univ., — N.C. —, 365 S.E.2d 898 (1988).

Violation as Evidence, etc. —

Violations of this section are evidence of negligence. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

Tenant's Contributory Negligence Held a Jury Question. — In a civil action wherein a tenant was injured when he stepped into a hole under the landlord's control, it could not be said as a

matter of law whether the surrounding circumstances — darkness, a growth of grass around the hole, the lapse of time between the tenant's prior awareness of the hole and his injury — were sufficient to excuse the tenant's alleged contributory negligence, and the issue of contributory negligence should have been decided by the jury. Baker v. Duhan, 75 N.C. App. 191, 330 S.E.2d 53 (1985).

Rent Abatement Allowed for Unfit Apartment.— A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with subsection (a). The rent abatement is calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition ("as is") plus any special and consequential damages alleged and proved. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

Determination of Fair Rental Value of Premises in Calculating Rent Abatement. — The fair rental value of property may be determined by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined; the "other facts" include the dilapidated condition of the premises — indirect evidence of fair rental value. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

Direct evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

A party is not required to put on direct evidence to show fair rental value. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

The rent agreed upon by the parties when entering into the lease is some evidence of the property's "as warranted" fair rental value, but it is not binding. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

The illegality of re-renting a unit on the open market does not automatically reduce the unit's fair rental value to zero. The measure of the unit's fair rental value is not the price at which the owner could lawfully rent the unit to a new tenant in the open market, but the price at which he could rent it if it were lawful for him to do so; thus, the trial court did not err by refusing to find the fair rental value of the plaintiffs' units was zero during the period of time between the repair deadline and the date of repair. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692 (1987).

And Three-Year Statute of Limitations Governs. — Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statue, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to § 1-52(1) and (2). Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Violations of subsection (a) constitute a continuing offense. Thus, plaintiffs would be entitled to recover for any period of their occupancy (following the three-year limit of the statute of limitations) during which they could establish that the condition of the premises was substandard as measured by the statute, regardless of whether the conditions complained of first existed prior to that time. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Punitive Damages Recoverable Only Where Tortious Conduct. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post,

Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Cited in Jackson v. Housing Auth., 73 N.C. 363, 341 S.E.2d 523 (1986).

§ 42-43. Tenant to maintain dwelling unit.

CASE NOTES

Cited in Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

§ 42-44. General remedies and limitations.

CASE NOTES

Rent Abatement Allowed for Unfit Apartment. — A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

And Three-Year Statute of Limitations Governs. — Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, § 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to § 1-52(1) and (2). Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Punitive Damages Recoverable Only Where Tortious Conduct. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Applied in Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985).

§ 42-45. Early termination of rental agreement by military personnel.

(a) Any member of the United States Armed Forces who (i) is required to move pursuant to permanent change of station orders to depart 50 miles or more from the location of the dwelling unit, or (ii) is prematurely or involuntarily discharged or released from active duty with the United States Armed Forces, may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer.

Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental

agreement. The tenant is not liable for any other rent or damages due to the early termination of the tenancy except the liquidated damages provided in subsection (b) of this section. If a member terminates the rental agreement pursuant to this section 14 or more days prior to occupancy, no damages or penalties of any kind shall be due.

(b) In consideration of early termination of the rental agreement, the tenant is liable to the landlord for liquidated damages provided the tenant has completed less than nine months of the tenancy and the landlord has suffered actual damages due to loss of the tenancy. The liquidated damages shall be in an amount no greater than one month's rent if the tenant has completed less than six months of the tenancy as of the effective date of termination, or one-half of one month's rent if the tenant has completed at least six but not less than nine months of the tenancy as of the effective date of termination.

(c) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances. Nothing in this section shall affect the rights established by G.S. 42-3. (1987, c. 478, s. 1.)

Editor's Note. — Session Laws 1987, c. 478, s. 2 makes this section effective October 1, 1987, and applicable to rental agreements executed or renewed on or after that date.

§ 42-46. Late fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the rental payment, whichever is greater, to be charged by the lessor if any rental payment is five days or more late.

(b) A late fee under this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default.

(c) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable. (1987, c. 530, s. 1.)

Editor's Note. — Session Laws 1987, c. 530, s. 2 makes this section effective upon ratification and applicable only to leases entered into on or after that date. The act was ratified July 1, 1987.

§§ 42-47 to 42-49: Reserved for future codification purposes.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

CASE NOTES

Defendants' unequivocal admission in their answer that they did "accept a security deposit" constituted a judicial admission conclusively establishing the fact, despite defendants' contention that the deposit was not a security deposit, but was simply to "hold the house." Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

§ 42-51. Permitted uses of the deposit.

CASE NOTES

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Clamar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

Chapter 43.

Land Registration.

Article 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Article 3.

Procedure for Registration.

§ 43-12. Effect of decree; approval of judge.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Article 4.

Registration and Effect.

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 43-21. No right by adverse possession.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

Chapter 44.

Liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

CASE NOTES

Held Not Entitled to Lien. — Where action for child's damages was instituted in the Edgecombe County Superior Court and plaintiffs did not file a claim for their lien with the clerk of that court within the time designated by this section, they were not entitled to a lien under its provisions. Duke Univ. Medical Center, Private Diagnostic Clinic v. Hardy, — N.C. —, 367 S.E.2d 6 (1988).

Applied in Duke Univ. Medical Center, Private Diagnostic Clinic v. Hardy, — N.C. App. —, 367 S.E.2d 6 (1988).

Cited in North Carolina Baptist Hosps. v. Mitchell, — N.C. App. —, 362 S.E.2d 841 (1987).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

CASE NOTES

Distribution of Proceeds Held Proper. — Action of defendant attorney in receiving $25,000.00 in settlement proceeds, deducting her fee of 25%, and then dividing the balance equally between injured party and medical providers was in direct accord with this section. North Carolina Baptist Hosps. v. Mitchell, — N.C. App. —, 362 S.E.2d 841 (1987).

Applied in Duke Univ. Medical Center, Private Diagnostic Clinic v. Hardy, — N.C. App. —, 367 S.E.2d 6 (1988).

ARTICLE 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Pasquotank, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466.)

Effect of Amendments. —

The 1985 amendment, effective February 25, 1985, inserted a reference to Alexander County.

The 1985 (Reg. Sess., 1986) amendment, effective July 8, 1986, inserted a reference to Chatham County.

The 1987 amendment, effective June 24, 1987, inserted a reference to Craven County.

ARTICLE 12.

Liens on Certain Agricultural Products.

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

CASE NOTES

Recovery on Federal Loan Program. — While an action brought by the United States to recover damages for conversion of property is governed by the six-year statute of limitations contained in 28 U.S.C. § 2415(b), and not by similar statutes provided by state law, this section specifically controls the legal duration of an agricultural lien upon soybeans under state substantive law and is not a statute of limitations. Actions to recover on federal loan programs are controlled by federal common law and state law is adopted as the federal common law unless it is found to be discriminatory. In this regard, this section is far from discriminatory and provides an effective mechanism for resolution of disputes concerning perishable, agricultural commodities. United States v. Bailey Feed Mill, Inc., 592 F. Supp. 844 (E.D.N.C. 1984).

§ 44-69.3. Liens on tangible and intangible assets of milk distributors.

(a) A producer, or an association of producers who supplies milk either through an agreement of sale or on consignment to a distributor shall, upon complying with the provisions of this section, have a lien upon the tangible and intangible assets, including but not limited to the accounts receivable of the distributor to secure payment for such milk. For purposes of this section the term "milk" is as defined in Article 28B of Chapter 106 of the General Statutes.

(b) The lien claimed by the producer or association of producers must be filed in the office of the clerk of court for the county of the distributor's principal place of business. Provided that if the distributor is not a resident of the State a filing must be made with the clerk of superior court for the county in which the distributor's registered office is located. The clerk shall note the claim of lien on the judgment docket and index the same under the name of the distributor at the time the claim is filed.

(c) A producer or association of producers claiming nonpayment for milk sold to a distributor shall file with the clerk a notarized statement of nonpayment. The statement shall contain at a minimum the following information:

(1) The name of the distributor who received the milk;
(2) The date and quantity of milk shipped for which payment has not been received; and
(3) A statement from the North Carolina Milk Commission certifying the amount due from the distributor, and the date payment was due.

The producer or association of producers shall furnish a copy of the statement as provided by this subsection to the distributor, which shall constitute a notice of claim of lien. The notice shall be served personally by a person authorized by law to serve process or by certified mail. The lien granted by this section shall be effective as of the time it is filed with the clerk of court. Provided the distributor shall have the right to contest the validity of such lien by filing, with the clerk of court and serving on the producer within 10 days after he receives notice that the producer has filed a claim of lien, a notice that the distributor contest the amount due thereunder. In the event the distributor fails to contest the lien or is unsuccessful in obtaining a discharge of the lien, the lien shall be perfected as of the date of filing with the clerk of court.

(d) The lien created by this section may be discharged in any of the following manner:

(1) By filing with the clerk of superior court a receipt of acknowledgment signed by the chairman of the North Carolina Milk Commission or his designee, that the lien has been discharged;
(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the producer; or
(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed or a judgment has been rendered against the claimant in such action.

(4) By filing with the clerk a sworn statement signed by the producer or an official of an association of producers that the lien or claim of lien has been satisfied.

(e) Action to enforce the lien created by this section may be instituted in any court of competent jurisdiction in the county where the lien was filed not later than 90 days following the maturity of the distributor's obligation to pay for the milk. In the event no action to enforce the lien is commenced within the 90-day period the lien created hereby shall no longer be valid. Nothing herein shall prohibit the North Carolina Milk Commission from acting as a mediator or an arbitrator between the distributor and producer or association of producers when there is a claim of nonpayment at any time before or after claim of lien is filed but before a judgment is rendered. (1985, c. 678, s. 1.)

Editor's Note. — Session Laws 1985, c. 678, s. 2 makes this section effective October 1, 1985.

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

CASE NOTES

Applied in Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985).

§ 44A-3. When lien arises and terminates.

CASE NOTES

Amendment of Complaint Held Timely. — When plaintiff filed motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was filed within the statutory 180-day period, the date of the filing of the motion, rather than the date the court rules on it, being the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

§ 44A-4. Enforcement of lien.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of four dollars ($4.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall

inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired and the Division shall notify lienor. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. Failure of the recipient to notify the Division within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, the Division shall notify the lienor, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, the lienor may institute a special proceeding in the court where the vehicle is being held, for authorization to sell that vehicle. In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State and be paid immediately to the treasurer for disposition pursuant to Chapter 116B of the General Statutes. A vehicle owner or possessor claiming an interest in such proceeds shall have a right of action under G.S. 116B-38.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person the Division has mailed notice to previously. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that two or more bona fide bids on the vehicle were received, the names, addresses and bids of the bidders, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-399.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 655, s. 6 provides: "The Administrative Office of the Courts with the advice and assistance of the Attorney General shall prepare forms appropriate and necessary to meet the purposes of this act."

Effect of Amendments. — The 1985 amendment, effective January 1, 1986, deleted "or posts bond for double such amount" following "court in which such action is pending" in the second sentence of the second paragraph of subsection (a), added the last five sentences of that paragraph, and added the last three paragraphs of subdivision (b)(1).

CASE NOTES

Applied in Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985); Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985).

§ 44A-5. Proceeds of sale.

CASE NOTES

Stated in Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes.

(1969, c. 1112, s. 1; 1975, c. 715, s. 1; 1985, c. 689, s. 13.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "Chapter 83A, 89A or 89C" for "Chapter 83, 89 or 89A" at the end of subdivision (1).

Legal Periodicals. — For article on "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

CASE NOTES

Act Is Remedial in Nature. — The materialman's lien act, Chapter 44A, Article 2, Part 1, is remedial in nature and should be construed to advance the legislative intent in enacting it. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the meaning of this section, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Cited in W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135 (1986); Brown v. Middleton, 86 N.C. App. 63, 356 S.E.2d 386 (1987).

§ 44A-8. Mechanics', laborers' and materialmen's lien; persons entitled to lien.

Legal Periodicals. —
For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Purpose. — The purpose of the materialman's lien statute is to protect the interest of the supplier in the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value. To implement this purpose, courts should construe the statute so as to further the legislature's intent. They should construe a remedial statute to advance the remedy intended. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

The lien created by this section, etc., —

In accord with 1st paragraph in main volume. See Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

No Lien for Lost Profits. — A lien under this section attaches only for debts owing for labor done or professional design or surveying services or material furnished. Nothing is said about lost profits. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Plaintiff Must Prove, etc. —

In accord with main volume. See Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

Delivery of Materials to Site. —

In accord with the main volume. See Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

"Debts Owing". — Where plumbing company had contracted with owner of office condominium complex for a total, after change orders, of $43,178.61, and prior to defaulting, owner had paid $30,000.00 toward this total, the "debt owing" to which a lien under this section could attach totalled $13,718.61. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Priority over Purchase Money Deed of Trust. — Where plaintiff had a contract with the owner of the property within the meaning and intent of those terms as used in this section, materials furnished pursuant to that contract gave rise to a statutory materialman's lien which takes precedence over a purchase money deed of trust when there is an intervening construction loan deed of trust. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Lien Could Not Be Imposed Absent Underlying Debt. — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and sought to have such personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract by taking a voluntary dismissal of its claim against owners, when the trial judge granted the purchasers' Rule 12(b) motion to dismiss there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against the owners, the 12(b)(6) order was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 515 (1986).

Improvement of Property Not Required. — There is no requirement in this section that the lien-holder's work actually improve the property. Design Assocs. v. Powers, 86 N.C. App. 216, 356 S.E.2d 819 (1987).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the

meaning of § 44A-7, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Agreement to Arbitrate Did Not Bar Plaintiff from Statutory Remedy. — Claim of lien, included within complaint of plaintiff, a registered professional engineer, for breach of contract, and filed pursuant to this section, constituted a statutory remedy that was not extinguished merely because plaintiff had entered into a contract providing for arbitration; plaintiff was not foreclosed from pursuing his statutory remedy by agreeing to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Professional design services furnished by an architectural firm pursuant to a contract entitled the plaintiff firm to a lien to secure payment for those services. Design Assocs. v. Powers, 86 N.C. App. 216, 356 S.E.2d 819 (1987).

Applied in Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985).

Cited in Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987).

§ 44A-10. Effective date of liens.

CASE NOTES

Delivery of Materials to Site. — In accord with the main volume. See Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Priority of Purchase Money Deed of Trust under Doctrine of Instantaneous Seisin. — A materialman's lien relates back and takes effect from the time of the first furnishing of materials at the site of the improvement by the person claiming the lien. While the statutory language does not indicate the precise moment of attachment, it does indicate an order of priority between competing lien claimants. That priority can be defeated by the application of the doctrine of instantaneous seisin. Such doctrine provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. It would thus subordinate a previously existing materialman's lien. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Policy supporting the doctrine of instantaneous seisin is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

No Priority Where Holder Gives Construction Lender Priority over Own Interest. — Since the vendor and the construction lender have the resources and the bargaining power to require the vendee to obtain lien waivers from material suppliers or to obtain title insurance, the court can perceive no reason to extend the doctrine of instantaneous seisin to protect, at the expense of the materialman, the holder of a purchase money security interest who, by consenting to give a construction lender's security an intervening priority over his or her own, has indicated an intent not to be so protected. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

§ 44A-12. Filing claim of lien.

(c) Contents of Claim of Lien to Be Filed. — All claims of lien must be filed using a form substantially as follows:

CLAIM OF LIEN

(1) Name and address of the person claiming the lien:
(2) Name and address of the record owner of the real property claimed to be subject to the lien at the time the claim of lien is filed:
(3) Description of the real property upon which the lien is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
(5) Date upon which labor or materials were first furnished upon said property by the claimant:
(5a) Date upon which labor or materials were last furnished upon said property by the claimant:
(6) General description of the labor performed or materials furnished and the amount claimed therefor:

.....
Lien Claimant

Filed this ..... day of ....., 19 .....

.....
Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(1969, c. 1112, s. 1; 1977, c. 369; 1983, c. 888.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (c) of this section is set out above to correct the indentation in the main volume.

Legal Periodicals. —

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Date in Claim of Lien is Binding. — The plaintiff was not entitled to amend or change the date of last furnishing stated in his claim of lien, where such date, on its face, was not an obvious typographical error, and as the claim of lien was filed more than 120 days after the last date of furnishing, it was void and subject to cancellation. Brown v. Middleton, 86 N.C. App. 63, 356 S.E.2d 386 (1987).

Delivery of Materials to Site. — In accord with the main volume. See Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Applied in Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353

S.E.2d 418 (1987); Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

§ 44A-13. Action to enforce lien.

CASE NOTES

Time Limitation Inapplicable Where Lien Cancelled. — Subsection (a), which only limits the time for suing to enforce a lien on real property, had no application where there was no lien on real estate that contractor could sue to enforce, as the lien that he might have sued to enforce had been cancelled and discharged both by the terms of agreement between himself and owner and the provisions of § 44A-16(5). In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987).

The amount of the lien is limited by subsection (b) of this section to the amount stated in the claim. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Delivery of Materials to Site. — In accord with the main volume. See Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Lien Not Barred by Failure of Court to Include Beginning and Ending Dates of Work in Judgment. — Where a plaintiff pursued his recovery by filing both a claim of lien and action, and had at all times maintained its request for a lien in its complaint and appeal, the judgment relating back and incorporating the complaint and claim of lien included all the information required, except the effective date of the lien, then plaintiff should not have been barred from the benefits of a remedy by the trial court's failure to include in its judgment the beginning and ending dates of the work. Jennings Glass Co. v. Brummer, — N.C. App. —, 362 S.E.2d 578 (1987).

Prejudgment Interest. — Prejudgment interest is not authorized when only enforcing a statutory lien, absent a contract between the parties. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Cited in Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987).

§ 44A-14. Sale of property in satisfaction of judgment enforcing lien or upon order prior to judgment; distribution of proceeds.

CASE NOTES

Cited in Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

§ 44A-16. Discharge of record lien.

CASE NOTES

Cited in In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Miller v. Ensley, — N.C. App. —, 365 S.E.2d 11 (1988).

Part 2. Liens of Mechanics, Laborers and Materialmen Dealing with One Other Than Owner.

§ 44A-17. Definitions.

Legal Periodicals. — For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Cited in Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248 (1986); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987).

§ 44A-18. Grant of lien; subrogation; perfection.

Upon compliance with this Article:

(6) A lien upon funds granted under this section is perfected upon the giving of notice in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third tier subcontractor to the lien of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23. (1971, c. 880, s. 1; 1985, c. 702, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, rewrote subdivision (6), which read: "The liens granted under this section are perfected upon the giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by obligor."

CASE NOTES

Materials are furnished within the meaning of this section if, pursuant to a subcontract, a subcontractor delivers materials to the site of improvement to real property. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Materials are furnished within the meaning of subsection (1) of this section when, pursuant to a subcontract, materials are delivered to the site of improvement, and there is no need that they be incorporated into the improvement itself. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Subcontractor's Right Not Affected By Amounts Due or Completion of Performance. — Where the plaintiff subcontractor, pursuant to a subcontract with the general contractor, furnished materials to the site of improvement to the real property improved, pursuant to this section, the plaintiff was entitled to a lien upon funds owed by the owner to the general contractor, regardless of whether or not the amounts were due and whether or not performance or delivery was complete. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Subcontractor Need Not Deliver Materials Personally. — This section, which grants a lien to subcontractors "who furnished labor or materials at the site of the improvement," does not require that the subcontractor claiming

the lien personally deliver the materials to the building site. Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Physical Presence of Materials When Notice Is Given Not Required. — Just as actual incorporation into the improvement is not a statutory prerequisite, neither does the statute require that the materials be physically present on the site at the time notice of lien is given. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

If a third tier subcontractor delivers materials to a second tier subcontractor with the intent that the materials ultimately be delivered at the site, and the materials are actually delivered at the site, the third tier subcontractor has a lien on the funds owed to the second tier subcontractor for those materials. Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-19. Notice to obligor.

(d) Notices under this section shall be served upon the obligor in person or by certified mail in any manner authorized by the North Carolina Rules of Civil Procedure. A copy of the notice shall be attached to any claim of lien filed pursuant to G.S. 44A-20(d). (1971, c. 880, s. 1; 1985, c. 702, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, added subsection (d).

CASE NOTES

Purpose of Notice. — The notice of claim of lien filed by the subcontractor is for the purpose of giving the owner obligor notice; the notice is not intended to protect innocent third parties and does not affect the title to the real property being improved. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Deviation from the statutory form is permissible so long as all of the information set out in the statutory form is contained in the notice. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Sufficient Compliance. — The subcontractor's letter to the property owner was held, as a matter of law, to substantially comply with the notice requirements set forth in this section. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

§ 44A-20. Duties and liability of obligor.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a lien upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b), which lien shall be enforced only in the manner set forth in G.S. 44A-7 through 44A-16 and which lien shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. The claim of lien shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice given pursuant to G.S. 44A-19 as an

exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under subsection (b). (1971, c. 880, s. 1; 1985, c. 702, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, added the last two sentences of subsection (d).

CASE NOTES

Once entitlement to a lien has been established, statutory requirements concerning perfection must be liberally construed in favor of the lien claimant. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987).

§ 44A-21. Pro rata payments.

CASE NOTES

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-22. Priority of liens.

CASE NOTES

Applied in Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248 (1986).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-23. Contractor's lien; subrogation rights of subcontractor.

A first, second or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent. (1971, c. 880, s. 1; 1985, c. 702, s. 4.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to notices and claims filed after that date, inserted the present third sentence.

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

Local Modification. — (As to Article 3) East Duplin High School in Duplin County: 1985 (Reg. Sess., 1986), c. 887, expiring June 30, 1989; (As to Article 3) City of Charlotte: 1987, c. 329, s. 2; (As to Article 3) City of Durham: 1987, c. 789; (As to Article 3) Town of Manteo: 1985 (Reg. Sess., 1986), c. 808.

CASE NOTES

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987); Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

OPINIONS OF ATTORNEY GENERAL

Withholding of Contractor's Funds after Notice of Claim by Subcontractor. — In view of the required statutory contract payment bond, the provision of Article 32 of the general contract conditions of state construction contracts, which provides for the withholding of the prime contractor's funds upon notice of a claim by the subcontractor against the prime contractor, is not necessary to protect the state from liability. There is no legal requirement to withhold the funds after notice to the state by the subcontractor of the unpaid claim against the prime contractor, and neither the state nor its agents are exposed to additional liability for failure to withhold funds after notice of such claim. Payment to a third party of such funds is not authorized in the absence of contract provisions or statutory authority. See opinion of the Attorney General to Mr. James S. Lofton, Secretary, N.C. Dept. of Transportation, — N.C.A.G. — (March 3, 1988).

§ 44A-26. Bonds required.

(a) When the total amount of construction contracts awarded for any one project exceeds fifty thousand dollars ($50,000) a performance and payment bond as set forth in (1) and (2) is required by the contracting body from any contractor with a contract more than fifteen thousand dollars ($15,000). In the discretion of the contracting body, a performance and payment bond may be required on any construction contract as follows:

(1) A performance bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such bond shall be solely for the protection of the contracting body which awarded the contract.

(2) A payment bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor or subcontractor is liable.

(1973, c. 1194, s. 1; 1983, c. 818; 1987 (Reg. Sess., 1988), c. 1108, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Local Modification. — Guilford: 1987 (Reg. Sess., 1988), c. 1010, § 1; City of Greensboro: 1987 (Reg. Sess., 1988), c. 1010, § 1; City of Winston-Salem: 1987 (Reg. Sess., 1988), c. 949.

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective August 1, 1988, substituted "fifty thousand dollars ($50,000)" for "thirty thousand dollars ($30,000)" in the introductory language of subsection (a).

CASE NOTES

Article Presumed Written into Payment Bond. — In all cases of public construction for which a payment bond is required under this section, the provisions of this Article are conclusively presumed to have been written into the payment bond. Pyco Supply Co. v. American Centennial Ins. Co., — N.C. —, 364 S.E.2d 380 (1988).

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Agreement for Delayed Payment. — This Article does not explicitly provide that an agreement for delayed payment after termination of the subcontract is void. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987).

§ 44A-27. Actions on payment bonds; service of notice.

(b) Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor may bring an action on the payment bond only if he has given written notice to the contractor within 180 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

(1973, c. 1194, s. 1; 1987, c. 569.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 7, 1987, substituted "180 days" for "90 days" in subsection (b).

CASE NOTES

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Agreement for Delayed Payment. — This Article does not explicitly provide that an agreement for delayed payment after termination of the subcontract is void. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Stated in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987).

§ 44A-28. Actions on payment bonds; venue and limitations.

Legal Periodicals. — For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Purpose of employing "final settlement" as yardstick is that it provides definite time, fixed by public record and readily ascertainable, after which subcontractors must bring suit. Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360, cert. granted, 320 N.C. 171, 357 S.E.2d 927 (1987).

For discussion of meaning of "final settlements," see Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360, cert. granted, 320 N.C. 171, 357 S.E.2d 927 (1987).

Contractual Reduction of Statutory Limitation Time Disregarded. — Where the contractual provisions of a bond sought to shorten the limitation period to the minimum allowed under subsection (b), but the statute provides for the longer period, the contractual limits set out in the bond would be disregarded to the extent they would reduce the limitation period allowed under subsection (b). Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360, cert. granted, 320 N.C. 171, 357 S.E.2d 927 (1987).

Surety's Liability Ceases Following One-Year Limitation. — As the one-year limitation in subsection (b) was a condition precedent to surety's liability, surety's liability to plaintiff accordingly ceased one year after either of the two starting dates provided by the statute. Accordingly, once surety's liability terminated, plaintiff's amendment could not revive that liability, irrespective of any "relation back" under N.R.Civ.P. 15(c). Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360, cert. granted, 320 N.C. 171, 357 S.E.2d 927 (1987).

Applied in Mid-South Constr. Co. v. Wilson, 71 N.C. App. 445, 322 S.E.2d 418 (1984).

Quoted in Pyco Supply Co. v. American Centennial Ins. Co., — N.C. —, 364 S.E.2d 380 (1988).

§ 44A-30. Variance of liability; contents of bond.

CASE NOTES

Article Presumed Written into Payment Bond. — In all cases of public construction for which a payment bond is required under § 44A-26, the provisions of this Article are conclusively presumed to have been written into the payment bond. Pyco Supply Co. v. American Centennial Ins. Co., — N.C. —, 364 S.E.2d 380 (1988).

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Stated in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987).

ARTICLE 4.

Self-Service Storage Facilities.

§ 44A-43. Enforcement of self-service storage facility lien.

(b) Notice and Hearing:

(1) If the property upon which the lien is claimed is a motor vehicle, the lienor, following the expiration of the 15-day period provided by subsection (a), shall give notice to the Division of Motor Vehicles that a lien is asserted and that a sale is proposed. The lienor shall remit to the Division a fee of two dollars ($2.00); and shall also furnish the Division with the last known address of the occupant. The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested to the person having legal title to the vehicle, if reasonably ascertainable, and to the occupant, if different, at his last known address. The notice shall:

a. State: (i) that a lien is being asserted against the specific vehicle by the lienor or owner of the self-service storage facility, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the vehicle in satisfaction of the lien;

b. Inform the person having legal title and the occupant of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place; and

c. State that the legal title holder and the occupant have a period of 10 days from the date of receipt of the notice in which to notify the Division of Motor Vehicles by registered or certified mail, return receipt requested, that a hearing is desired to contest the sale of the vehicle pursuant to the lien.

The person with legal title or the occupant must, within 10 days of receipt of the notice from the Division of Motor Vehicles, notify the Division of his desire to contest the sale of the vehicle pursuant to the lien, and that the Division should so notify lienor.

Failure of the person with legal title or the occupant to notify the Division that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the vehicle against which the lien is asserted. Upon such failure, the Division shall so notify the lienor; the lienor may proceed to enforce the lien by a public sale as provided by this section; and the Division shall transfer title to the property pursuant to such sale.

If the Division is notified within the 10-day period provided in this section that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

(2) If the property upon which the lien is claimed is other than a motor vehicle, the lienor following the expiration of the

15-day period provided by subsection (a) shall issue notice to the person having a security or other interest in the property, if reasonably ascertainable, and to the occupant, if different, at his last known address by registered or certified mail, return receipt requested.

The notice shall:

a. State: (i) that a lien is being asserted against the specific property by the lienor, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the property in satisfaction of the lien;

b. Provide a brief and general description of the personal property subject to the lien. The description shall be reasonably adequate to permit the person notified to identify it, except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents;

c. Inform the person with a security or other interest in the property and occupant, if different, of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place;

d. State that the person with a security or other interest in the property or the occupant, if different, has a period of 10 days from the date of receipt of the notice to notify the lienor by registered, or certified mail, return receipt requested, that a hearing is desired, and that if the legal title holder or occupant wishes to contest the sale of his property pursuant to the lien he should notify the lienor that a hearing is desired.

The person with a security or other interest in the property or the occupant must, within 10 days of receipt of the notice from the lienor, notify the lienor of his desire for a hearing, and state whether or not he wishes to contest the sale of the property pursuant to the lien.

Failure of the person with a security or other interest in the property, or the occupant to notify the lienor that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted. Upon such failure the lienor may proceed to enforce the lien by a public sale as provided by this section.

If the lienor is notified, within the 10-day period as provided by this section, that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(1981 (Reg. Sess., 1982), c. 1275, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (b) of this section is set out above to correct the indentation in the main volume.

Chapter 45.

Mortgages and Deeds of Trust.

Article 2.

Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.

CASE NOTES

When Objection to Foreclosure to be Raised. — If the foreclosure proceeding was not authorized for any reason or if it was irregularly conducted (e.g., the

notice was incorrect or inadequate in certain respects; the affidavit of default was based on hearsay), it was incumbent on the mortgagor to raise that issue in that proceeding either by objection or motion in the cause. Douglas v. Pennamco, Inc., 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Collateral Attack Not Permitted. — The law does not permit a collateral attack on a foreclosure proceeding and judgment. Douglas v. Pennamco, Inc., 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Cited in Fisher v. First Union Mtg. Corp., 80 Bankr. 58 (Bankr. M.D.N.C. 1987).

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2; 1975, c. 66; 1985, c. 320; c. 689, s. 14.)

Effect of Amendments. — Session Laws 1985, c. 320, s. 1, effective October 1, 1985, rewrote this section.

Session Laws 1985, c. 689, s. 14, effective July 11, 1985, substituted "this subsection" for "this section" in the last paragraph of subsection (a) of this section as it read prior to the amendment by Session Laws 1985, c. 320, s. 1. The section is set out as amended by c. 320.

§ 45-20.1. Validation of trustees' deeds where seals omitted.

All deeds executed prior to April 1, 1987, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature are validated. (1943, c. 171; 1981, c. 183, s. 1; 1983, c. 398, s. 1; 1985, c. 70, s. 1; 1987, c. 277, s. 1.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definition.

CASE NOTES

Two methods of foreclosure are possible in North Carolina: Foreclosure by action and foreclosure by power of sale. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Foreclosure pursuant to a power of sale is strictly regulated by this Article which requires a hearing before the clerk of superior court to determine four issues. If the clerk determines the existence of each item, the clerk then authorizes the trustee to proceed with the sale pursuant to the power of sale contained in the mortgage instrument itself. This procedure enables the trustee or mortgagee to conduct the foreclosure sale with a level of judicial involvement somewhat less than that required in a foreclosure by action. If the mortgage contains a power of sale, the mortgagee or trustee may elect to proceed under this Article or may choose to proceed under foreclosure by action. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Proceedings under Article Are Special Proceedings. — Since rights sought to be enforced under this Article are instituted by filing notice instead of a complaint and summons and are prosecuted without regular pleadings, they are properly characterized as "special proceedings." Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Order Construing Validity of Debt and Right to Foreclose May Be Res Judicata. — An order entered by the clerk of superior court construing the validity of the debt and the trustee's right to foreclose, pursuant to this Article may be res judicata as to a subsequent action based on the issues decided in the clerk's order. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

This Article does not apply to or prevent bringing of foreclosure by action. However, when a mortgagee or trustee elects to proceed under § 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are res judicata and cannot be relitigated in an action for strict judicial foreclosure. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

§ 45-21.2. Article not applicable to foreclosure by court action.

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555 (1986).

§ 45-21.8. Sale as a whole or in parts.

CASE NOTES

Quoted in Pannill Knitting Co. v. Golden Corral Corp., — N.C. App. —, 366 S.E.2d 891 (1988).

Cited in In re Allan & Warmbold Constr. Co., — N.C. App. —, 364 S.E.2d 723 (1988).

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.

CASE NOTES

Quoted in Pannill Knitting Co. v. Golden Corral Corp., — N.C. App. —, 366 S.E.2d 891 (1988).

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When the same property secures two or more mortgages or deeds of trust held by the same person, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1.)

Editor's Note. — Session Laws 1985, c. 515, s. 2 makes this section effective July 1, 1985, and applicable to sales conducted on or after that date.

§ 45-21.12. Power of sale barred when foreclosure barred.

CASE NOTES

Quoted in In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

CASE NOTES

Subsection (d) of this section does not authorize redetermination of matters that have been finally adjudicated before the clerk. In re Williams, — N.C. App. —, 363 S.E.2d 380 (1988).

Issues To Be Determined, etc. — In accord with 2nd paragraph in main volume. See In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to this section, but must instead be asserted in an action to enjoin the foreclosure sale under § 45-21.34. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

Assignment between Notice and Hearing. — This section does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing, and it is silent as to whether additional notification is necessary when an assignment takes place. In re Fortescue, 80 N.C. App. 297, 341 S.E.2d 757 (1986), upholding notice which named the original and present holder of the note and deed of trust where the note and deed were subsequently assigned to another individual, where mortgagor had over nine months actual notice before the trial court's de novo hearing of the assignment.

Second Proceeding Set Aside Where Debt Satisfied in Prior Proceeding. — The mortgage indebtedness that a substitute trustee sought to collect in a foreclosure proceeding instituted in Davidson County, upon a tract of land located partly in Davidson and Randolph counties, was paid off in full during a prior foreclosure in Randolph County. Thus, this second foreclosure was without foundation and the order of the trial court authorizing the foreclosure was set aside. In re Rollins, 75 N.C. App. 656, 331 S.E.2d 303 (1985).

Payment Delinquent Where One Day Past Due. — The 30-day grace period contained in the original promissory note was contained in the clause governing the lender's right to accelerate the debt, and the loan modification agreement contained a new acceleration clause, which provided that the lender could accelerate the debt in the event one monthly payment became "delinquent." The judge properly gave the word "delinquent" its plain meaning, i.e., overdue or late. Consequently, it was clear that the debtor became delinquent in making his payment one day after the agreement provided it was due. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

Foreclosure under Original Deed of Trust Where Second Deed of Trust Invalid. — Where second deed of trust was given by respondents as security for second loan, which was used to pay off first loan, the parties intending the second note and deed of trust to replace and be substituted for the original note and deed of trust, but failure of the respondents to affix the proper signatures to the second deed of trust caused it to be invalid and amounted to substantial failure of consideration for the second loan agreement, the second loan agreement was rendered a nullity, and the parties' duties under the original loan

agreement were revived. Thus, where respondents were in default under the original debt petitioner had a right to foreclose under the original deed of trust. Bowers v. Bowers, 74 N.C. App. 708, 329 S.E.2d 725, cert. denied, 314 N.C. 540, 335 S.E.2d 14 (1985).

Mortgagors, by joining in consent order, not only waived their right to appeal from final adjudication based thereon, but also left the case with no unresolved issue to appeal, even though their appeal to the judge was not from the consent order but from the clerk's follow-up order authorizing foreclosure, since the consent order established that the foreclosure issue would be finally set at rest by the subsequent order, and the parties, in effect, agreed and consented to the subsequent order as well. In re Williams, — N.C. App. —, 363 S.E.2d 380 (1988).

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985); In re Johnson, 72 N.C. App. 485, 325 S.E.2d 502 (1985).

Cited in Hofler v. Hill, 311 N.C. 325, 317 S.E.2d 670 (1984).

§ 45-21.16A. Contents of notice of sale.

The notice of sale shall —

(3) Describe the real property to be sold in such a manner as is reasonably calculated to inform the public as to what is being sold, which description may be in general terms and incorporate the description as used in the instrument containing the power of sale by reference thereto. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in such a manner as to enable prospective purchasers to determine what is and what is not being offered for sale.

(1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 1; 1987, c. 493.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Cross References. — As to validation of certain foreclosure sales when provisions of subdivision (3) of this section are not complied with, see § 45-21.49.

Effect of Amendments. — The 1987 amendment, effective June 26, 1987, deleted "(including improvements thereon)" following "Describe the real property" at the beginning of subdivision (3).

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(1) Notice of sale of real property shall

a. Be posted, at the courthouse door in the county in which the property is situated, for at least 15 days immediately preceding the sale.

b. And in addition thereto,

1. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.

3. In addition to the newspaper advertisement under 1 or 2 above, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 567, s. 3 provides that nothing in the act shall affect pending litigation.

Effect of Amendments. — The 1985 amendment, effective July 2, 1985, substituted "for at least 15 days" for "for 20 days" in paragraph (1)a.

CASE NOTES

Quoted in Pannill Knitting Co. v. Golden Corral Corp., — N.C. App. —, 366 S.E.2d 891 (1988).

§ 45-21.21. Postponement of sale.

CASE NOTES

Discretion of Trustee. — The trustee has substantial discretion in discharging his responsibilities, which are to attempt to satisfy the debt while getting the highest price for the mortgagor and protecting the mortgagor's rights and equity. As long as the trustee does not violate the fiduciary duty of the office, and does not give unfair advantages to any party, the exercise of that discretion is not reviewable by the courts. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 45-21.26. Preliminary report of sale of real property.

CASE NOTES

Applied in In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

§ 45-21.27. Upset bid on real property; compliance bonds.

CASE NOTES

Power of a clerk to set aside his initial approval is inherent in subsection (b) of this section, and is also authorized by § 45-21.29(j). In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to § 45-21.34, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period

during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Cited in In re Keziah, 53 Bankr. 116 (W.D.N.C. 1985).

§ 45-21.29. Resale of real property; jurisdiction; procedure; orders for possession.

(*l*) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3; 1975, c. 492, ss. 7-9; 1987, c. 627, s. 3.)

Only Part of Section Set Out. — As the rest of this section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 16, 1987, and applicable to all orders of possession granted or issued after that date, added subsection (*l*).

CASE NOTES

Power of a clerk to set aside his initial approval is inherent in § 45-21.27(b), and is also authorized by subsection (j) of this section. In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to § 45-21.34, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 45-21.29A. Necessity for confirmation of sale.

CASE NOTES

The rights fixed by this section are solely contractual in nature and do not involve any transfer of title. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

The rights fixed by this section are subject to the provisions of § 39-39. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

The only rights that are "fixed" un-

der this section upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price. The rights of other parties, including those in possession, are not necessarily affected. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the morgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 45-21.30. Failure of bidder to make cash, deposit or to comply with bid; resale.

CASE NOTES

Discretion of Trustee. — The trustee has substantial discretion in discharging his responsibilities, which are to attempt to satisfy the debt while getting the highest price for the mortgagor and protecting the mortgagor's rights and equity. As long as the trustee does not violate the fiduciary duty of the office, and does not give unfair advantages to any party, the exercise of that discretion is not reviewable by the courts. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Withdrawal of Upset Bid for Mistake Held Error. — Order permitting an individual to withdraw his upset bid and requiring a resale of foreclosed property, based on the court's finding that he made his bid in the mistaken belief, due to negligently failing to inform himself as to the land that he was bidding on, that he was bidding on all three parcels of land covered by deed of trust, rather than just two, was in error, as there was no equitable basis for allowing him to withdraw it. When the bid was accepted by the trustee as the last and highest, a contract was made, and the mere mistake of one party alone is not sufficient to avoid a contract. In re Allan & Warmbold Constr. Co., — N.C. App. —, 364 S.E.2d 723 (1988).

Quoted in In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 644, 339 S.E.2d 854 (1986).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

CASE NOTES

Cited in Merritt v. Edwards Ridge, — N.C. App. —, 362 S.E.2d 610 (1987).

§ 45-21.32. Special proceeding to determine ownership of surplus.

CASE NOTES

Special Proceeding Not Necessary. — The federal government, which sought to enforce an administrative levy served in connection with the collection of federal taxes, was not required under the law to commence a special proceeding in state court in order to determine the ownership of surplus funds from the foreclosure of property which taxpayer and her husband owned as tenants by the entirety or to recover the funds belonging to the taxpayer. United States v. Mauney, 642 F. Supp. 1097 (W.D.N.C. 1986).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

CASE NOTES

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to this section, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Right of Bankrupt to Cure Default Held Terminated. — Although under this section a debtor may still seek to permanently enjoin a foreclosure after the sale has been held, and can raise defenses such as that the right to foreclose was waived or that there was no default under the deed of trust, the foreclosure sale may nevertheless become final without any further action by the lender or the trustee on the deed of trust. Thus, where Chapter 13 debtor filed her petition after foreclosure sale had been held, there had been sufficiently serious alterations of the security holder's rights so that her right to cure the default under 11 U.S.C. § 1322(b)(5) was terminated. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to § 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under this section. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

CASE NOTES

This section is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contracts with the mortgagors. Northwestern Bank v. Weston, 73 N.C. App. 162, 325 S.E.2d 694, cert. denied, 314 N.C. 117, 332 S.E.2d 483 (1985).

This section has no application to foreclosure sales made pursuant to an order or decree of court. In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 664, 339 S.E.2d 854 (1986).

Section Applies to Mortgagee Who Holds Obligation Securing Property for Sale. — This section does not say that it applies to any mortgagee or to a mortgagee who holds an obligation secured by the property for sale. Rather, it applies to the mortgagee, payee or other holder, who holds the obligation thereby secured, i.e., the obligation secured by the property for sale, and under which the sale is held. Northwestern Bank v. Weston, 73 N.C. App. 162, 325 S.E.2d 694, cert. denied, 314 N.C. 117, 332 S.E.2d 483 (1985).

A deficiency judgment is an imposition of personal liability on the mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

When Proof of Value of Foreclosed Property May Be Made. — This section permits proof that foreclosed property acquired by creditors was worth the sum that was owed them only in a suit against a mortgagor, trustor or other maker for a deficiency judgment. In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 664, 339 S.E.2d 854 (1986).

Cited in Northwestern Bank v. Barber, 79 N.C. App. 425, 339 S.E.2d 452 (1986).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

Legal Periodicals. —

For note discussing North Carolina's Anti-Deficiency Statute and whether suing on the note is a lost option, in light of 313 N.C. 565, 330 S.E.2d 600 (1985), see 22 Wake Forest L. Rev. 389 (1987).

CASE NOTES

Legislative Intent. —

At foreclosure, the holder of a purchase money mortgage or deed of trust is limited to the recovery of the security or to the proceeds from the sale of the security. The holder is prohibited from ignoring his security and bringing an in personam action against the mortgagor on the note secured by the deed of trust. The holder is, also, prohibited from bringing an in personam suit after foreclosure to recover a deficiency. In fact, the State Supreme Court has stated, unequivocally, that the manifest intention of the Legislature in codifying this section was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

The legislative intent behind this section is to limit recovery by purchase money mortgagees to the property conveyed. Underlying this intent is a desire to discourage oppressive overpricing at sale and underpricing at foreclosure. Sink v. Egerton, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

Commercial Transactions Not Excluded. — The 1933 General Assembly of North Carolina did not intend any special exclusion of commercial transac-

tions, such as by "sophisticated business people," from this section. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

So long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price, the deed of trust is a purchase money deed of trust. Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc., 80 N.C. App. 318, 341 S.E.2d 754, cert. denied, 317 N.C. 701, 347 S.E.2d 37 (1986).

A deficiency judgment is an imposition of personal liability on a mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Courts will not apply this section unless deed of trust, on its face, indicates that deed of trust for purchase money for sale of real property. Bigley v. Lombardo, — N.C. App. —, 367 S.E.2d 389 (1988).

Protection Not Afforded Where No Purchase Money Deed of Trust. — Suit on the second of two separate and distinct notes, secured by a security interest in a 1983 Mazda automobile, not "a deed of trust on the property or part of it," and executed not at the same time defendant and his partners bought the property, but only when he wanted to buy out his partners a year later, where the security agreement did not secure any portion of the original purchase of real property, but secured a loan of money from plaintiffs to defendant made so that defendant could "buy out" his business partners, was not a purchase money deed of trust, and the protection afforded under this section was not available. Bigley v. Lombardo, — N.C. App. —, 367 S.E.2d 389 (1988).

This section does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by a holder of a first purchase money mortgage or deed of trust. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

This section does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Notwithstanding the anti-deficiency statute, a creditor could sue on the purchase money note he held where he had lost the opportunity to foreclose due to an earlier foreclosure by another creditor. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

This section prohibited plaintiff from recovering interest on a purchase money note, where the interest was part of the debt secured by the purchase money deed of trust. Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc., 80 N.C. App. 318, 341 S.E.2d 754, cert. denied, 317 N.C. 701, 347 S.E.2d 37 (1986).

The anti-deficiency statute does not apply to actions by unsecured creditors. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

Obligations under Notes and Deeds of Trust as "Antecedent Debts". — Purchasers of real property who execute purchase money notes and deeds of trust have no personal liability for the underlying indebtedness and the seller's remedy is to foreclose the deed of trust. This does not, however, render the debtors' obligations under the notes and deeds of trust any less an "antecedent debt." Carter v. Homesley (In re Strom), 46 Bankr. 144 (Bankr. E.D.N.C. 1985).

Noteholder Could Recover Debt Only from Property Conveyed. — The holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing the land could not release his security and sue on the note, but had to look exclusively to the property conveyed in seeking to recover any balance owed. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

Holder of Subordinate Deed of Trust Cannot Bring In Personam Action. — A seller, who is the holder of a subordinate purchase money deed of trust and whose security has been eroded by foreclosure of a senior deed of trust, cannot bring an in personam action for the debt. Sink v. Egerton, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

Recovery of Attorneys' Fees Not a Deficiency. —

Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981) permits the recovery of attorneys' fees and expenses after default and foreclosure, insofar as attorneys' fees and expenses are not part of the balance owing on the

note. Merritt v. Edwards Ridge, — N.C. App. —, 362 S.E.2d 610 (1987).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.44. Validation of foreclosure sales when provisions of G.S. 45-21.17(2) not complied with.

In all cases prior to March 1, 1974, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to 20 days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G.S. 45-21.17(2) had been fully complied with. (1959, c. 52; 1963, c. 1157; 1971, c. 879, s. 1; 1975, c. 454, s. 2; 1985, c. 689, s. 15.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 45-21.17(2)" for "§ 45-21.17(c)(2)" in the catchline and substituted "G.S. 45-21.17(2)" for "G.S. 45-21.17(c)(2)" near the end of the section.

§ 45-21.46. Validation of foreclosure sales where posting and publication not complied with.

(a) In all cases of foreclosure of mortgages or deeds of trust secured by real estate pursuant to power of sale which foreclosures were commenced on or subsequent to June 6, 1975, and consummated prior to June 1, 1983, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced before January 1, 1984.

(b) All foreclosures of mortgages or deeds of trust secured by real estate pursuant to power of sale, which foreclosures were commenced on or subsequent to June 1, 1983, and consummated prior to April 1, 1985, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting

and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced in the period beginning January 1, 1984, and ending January 1, 1986. (1983, c. 582, s. 1; c. 738, s. 1; 1985, c. 341.)

Effect of Amendments. — The 1985 amendment, effective June 6, 1985, designated the first paragraph as subsection (a) and added subsection (b).

§ 45-21.47. Validation of foreclosure sales when trustee is officer of owner of debt.

All sales of real property made prior to June 1, 1987, under a power of sale contained in a mortgage or deed of trust for which the trustee was an officer, director, attorney, agent, or employee of the owner of all or part of the debt secured by the mortgage or deed of trust are validated and have the same effect as if the trustee had not been an officer, director, attorney, agent, or employee of the owner of the debt unless an action to set aside the foreclosure is commenced within one year after June 1, 1987. (1983, c. 582, s. 1; 1985, c. 604; 1987, c. 277, s. 10.)

Editor's Note. — Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, substituted "June 1, 1985" for "June 1, 1983" in two places.

The 1987 amendment, effective July 1, 1987, substituted "June 1, 1987" for "June 1, 1985" in two places.

§ 45-21.48. Validation of certain foreclosure sales that did not comply with posting requirement.

A sale of real property made on or before July 2, 1985, under a power of sale contained in a mortgage or deed of trust, for which a notice of the sale was not posted at the courthouse door for 20 days immediately preceding the sale, as required by G.S. 45-21.17(1), but was posted at the courthouse door for at least 15 days immediately preceding the sale, is declared to be a valid sale to the same extent as if the notice of the sale had been posted for 20 days; unless an action to set aside the foreclosure sale is not barred by the statute of limitations and is commenced on or before October 1, 1985. (1985, c. 567, s. 2.)

Editor's Note. — Session Laws 1985, c. 567, s. 3 makes this section effective upon ratification, and provides that nothing in the act shall affect pending litigation. The act was ratified July 2, 1985.

§ 45-21.49. Validation of foreclosure sales when provisions of § 45-21.16A(3) not complied with.

(a) Whenever any real property was sold under a power of sale as provided in Article 2A of Chapter 45, and the notice of sale did not describe the improvements on the property to be sold, as required under G.S. 45-21.16A(3), the sale shall not be invalidated because of such omission.

(b) This section shall apply to all sales completed prior to June 1, 1987. (1987, c. 277, s. 10a.)

Editor's Note. — Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

ARTICLE 4.

Discharge and Release.

§ 45-36.3. Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument; civil penalty.

(a) After the satisfaction of the provisions of any deed of trust or mortgage, or other instrument intended to secure with real property the payment of money or the performance of any other obligation and registered as required by law, the holder of the evidence of the indebtedness, if it is a single instrument, or a duly authorized agent or attorney of such holder shall within 60 days:

(1) Discharge and release of record such documents and forward the cancelled documents to the grantor, trustor or mortgagor; or,

(2) Alternatively, the holder of the evidence of the indebtedness or a duly authorized agent or attorney of such holder, at the request of the grantor, trustor or mortgagor, shall forward said instrument and the deed of trust or mortgage instrument, with payment and satisfaction acknowledged in accordance with the requirements of G.S. 45-37, to the grantor, trustor or mortgagor.

(b) Any person, institution or agent who fails to comply with this section may be required to pay a civil penalty of not more than one thousand dollars ($1,000) in addition to reasonable attorneys' fees and any other damages awarded by the court to the grantor, trustor or mortgagor, or to a subsequent purchaser of the property from the grantor, trustor or mortgagor. A five hundred dollar ($500.00) civil penalty may be recovered by the grantor, trustor or mortgagor, and a five hundred dollar ($500.00) penalty may be recovered by the purchaser of the property from the grantor, trustor or mortgagor. If that purchaser of the property consists of more than a single grantee, then the civil penalty will be divided equally among all of the grantees. A petitioner may recover damages under this section only if he has given the mortgagee, obligee, beneficiary or other responsible party written notice of his intention to bring an action

pursuant to this section. Upon receipt of this notice, the mortgagee, obligee, beneficiary or other responsible party shall have 30 days, in addition to the initial 60-day period, to fulfill the requirements of this section.

(c) Should any person, institution or agent who is not the present holder of the evidence of indebtedness be required to pay a civil penalty, attorneys' fees, or other damages under this section, they will have an action against the holder of the evidence of indebtedness for all sums they were required to pay. (1979, c. 681, s. 1; 1987, c. 662, ss. 1-3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "trustor" in subdivision (a)(1), rewrote subdivision (a)(2), rewrote subsection (b), and added subsection (c).

§ 45-37. Discharge of record of mortgages, deeds of trust and other instruments.

(a) Subject to the provisions of G.S. 45-73 relating to secured instruments which secure future advances, any deed of trust or mortgage or other instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be discharged and released of record in the following manner:

(1) By acknowledgment of the satisfaction of the provisions of such deed of trust, mortgage or other instrument in the presence of the register of deeds by
   a. The trustee,
   b. The mortgagee,
   c. The legal representative of a trustee or mortgagee, or
   d. A duly authorized agent or attorney of any of the above.

   Upon acknowledgment of satisfaction, the register of deeds shall forthwith make upon the margin of the record of such deed of trust, mortgage or other instrument an entry of such acknowledgment of satisfaction which shall be signed by the trustee, mortgagee, legal representative, agent or attorney and witnessed by the register of deeds, who shall also affix his name thereto.

(2) By exhibition of any deed of trust, mortgage or other instrument accompanied with the bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon by
   a. The obligee,
   b. The mortgagee,
   c. The trustee,
   d. An assignee of the obligee, mortgagee, or trustee, or
   e. Any chartered banking institution, or savings and loan association, national or state, or credit union, qualified to do business in and having an office in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

   Upon exhibition of the instruments, the register of deeds shall cancel the mortgage, deed of trust or other instrument by entry of satisfaction on the margin of the record. The person so claiming satisfaction, performance or dis-

charge of the debt or other obligation may retain possession of all of the instruments exhibited. The exhibition of the mortgage, deed of trust or other instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the mortgage, deed of trust or other instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it. The register of deeds may require the person exhibiting the instruments for cancellation to furnish him an acknowledgment of cancellation of the mortgage, deed of trust or other instrument for the purpose of showing upon whose request and exhibition the mortgage, deed of trust or other instrument was canceled.

(3) By exhibiting to the register of deeds by:

a. The grantor,

b. The mortgagor, or

c. An agent, attorney or successor in title of the grantor or mortgagor

of any mortgage, deed of trust or other instrument intended to secure the payment of money or the performance of any other obligation, together with the bond, note or other instrument secured thereby, or by exhibition of the mortgage, deed of trust or other instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of exhibition, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so exhibited have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

The register of deeds shall make proper entry of cancellation and satisfaction of said instrument on the margin of the record where the same is recorded, whether there be any such entries on the original papers or not.

(4) By exhibition to the register of deeds of any deed of trust given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Upon exhibition of the deed of trust, and the evidences of indebtedness properly marked, the register of deeds shall cancel such deed of trust by entry of satisfaction upon the margin of the record, which entry shall be valid and binding upon all persons, if no person rightfully entitled to the deed of trust or evidences of indebtedness has previously notified the register of deeds in writing of the loss or theft of the instrument or evidences of indebtedness and has caused the register of deeds to record the notice or loss or theft on the margin of the record of the deed of trust.

Upon receipt of written notice of loss or theft of the deed of trust or evidences of indebtedness the register of deeds

shall make on the record of the deed of trust concerned a marginal entry in writing thereof, with the date of receipt of the notice. The deed of trust shall not be canceled after such marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

Every entry of acknowledgment of satisfaction or of satisfaction made or witnessed by the register of deeds as provided in subdivision (a)(1) shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

(5) By exhibition to the register of deeds of a notice of satisfaction of a deed of trust or other instrument which has been acknowledged by the trustee before an officer authorized to take acknowledgments. The notice of satisfaction shall be substantially in the form set out in G.S. 47-46.1. The notice of satisfaction shall recite the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, and a reference by book and page number to the record of the instrument satisfied.

Upon exhibition of the notice of satisfaction and payment of the appropriate fee provided in G.S. 161-10, the register of deeds shall record the notice of satisfaction and cancel the deed of trust or other instrument by entry of satisfaction on the margin of the record or as provided in G.S. 45-37.2.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible. The register of deeds may refuse to accept any document when the provisions of this subsection have not been met. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C.S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746; 1975, c. 305; 1985, c. 219; 1987, c. 405, s. 1; c. 620, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added subsection (f).

Session Laws 1987, c. 620, s. 1, effective July 15, 1987, inserted "or savings and loan association" in paragraph (a)(2)e.

Session Laws 1987, c. 405, s. 1, effective 30 days after ratification, added subdivision (a)(5). The act was ratified June 18, 1987.

OPINIONS OF ATTORNEY GENERAL

An attorney is not required to present a written authorization or instrument agency in recordable form in order to acknowledge satisfaction of the provisions of a deed of trust. See opinion of Attorney General to Mr. R. Wendell Hutchins, Counsel to the Commissioners for the County of Washington, 54 N.C.A.G. 71 (1985).

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages in counties using microfilm.

In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the satisfaction and cancel the record of each such instrument satisfied by recording a notice of satisfaction which shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G.S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. The fee for recording a notice of satisfaction shall be the fee for recording instruments in general provided in G.S. 161-10(a)(1). (1963, c. 1021, s. 1; 1967, c. 765, s. 6; 1987, c. 620, s. 2.)

Effect of Amendments. — The 1987 amendment, effective July 15, 1987, added the last sentence.

ARTICLE 5.

Miscellaneous Provisions.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

CASE NOTES

Quoted in Branch Banking & Trust Co. v. Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186 (1985).

§ 45-45.2. Transfer taxes not applicable.

Notwithstanding any other provision of law, no excise tax on instruments conveying an interest in real property, except that levied by Article 8E of Chapter 105 of the General Statutes, shall apply to instruments conveying an interest in property as the result of foreclosure or in lieu of foreclosure to the holder of the security interest being foreclosed or subject to being foreclosed. (1987, c. 685, s. 1.)

Editor's Note. — Session Laws 1987, c. 685, s. 2 makes this section effective upon ratification and applicable to instruments executed on or after that date. The act was ratified July 27, 1987.

Article 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-68. Requirements.

A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(2) At the time of incurring any such future obligations, each obligation is evidenced by a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such security instrument; provided, however, that this subsection shall apply only if the obligor and obligee have contracted in writing that each future obligation shall be evidenced by a written instrument or notation; and

(1969, c. 736, s. 1; 1985, s. 457.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective June 24, 1985, and applicable to security instruments executed on or after that date, added the proviso at the end of subdivision (2).

Article 9.

Instruments to Secure Equity Lines of Credit.

§ 45-81. Definition.

(a) The term "equity line of credit" means an agreement in writing between a lender and a borrower for an extension of credit pursuant to which:

(1) At any time within a specified period not to exceed 15 years the borrower may request and the lender is obligated to provide, by honoring negotiable instruments drawn by the borrower or otherwise, advances up to an agreed aggregate limit;

(2) Any repayments of principal by the borrower within the specified period will reduce the amount of advances counted against the aggregate limit; and

(3) The borrower's obligation to the lender is secured by a mortgage or deed of trust relating to real property which mortgage or deed of trust shows on its face the maximum principal amount which may be secured at any one time and that it secures an equity line of credit governed by the provisions of this Article.

(b) As used in subdivision (a)(1) of this section, "lender is obligated" means that the lender is contractually bound to provide advances. The contract must set forth any events of default by the borrower, or other events not within the lender's control, which may relieve the lender from his obligation, and must state whether or not the lender has reserved the right to cancel or terminate the obligation.

(c) At any time when the balance of all outstanding sums secured by a mortgage or deed of trust pursuant to the provisions of this Article is zero, the lender shall, upon the request of the borrower, make written entry upon the security instrument showing payment and satisfaction of the instrument; provided, however, that such security instrument shall remain in full force and effect for the term set forth therein absent the borrower's request for such written entry. No prepayment penalty may be charged with respect to an equity line of credit loan. (1985, c. 207, s. 2.)

Editor's Note. — Session laws 1985, c. 207, s. 3 makes this Article effective on ratification. The act was ratified May 20, 1985.

§ 45-82. Priority of security instrument.

A mortgage or deed of trust which shows on its face that it secures an equity line of credit governed by the provisions of this Article, shall, from the time of its registration, have the same priority to the extent of all advances secured by it as if the advances had been made at the time of the execution of the mortgage or deed of trust, notwithstanding the fact that from time to time during the term of the loan no balance is outstanding. Payments made by the lender for insurance, taxes, and assessments and other payments made by the lender pursuant to the deed of trust shall have the same priority as if made at the time of the execution of the mortgage or deed of trust, notwithstanding the maximum principal amount set forth in the mortgage or deed of trust. (1985, c. 207, s. 2.)

§ 45-83. Future advances statute shall not apply.

The provisions of Article 7 of this Chapter shall not apply to an equity line of credit or the instrument securing it, if the instrument shows on its face that it secures an equity line of credit governed by the provisions of this Article. (1985, c. 207, s. 2.)

§ 45-84. Article not exclusive.

Except as otherwise provided in G.S. 45-83, the provisions of this Article are not exclusive, and no mortgage or deed of trust which secures a line of credit or other obligation shall be invalidated by failure to comply with the provisions of this Article. (1985, c. 207, s. 2.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 28A-17-3" for "G.S. 28-81" near the end of the section.

Article 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which formerly read: "Whenever it appears by satisfactory proof that an actual partition of the land cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof."

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, designated the first paragraph as subsection (a) and added subsection (b).

The 1987 amendment, effective June 4, 1987, in the second sentence of subsection (b), substituted "commissioners" for "Commissioner", and substituted "court" for "Court" in two places.

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding:

a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or

b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or

c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and

(2) The purchaser has not agreed in writing to assume the lien; and

(3) The lien will not be satisfied out of the proceeds of the sale; and

(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer,

and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale pursuant to the provisions of G.S. 1-339.27. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote subsection (a), substituted "party petitioning for revocation" for "purchaser" near the beginning of the first sentence of subsection (b), inserted "In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed" at the beginning of the introductory language of subsection (c), inserted "and" at the end of subdivisions (c)(1), (c)(2), and (c)(3), in subdivision (c)(4) substituted "any money or security" for "any moneys or security" and "pursuant to the offer" for "pursuant to his offer," added the second paragraph of subsection (c), rewrote subsection (d), which read: "The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of the lien," and added subsection (e).

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote this section, which read: "After the order of confirmation has been entered, the successful bidder may immediately purchase the property upon which he bid; and upon the exercise of such election, the order of confirmation shall become final."

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

CASE NOTES

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

§ 47-3: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3, effective July 15, 1987.

§ 47-8. Attorney in action not to probate papers therein.

OPINIONS OF ATTORNEY GENERAL

Not advisable for Attorney to Act as Notary and Verify Client's Divorce Complaint. — It is not advisable for a notary who is also a partner in a law firm acting as counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also appear, and they could be prohibited under this section from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and as an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

Pleadings not requiring verification by one of parties not subject to dismissal if verified anyway and partner of firm representing client acts as notary. However, this section would still seem to say that partner is without power to act as a notary in that situation. The signature of the attorney signing the pleadings would be adequate under N.C.R.P., Rule 11(a). See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

§ 47-14.1. Repeal of laws requiring private examination of married women.

CASE NOTES

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

§ 47-18. Conveyances, contracts to convey, options and leases of land.

CASE NOTES

I. IN GENERAL.

This section and § 47-20, etc. — The recording statute for deeds of trust, § 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

The purpose of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Principles applicable to sufficiency of references, etc. — In accord with the main volume. See Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Applied in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

III. WHAT INSTRUMENTS AFFECTED.

Parol and Implied Trusts, etc. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

Creditors Put Upon Same Plane as Purchasers. — Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

V. NOTICE.

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title

should reveal. Stegall v. Robinson, 81 N.C. App 617, 344 S.E.2d 803 (1986).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

Editor's Note. — Session Laws 1987, c. 548, s. 4 makes this section effective upon ratification. The act was ratified July 3, 1987.

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.

CASE NOTES

I. IN GENERAL.

The object of this section, etc. — The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Section Intended Primarily to Protect, etc. —

The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

Construction of this Section and § 47-18, etc. —

This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, § 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

No distinction is made, etc. —

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

Applied in In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

II. REGISTRATION AS BETWEEN PARTIES.

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first

registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, — N.C. App. —, 363 S.E.2d 678 (1988).

IV. NOTICE.

No Mere Notice, etc. —

In accord with original. See Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

CASE NOTES

Cited in Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

Legal Periodicals. —

For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assoc's, 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-26. Deeds of gift.

CASE NOTES

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Applied in Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

§ 47-30. Plats and subdivisions; mapping requirements.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136. (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1987, c. 747, s. 25 provides that as used in the act, the word "municipality" means a "city" as defined by § 160A-1.

Session Laws 1987, c. 747, s. 26 is a severability clause.

Effect of Amendments. —

The 1987 amendment, effective August 7, 1987, added "nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136" at the end of subdivision (*l*).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rocking-

ham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

§ 47-32.2. Violation of § 47-30 or 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2.)

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted the reference to Brunswick County in the second paragraph.

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified June 30, 1986.

Effect of Amendments. — The 1987 amendment, effective June 12, 1987, and applicable to corrections made on or after that date, inserted the present third sentence.

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Certificate and adjudication of registration.

Local Modification. — Martin County: 1987 (Reg. Sess., 1988), c. 925.

§ 47-46.1. Notice of satisfaction of deed of trust or other instrument.

The form of a notice of satisfaction of a deed of trust or other instrument pursuant to G.S 45-37(a)(5) shall be substantially as follows:

North Carolina, _____ County.

I, _____ (name of trustee), certify that the debt or other obligation in the amount of _____ secured by the (deed of trust) (other instrument) executed by _____ (grantor), _____ (trustee), and _____ (beneficiary), and recorded in _____ County at _____ (book and page) was satisfied on _____ (date of satisfaction).

_____

(Signature of trustee)

I, _____ (name of officer taking acknowledgment), _____ (official title of person taking acknowledgment) certify that _____ (name of trustee) personally came before me this day and acknowledged the satisfaction of the provisions of the above-referenced (deed of trust) (other instrument).

Witness my hand and official seal this the _____ day of _____ (month), _____ (year).

_____

(Signature of officer taking acknowledgment)

My commission expires _____ (Date of expiration of official's commission).

North Carolina, _____ County.

The foregoing acknowledgment of _____ (name of officer that took acknowledgment), _____ (official title of person that took acknowledgment), is certified to be correct.

This _____ (day) of _____ (month), _____ (year).

_____

(Signature of Register of Deeds).

(1987, c. 405, s. 2; c. 662, s. 4.)

Editor's Note. — Session Laws 1987, c. 405, s. 3 makes this section effective 30 days after ratification. The act was ratified June 18, 1987.

Effect of Amendments. — The 1987 amendment, effective on the same date as this section became effective, substituted "acknowledgment" for "notice of satisfaction (or annexed notice of satisfaction)" near the end of the form.

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

Effect of Amendments. — The 1987 amendment, effective June 12, 1987, and applicable to corrections made on or after that date, substituted "April 1, 1980" for "April 1, 1974" at the end of the section.

§ 47-51. Official deeds omitting seals.

All deeds executed prior to April 1, 1987, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to April 1, 1987: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the last sentence.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" near the end of the section.

§ 47-53.1. Acknowledgment omitting seal of notary public.

Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to April 1, 1987. (1951, c. 1151, s. 1A; 1953, c. 1307;

1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" at the end of the section.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

§ 47-71.1. Corporate seal omitted prior to April 1, 1987.

Any corporate deed, or conveyance of land in this State, made prior to April 1, 1987, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "January, 1981" in the catchline and for "May 1, 1983" near the beginning of the text of the section.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" in the catchline and near the beginning of the section.

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to April 1, 1987, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983."

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985."

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to April 1, 1987, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7.)

Editor's Note. —

Session Laws 1985, c. 70, s. 8, provides that the act is effective upon ratification (April 10, 1985) and shall not affect pending litigation.

Session Laws 1987, c. 277, s. 11 provides: "This act is effective upon ratification [June 4, 1987], except for Sections 10 and 11 which are effective July 1, 1987, and shall not affect pending litigation."

Effect of Amendments. —

The 1985 amendment, effective April 10, 1985, substituted "April 1, 1985" for "May 1, 1983" in the second paragraph.

The 1987 amendment, effective June 4, 1987, substituted "April 1, 1987" for "April 1, 1985" in the second paragraph.

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 842, s. 3 makes this section effective upon ratification and provides that it shall not affect pending litigation. The act was ratified June 30, 1986.

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly § 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4.)

Editor's Note. — This section was formerly § 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by

law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4.)

Editor's Note. — This section was formerly § 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4.)

Editor's Note. — This section was formerly § 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4.)

Editor's Note. — This section was formerly § 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4.)

Editor's Note. — This section was formerly § 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2, effective October 1, 1983.

Cross References. — As to powers of attorney, see now § 32A-1 et seq. As to effect of powers of attorney executed pursuant to § 47-115.1 prior to October 1, 1983, see § 32A-14.

Chapter 47A.
Unit Ownership.

ARTICLE 1.
Unit Ownership Act.

§ 47A-1. Short title.

Legal Periodicals. —
For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-2. Declaration creating unit ownership; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-3. Definitions.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-4. Property subject to Article.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-8. Use of common areas and facilities.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-18. Bylaws; annexed to declaration; amendments.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

Legal Periodicals. —
For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-21. Units taxed separately.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

ARTICLE 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

Chapter 47B.

Real Property Marketable Title Act.

§ 47B-1. Declaration of policy and statement of purpose.

Legal Periodicals. —
For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987).

Cited in Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985).

§ 47B-3. Exceptions.

Legal Periodicals. —
For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Applied in Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Chapter 47C.

North Carolina Condominium Act.

ARTICLE 1.

General Provisions.

§ 47C-1-103. Definitions.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

ARTICLE 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, — N.C.A.G. — (Jan. 13, 1988).

§ 47C-2-105. Contents of declaration.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney Gen-

eral to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, — N.C.A.G. — (Jan. 13, 1988).

§ 47C-2-109. Plats and plans.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, — N.C.A.G. — (Jan. 13, 1988).

§ 47C-2-110. Exercise of development rights.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, — N.C.A.G. — (Jan. 13, 1988).

ARTICLE 3.

Management of the Condominium.

§ 47C-3-102. Powers of unit owners' association.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-105. Termination of contracts and leases of declarant.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-112. Conveyance or encumbrance of common elements.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-115. Assessments for common expense.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-117. Other liens affecting the condominium.

Legal Periodicals. — For a note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

Chapter 48.

Adoptions.

§ 48-1. Legislative intent; construction of Chapter.

CASE NOTES

Applied in In re Terry, 76 N.C. App. 529, 333 S.E.2d 526 (1985).

§ 48-2. Definitions.

In this Chapter, unless the context or subject matter otherwise requires —

(1) a., b. Repealed by Session Laws 1985, c. 758, s. 4, effective October 1, 1985.

(1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1; 1985, c. 758, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, deleted paragraphs (1)a and (1)b, which defined "abandoned child."

CASE NOTES

"Abandonment" Defined. —

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

"Willful" Defined. —

In accord with the main volume. See In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Willful intent is a question of fact, etc. —

In accord with the main volume. See In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Procedure for Adoption without Parent's Consent. — Prior to October 1, 1985, two procedures were available to enable a petitioning party to adopt a minor child without the consent of the opposing biological parent. First, under § 7A-289.32, a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein, and then, pursuant to § 48-5, once a district court had entered an order terminating the parental rights of a biological parent, that parent was no longer a necessary party to an adoption proceeding. Second, the court, under § 48-5(d), upon proper motion, was authorized to hold a hearing to determine whether an abandonment as defined in this section had taken place. However, effective October 1, 1985, these proceed-

ings were merged into one termination of parental rights proceeding under § 7A-289.32(8) to ascertain whether the parent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

§ 48-3. What minor children may be adopted; notice required before a child's placement; violation a misdemeanor; investigation.

(a) Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States, may be adopted in accordance with the provisions of this Chapter.

(b) No less than 72 hours before any child less than 12 years old may be placed with any person in anticipation of an adoption, the director of social services of the county in which the parent or guardian resides or the county in which the child was born or will be born shall be notified in writing of the proposed placement. The written notification shall be sent by the prospective adoptive parents and shall contain:

(1) The names and addresses of each parent or guardian of the child and of each person with whom the child is to be placed for adoption,

(2) The signatures of a parent or guardian of the child and of each person with whom the child is to be placed for adoption,

(3) The birth date or expected birth date and county of birth or expected county of birth of the child, and

(4) The intention of the parties as to adoption of the child.

The notification may also contain any request for counseling that any of the parties to the placement wish to make.

The requirement of notification does not apply to placements with a child's relative listed in G.S. 48-21.

Any person who wilfully and knowingly violates this subsection shall be guilty of a misdemeanor.

(c) Promptly upon receipt of notification under subsection (b), the director shall investigate the proposed adoptive placement. The director may waive an investigation if circumstances warrant, or, in making an investigation, may rely on information already known to the department. If the director determines that the proposed placement appears to be contrary to the child's welfare, the director shall promptly notify all the parties to the proposed placement. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and applicable only to placements made on and after that date, added "notice required before a child's placement; violation a misdemeanor; investigation" at the end of the catchline, designated the existing language of the section as subsection (a), and added subsections (b) and (c).

§ 48-3.1. Application of G.S. 14-320.

The separation of a child under six months old from a custodial parent for the purpose of adoption shall be subject to the provisions of G.S. 14-320. (1985, c. 240, s. 1.)

Editor's Note. — Session Laws 1985, c. 240, s. 3 makes this section effective on ratification. The act was ratified May 23, 1985.

Section 14-320, referred to in this section, was repealed by Session Laws 1987, c. 716, s. 2. See now § 48-3(b) and (c).

§ 48-4. Who may adopt children.

CASE NOTES

Spouse in Subsection (a) Is Not Biological Parent of Child. — The use of the word "however" in subsection (b) of this section indicates that the petitioner's spouse referred to in subsection (a) who "shall join in the petition" is not the biological parent. This is because subsection (b) makes a specific provision for cases in which the petitioner's spouse is the biological parent of the child to be adopted. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

§ 48-5. When parent is not necessary party to adoption proceedings.

(c) In all cases where a district court has heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A, the parent whose parental rights were terminated shall not be a necessary party to any proceeding under this Chapter nor shall the consent of such parent or parents be required.

(d) In the event that a district court has not heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A, the petitioner in the adoption proceeding may file a petition in district court to terminate the parental rights of either or both parents pursuant to Article 24B of Chapter 7A. In this case the court in the adoption proceeding, upon request of the petitioner, shall continue the adoption proceeding until a final disposition has been made on the petition to terminate parental rights.

(d1) In the event that there is a guardian of the person of the child, the petitioner in the adoption proceeding may file a petition with the clerk of superior court who appointed the guardian to remove him upon one or more of the grounds set forth in G.S. 7A-289.32(2), (4) and (8) for terminating parental rights. In such case the court in the adoption proceeding, upon request of the petitioner, shall continue the adoption proceeding until a final disposition has been made on the petition to remove the guardian.

(e) If the district court enters an order terminating parental rights pursuant to Article 24B of Chapter 7A or if the clerk of

superior court enters an order removing the guardian of the person, the consent of the parent whose parental rights are terminated or the consent of the guardian who is removed shall not be required.

(f) A copy of the order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A or a copy of the order removing the guardian of the person must be filed in the adoption proceeding, and consent must be given or withheld in accordance with G.S. 48-9(a)(2) or (a)(3). (1949, c. 300; 1957, c. 90; c. 778, s. 3; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; 1977, c. 879, s. 2; 1979, c. 107, s. 7; 1985, c. 758, ss. 5-9; 1987, c. 371, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Section 7A-288, referred to in this section, was repealed by Session Laws 1979, c. 815, s. 1. For the North Carolina Juvenile Code, see now §§ 7A-516 through 7A-732.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, in subsection (c) substituted "heretofore entered an order terminating parental rights pursuant to former G.S. 7A-288 or Article 24B of Chapter 7A" for "entered an order pursuant to G.S. 7A-288 or Article 24B of Chapter 7A terminating the parental rights with respect to a child adjudicated to be neglected or dependent," and substituted "were terminated" for "with respect to such child may have been terminated," rewrote subsection (d), inserted new subsection (d1), and rewrote subsections (e) and (f).

The 1987 amendment, effective June 15, 1987, deleted "when there has been a determination of abuse or neglect under Article 44 of Chapter 7A" preceding "may file a petition" in the first sentence of subsection (d), and substituted "In this case" for "in such case" at the beginning of the second sentence of subsection (d).

CASE NOTES

Procedure for Adopting Child without Parent's Consent. — Prior to October 1, 1985, two procedures were available to enable a petitioning party to adopt a minor child without the consent of the opposing biological parent. First, under § 7A-289.32, a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein, and then, pursuant to this section, once a district court had entered an order terminating the parental rights of a biological parent, that parent was no longer a necessary party to an adoption proceeding. Second, the court, under subsection (d) of this section, upon proper motion, was authorized to hold a hearing to determine whether an abandonment as defined in former § 48-2(1)a and (1)b had taken place. However, effective October 1, 1985, these proceedings were merged into one termination of parental rights proceeding under § 7A-289.32(8) to ascertain whether the parent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

§ 48-6. When consent of parents not necessary.

CASE NOTES

Cited in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

§ 48-7. When consent of parents or guardian necessary.

CASE NOTES

The language of subsection (d) of this section, that adoption by a stepparent does not affect the parent-child relationship with the natural parent, is a measure to protect that parent-child relationship from the otherwise sweeping effects of § 48-23(1), which otherwise might be construed to terminate the natural parent-child relationship. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 546, 343 S.E.2d 913 (1986).

Biological Parent Need Not Join in Spouse's Petition for Adoption of Her Children. — Section 29-17(e) and subsection (d) of this section were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of § 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under § 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Adopted Children as Lineal Descendants under § 30-3(b). — Natural children of one spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, are considered lineal descendants by the second marriage for purposes of § 30-3(b), which determines a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 546, 343 S.E.2d 913 (1986).

§ 48-9. When consent may be given by persons other than parents.

(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person:

(1) When the parent, parents, or guardian of the person of the child has in writing surrendered the child to a director of social services of a county or to a licensed child-placing agency and at the same time in writing has consented generally to adoption of the child, the director of social services or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of social services may accept the surrender of a child regardless of its place of birth or the residence of the parent or parents.

(2) If the court finds as a fact that there is no person qualified to give consent, or that an order terminating the parental rights of one or both parents under G.S. 48-5(d) and (e) has been entered by the district court or an order removing the guardian of the person of the child under G.S. 48-5(d1) and

(e) has been entered by the clerk of superior court, the court shall appoint some suitable person or the county director of social services of the county in which the child resides to act in the proceeding as guardian ad litem of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(3) When a district court has entered an order terminating parental rights as provided by G.S. 7A-289.31 (or former G.S. 7A-288) or when a clerk of superior court has entered an order removing the guardian of the person, and when the court has placed such child in the custody of the county department of social services or a licensed child-placing agency, then the director of such county department of social services or the executive director of such licensed child-placing agency shall have the right to give written consent to the adoption of such child without being appointed as guardian ad litem of the child.

(1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, substituted the language beginning "an order terminating the parental rights" and ending "entered by the clerk of superior court" for "the child has been abandoned by one or both parents or by the guardian of the person of the child" in the first sentence of subdivision (a)(2) and in subdivision (a)(3) inserted "(or former G.S. 7A-288) or when a clerk of superior court has entered an order removing the guardian of the person".

CASE NOTES

Foster Parents Have No Standing to Bring Custody Action. — Nothing in the language of § 48-9.1(1) gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Transfer of Custody to Foster Parents Is Not Prohibited. — The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to § 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Evidence held sufficient to support findings that social worker made a misrepresentation of an existing fact, with knowledge that it was false and with the intent to deceive 17-year-old parents into signing adoption consent forms, and that a prudent person could have reasonably relied on her statements concerning the adoption process and the contents of the forms and signed the forms without reading them. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Cited in In re Clark, 76 N.C. App. 83, 332 S.E.2d 196 (1985).

§ 48-9.1. Additional effects of surrender and consent given to director of social services or to licensed child-placing agency; custody of child; disposition of certain children with special needs.

CASE NOTES

Foster Parents Have No Standing to Bring Custody Action. — Nothing in the language of subdivision (1) of this section gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Transfer of Custody to Foster Parents Is Not Prohibited. — The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to § 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

§ 48-11. Consent not revocable.

(a) No consent described in G.S. 48-6, 48-7, or 48-9 may be revoked by the consenting party:

(1) After the entering of an interlocutory decree.

(2) After the entering of a final order of adoption when the entering of an interlocutory decree has been waived in accordance with the provisions of G.S. 48-21.

(3) After three months from the date of the giving of the consent.

(4) After 30 days from the date of the giving of the consent, when the consent has been given generally to a director of social services or to a duly licensed non-profit child-placing agency.

When the consent of any person or agency is required under the provisions of this Chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding; and no service of any process need be made upon such person or agency.

(1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to all petitions for adoption filed on or after that date, in the first sentence of subsection (a) deleted "or a final order of adoption when entering of an interlocutory decree" preceding "has been waived," inserted "unless no adoption proceeding is instituted within 18 months from the date of the giving of the consent in which case the consent may be revoked" in two places.

The 1987 amendment, effective October 1, 1987, rewrote subsection (a).

CASE NOTES

Instrument held sufficient revocation, etc. —

Letter mailed by natural mother to one of the petitioners, stating that she was withdrawing her consent to child's adoption, constituted sufficient notice of revocation under the law as it stood prior to Oct. 1, 1983, the effective date of subsection (b) of this section, and was timely made inasmuch as less than three months had elapsed since execution of the consent to adopt and no interlocutory or final order of adoption had been entered. In re Terry, 317 N.C. 132, 343 S.E.2d 923 (1986).

Evidence held sufficient to support findings that social worker made a misrepresentation of an existing fact, with knowledge that it was false and with the intent to deceive 17-year-old parents into signing adoption consent forms and that a prudent person could have reasonably relied on her statements concerning the adoption process and the contents of the forms and signed the forms without reading them. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 315 S.E.2d 750 (1987).

Quoted in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

§ 48-12. Nature of proceeding; venue.

CASE NOTES

Original Jurisdiction. — Adoption proceedings are within the original jurisdiction of the clerk of superior court. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Adoption proceedings are special proceedings and not civil actions. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Applicable Procedural Rules and Statutes. — Although an adoption proceeding is a special proceeding, no separate procedure is prescribed by statute so the Rules of Civil Procedure and the statutes governing special proceedings, § 1-393 et seq., would apply. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Filing of Motion Alleging Abuse of Discretion in Adoption Process. — In view of this section, which provides that adoption proceedings shall be before the clerk of superior court, any motion alleging an abuse of discretion in the adoption process should be filed with the clerk of superior court within the 10-day period provided for in § 7A-659(f). In re N.C.L., — N.C. App. —, 365 S.E.2d 213 (1988).

§ 48-14. Use of original name of child unnecessary; name used in proceedings for adoption.

CASE NOTES

Cited in In re N.C.L., — N.C. App. —, 365 S.E.2d 213 (1988).

§ 48-15. Petition for adoption.

CASE NOTES

Collateral Attack on Adoption by Party Thereto. — The provisions of § 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Cited in In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986).

§ 48-16. Investigation of conditions and antecedents of child and of suitableness of adoptive home.

CASE NOTES

Department of Social Services Has Duty to Make Investigations. — Under subsection (a) of this section, the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions; thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

§ 48-21. Final order of adoption; termination of proceeding within three years.

CASE NOTES

Cited in In re Terry, 317 N.C. 132, 343 S.E.2d 923 (1986).

§ 48-23. Legal effect of final order.

The following legal effects shall result from the entry of every final order of adoption:

(2a) Notwithstanding subdivisions (1) and (2), a biological grandparent is entitled to visitation rights with the adopted child as provided in G.S. 50-13.2(b1), 50-13.2A, and 50-13.5(j).

(3) From and after the entry of the final order of adoption, the words "child," "grandchild," "heir," "issue," "descendant," or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section. The use of the phrase "hereafter born" or similar language in any deed, grant, will, or other written instrument to establish a class of persons shall not by itself be sufficient to exclude adopted persons from inclusion within the class. This subdivision applies to instruments executed before October 1, 1985.

(4) Where an interlocutory decree has been entered in an adoption proceeding and one of the petitioners dies before the final order of adoption is entered, if the spouse of the deceased petitioner later obtains a final order of adoption, then:

a. The child shall have the status defined in subdivisions (1) and (3) of this section with respect to the deceased petitioner;

b. The child shall be entitled to inherit real and personal property by, through, and from the deceased petitioner

in accordance with the statutes relating to intestate succession and shall be held to be the "child," "grandchild," "heir," "issue," "descendant," or an equivalent, of the deceased petitioner;

c. The use of the word "child," "grandchild," "heir," "issue," or "descendant," or any word of like import in any deed, grant, will, or other written instrument executed by the deceased petitioner shall be held to include the child, whenever appropriate, unless the contrary plainly appears by its terms; and

d. The use of the phrase "hereafter born" or similar language in any deed, grant, will or other written instrument executed by the deceased petitioner to establish a class of persons shall not by itself be sufficient to exclude the child from the class. This subdivision applies to instruments executed before October 1, 1985.

(5) From and after the entry of the final order of adoption, any reference to a natural person in any deed, grant, will, or other written instrument executed on or after October 1, 1985, shall include any adopted person unless the instrument explicitly states that adopted persons are excluded, whether the instrument was executed before or after the entry of the final order of adoption.

(6) Where an interlocutory decree has been entered in an adoption proceeding and one of the petitioners dies before the final order of adoption is entered, if the spouse of the deceased petitioner later obtains a final order of adoption, any reference to a natural person in any deed, grant, will, or other written instrument executed by the deceased petitioner on or after October 1, 1985, shall include the child unless the instrument explicitly states that adopted persons are excluded. (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967; 1967, c. 619, s. 5; 1983, c. 454, s. 6; 1985, c. 67, ss. 1-4; c. 575, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

Session Laws 1985, c. 67, ss. 1-4, effective October 1, 1985, added the last two sentences of subdivision (3), rewrote subdivision (4), and added subdivisions (5) and (6).

Session Laws 1985, c. 575, s. 1, effective October 1, 1985, and applicable to pending litigation and actions or proceedings filed on or after that date, whether the adoption was final before or after October 1, 1985, inserted subdivision (2a).

CASE NOTES

I. IN GENERAL.

Adoption by Stepparent. — The language of § 48-7(d), that adoption by a stepparent does not affect the parent-child relationship with the natural parent, is a measure to protect that parent-child relationship from the otherwise sweeping effects of subsection (1) of this section, which otherwise might be construed to terminate the natural parent-child relationship. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Adopted Children as Lineal Descendants under § 30-3(b). — Natural children of one spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, are considered lineal descendants by the second marriage for

purposes of § 30-3(b), which determines a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Collateral Attack on Adoption by Party Thereto. — The provisions of § 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Applied in Pittman v. Pittman, 73 N.C. App. 584, 327 S.E.2d 8 (1985).

Quoted in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

§ 48-25. Record and information not to be made public; violation a misdemeanor.

CASE NOTES

Requirement that adoption records be sealed reflects legislative recognition of potential harm to adopted children and their adoptive families, and ultimately to society, which may arise from unwarranted revelation of private facts about adoptions, and suggests that the circumstances surrounding a particular adoption and the identities of the parties involved are ordinarily not matters of public interest. Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819, cert. granted, 320 N.C. 512, 358 S.E.2d 519 (1987).

Applied in Wilkinson v. Riffel, 72 N.C. App. 220, 324 S.E.2d 31 (1984).

§ 48-26. Procedure for opening record for necessary information.

(a) Any necessary information in the files or the record of an adoption proceeding may be disclosed, to the party requiring it, upon a written motion in the cause before the clerk of original jurisdiction. The movant must serve a copy of the motion, with proof of service, upon the Department of Human Resources, and the county department of social services or the licensed child placing agency which prepared the report in response to the order of reference issued pursuant to G.S. 48-16. The clerk of superior court shall give at least five days' notice to the Department of Human Resources and county department of social services or licensed child placing agency of every hearing on this motion, whether the hearing is before the clerk or a judge of the superior court, and the Department of Human Resources and the county department of social services or licensed child placing agency shall be entitled to appear and be heard in response to the motion. After hearing, the clerk may issue an order to open the record. Such order must be reviewed by a judge of the superior court and if, in the opinion of said judge, it be to the best interest of the child or of the public to have such information disclosed, he may approve the order to open the record.

(1949, c. 300; 1985, c. 448.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, deleted "who may issue an order to open the record" at the end of the first sentence of subsection (a) and inserted the present second, third and fourth sentences of that subsection.

§ 48-28. Questioning validity of adoption proceeding.

CASE NOTES

Collateral Attack on Adoption by Party Is Prohibited. — The provisions of this section would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.

CASE NOTES

Cited in In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913 (1986).

Chapter 48A.

Minors.

§ 48A-2. Age of minors.

CASE NOTES

Procedure for Changing Support When Child Reaches Age 18. — A husband had no authority to unilaterally attempt his own modification of child support payments upon one of his children reaching the age of 18, and being no longer a "minor" under this section, even though the support order directed the husband to pay support for "his two minor children. . . ." The proper procedure for the husband to follow would have been to apply to the trial court for relief pursuant to § 50-13.7. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Legal Periodicals. —
For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Cited in Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.

CASE NOTES

I. IN GENERAL.

Applied in Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985).

V. INSTRUCTIONS, SUBMISSION TO JURY, AND VERDICT.

And Submission of Interrogatories or Issues, etc. —
Although a general verdict of "guilty" or "guilty as charged" may be proper, it is not required. Indeed, the preferred practice in cases charging a violation of this section calls for the submission of written issues to the jury. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A jury's verdict based on issues submitted to it should include an individual determination of four issues. First, is defendant a parent of the illegitimate child in question? Second, did defendant receive notice and demand for support? Third, did defendant willfully neglect or refuse to provide adequate support for the child? Lastly, if the answers to the preceding are yes, is defendant guilty of willful neglect or refusal to maintain and provide adequate support for his illegitimate child? Such a verdict of the jury is in the nature of a special verdict and, when attempted, must reveal that all issues of ultimate material fact have been resolved against defendant. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A jury verdict must unambiguously state that defendant has been found guilty of a crime. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

A general verdict of "guilty" or "guilty as charged" is sufficient when a defendant is properly charged under this section. However, when the jury undertakes to spell out its verdict without specific reference to the charge, it is essential that the spelling be correct. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

Verdict Held Insufficient. — A verdict of "guilty of non-support of illegitimate child" was held improper and was set aside where it neither alluded generally to the warrant nor used specific language sufficient to show a conviction of the offense charged. State v. Hobson, 70 N.C. App. 619, 320 S.E.2d 319, supersedeas and temporary stay denied, 312 N.C. 497, 322 S.E.2d 562 (1984).

§ 49-4. When prosecution may be commenced.

CASE NOTES

There is no statute of limitations as such affecting a father's duty to support his illegitimate children. That duty continues throughout the child's minority. Bertie-Hertford Child Support Enforcement Agency v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

§ 49-7. Issues and orders.

The court before which the matter may be brought shall determine whether or not the defendant is a parent of the child on whose behalf the proceeding is instituted. After this matter has been determined in the affirmative, the court shall proceed to determine the issue as to whether or not the defendant has neglected or refused to provide adequate support and maintain the child who is the subject of the proceeding. After this matter shall have been determined in the affirmative, the court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings subject to the limitations of G.S. 50-13.10. The court in fixing this sum shall 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. The order fixing the sum shall require the defendant to pay it either as a lump sum or in periodic payments as the circumstances of the case may appear to the court to require. Compliance by the defendant with any or all of the further provisions of this Article or the order or orders of the court requiring additional acts to be performed by the defendant shall not be construed to relieve the defendant of his or her responsibility to pay the sum fixed or any modification or increase thereof.

The court before whom the matter may be brought, on motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood test and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensing practicing physician, duly qualified immunologist, duly qualified geneticist or other duly

qualified person. The evidentiary effect of those blood tests and comparisons and the manner in which the expenses therefor are to be taxed as costs shall be prescribed in G.S. 8-50.1. In addition, if a jury tries the issue of parentage, they shall be instructed as set out in G.S. 8-50.1. From a finding on the issue of parentage against the alleged-parent defendant, the alleged-parent defendant has the same right of appeal as though he or she had been found guilty of the crime of willful failure to support an illegitimate child. (1933, c. 228, s. 6; 1937, c. 432, s. 2; 1939, c. 217, ss. 1, 4; 1944, c. 40; 1947, c. 1014; 1971, c. 1185, s. 19; 1975, c. 449, s. 3; 1977, c. 3, s. 2; 1979, c. 576, s. 2; 1987, c. 739, s. 1.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "subject to the limitations of G.S. 50-13.10" at the end of the third sentence.

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Continuing Duty to Support. — The payment of the lump sum amount ordered pursuant to this section as a result of a conviction for non-support of an illegitimate child does not relieve defendant of responsibility for future support. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

This section, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in § 110-129, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

§ 49-8. Power of court to modify orders, suspend sentence, etc.

Upon the determination of the issues set out in the foregoing section [G.S. 49-7] and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require subject to the limitations of G.S. 50-13.10. The order or orders made in this regard may include any or all of the following alternatives:

(1) Commit the defendant to prison for a term not to exceed six months;

(2) Suspend sentence and continue the case from term to term;

(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child;

(4) Order the defendant to pay to the mother of the said child the necessary expenses of birth of the child and suitable medical attention for her;

(5) Require the defendant to sign a recognizance with good and sufficient security, for compliance with any order which the court may make in proceedings under this Article. (1933, c. 228, s. 7; 1939, c. 217, s. 6; 1987, c. 739, s. 2.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "subject to the limitations of G.S. 50-13.10" at the end of the first sentence.

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-10. Legitimation.

CASE NOTES

Section Read in Conjunction with Statutes Applicable to Special Proceedings. — This section, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases. To ensure the parties' right to a trial by jury, this section can and should be read in conjunction with the procedural statutes that apply to all special proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Legitimation Procedure within Jurisdiction of Superior Court Clerk. — The legitimation procedure, which is identified in this section as a special proceeding in the superior court of the county in which the putative father resides, is within the jurisdictional purview of the clerk of superior court. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

The clerks of superior court have authority, pursuant to this section, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, where the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man, provided that the issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Phrase "born out of wedlock" should refer to the status of the parents of the child in relation to each other. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock." In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Child Is Necessary Party. — Under this section, the child is a necessary party to the proceeding. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Married Woman's Husband Should Be Summoned. — As a potentially adverse party in a special proceeding under this section brought by natural father of child whose mother was married to another man at the time of his conception and birth, the married woman's husband should be construed as one of the respondents on whom summons must be served. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Summons Procedure Governed by § 1-393. — The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would be governed by § 1-393. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Standard of Proof. — This section, just as § 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Presumption of Legitimacy Where Child's Mother Is Married. — Because of the strong presumption of legitimacy involved where mother of child is married, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his

wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Man Living with Mother for Five Years Preceding Child's Birth Was Putative Father. — Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of child (born in 1965) since 1960, continuing to maintain and care for the child born of that relationship, was the "putative father" of the child, rather than the mother's husband, who discontinued living with the mother in 1960, years before the child was born. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under § 49-14 before proceeding under this section to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

§ 49-12. Legitimation by subsequent marriage.

CASE NOTES

Action under § 49-14 Prohibited When Child Is Legitimated. — If child is legitimated by virtue of this section, an action under § 49-14 cannot be maintained, as § 49-14 establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Applied in Department of Transp. v. Fuller, 76 N.C. App. 138, 332 S.E.2d 87 (1985).

§ 49-13. New birth certificate on legitimation.

Cited in Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

ARTICLE 3.

Civil Actions Regarding Illegitimate Children.

§ 49-14. Civil action to establish paternity.

(a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(d) If the action to establish paternity is brought more than three years after birth of a child, paternity shall not be established in a contested case without evidence from a blood grouping test, or evidence that the putative father has declined an opportunity for such testing. (1967, c. 993, s. 1; 1973, c. 1062, s. 3; 1977, c. 83, s. 2; 1981, c. 599, s. 14; 1985, c. 208, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, added "at any time prior to such child's

eighteenth birthday" at the end of the first sentence of subsection (a) and added subsection (d).

Legal Periodicals. —

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

CASE NOTES

Purpose. —

The purpose of an action under this section is to establish the identity of the biological father of an illegitimate child so that the child's right to support may be enforced and the child will not become a public charge. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Applicability of § 50-13.6. — Section 50-13.6 does not apply to civil actions to establish paternity under this section, but would authorize an award of reasonable attorney fees for custody and support actions involving an illegitimate child whose paternity had been determined. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Action under This Section Prohibited When Child Is Legitimated. — If child is legitimated by virtue of § 49-12, an action under this section cannot be maintained, as this section establishes a means of support for illegitimate children. Lewis v. Stitt, 86 N.C. App. 103, 356 S.E.2d 398 (1987).

Claim of Being Tricked into Fathering Child Not Appropriate as Defense. — Argument of defendant in paternity proceeding in which he counterclaimed against plaintiff for fraud that he was tricked into fathering a child and should not bear the financial reponsibility for it was not appropriate in a civil action to establish paternity, either as a defense or a counterclaim. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Standard of Proof. — Section 49-10, just as this section, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of child's mother to man other than its natural father. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

In a paternity action under this section, plaintiff must prove beyond a reasonable doubt that defendant is the father of the child whose paternity is in issue. Thus, in a paternity case, in order to affirm a JNOV, the court must conclude as a matter of law that the jury could have had no reasonable doubt that defendant was the biological father of plaintiff's son. Smith v. Price, 74 N.C. 413, 340 S.E.2d 408 (1986).

Transfer to Civil Docket for Jury Determination of Paternity. — Resolution by a jury of the factual issue of paternity, when a presumption of legitimacy is involved, may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to § 1-273. Therefore, it is not necessary to require that the putative father first file a paternity action under this section before proceeding under § 49-10 to have child legitimated. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Applied in In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984).

Cited in Belfield v. Weyerhaeuser Co., 77 N.C. App. 332, 335 S.E.2d 44 (1985); State ex rel. Pender County Child Support Enforcement Agency v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 49-15. Custody and support of illegitimate children when paternity established.

CASE NOTES

Child's Welfare Is Primary Consideration. — Once paternity is established, the proper custody and amount of support are determined in the same manner as for a legitimate child. In making this determination, the court has considerable discretion, but the welfare of the child is the primary consideration. To determine the rights of an illegitimate child any differently would violate the illegitimate child's constitutional right to equal protection of the law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), aff'd in part and rev'd in part, 315 N.C. 523, 340 S.E.2d 408 (1986).

Cited in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Smith v. Davis, — N.C. App. —, 364 S.E.2d 156 (1988).

Chapter 50.

Divorce and Alimony.

Article 1.

Divorce, Alimony, and Child Support, Generally.

§ 50-3. Venue; removal of action.

Legal Periodicals. — For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

§ 50-6. Divorce after separation of one year on application of either party.

CASE NOTES

I. IN GENERAL.

Cited in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

II. SEPARATION.

Evidence of Conjugal Relations within Statutory Period before Action. — Sexual relations between spouses separated for less than one year invalidates those obligations of the parties, pursuant to a separation agreement, that are contingent upon the requirement that the parties "live continuously separate and apart" for one year. Higgins v. Higgins, 86 N.C. App. 513, 358 S.E.2d 553 (1987).

§ 50-7. Grounds for divorce from bed and board.

CASE NOTES

I. IN GENERAL.

Cited in State v. Getward, — N.C. App. —, 365 S.E.2d 209 (1988).

§ 50-8. Contents of complaint; verification; venue and service in action by nonresident; certain divorces validated.

Legal Periodicals. —
For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

OPINIONS OF ATTORNEY GENERAL

Not Advisable for Attorney to Act as Notary and Verify Client's Divorce Complaint. — It is not advisable for a notary who is also a partner in a law firm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also appear, and they could be prohibited under § 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and as an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, — N.C.A.G. — (May 18, 1988).

§ 50-11. Effects of absolute divorce.

CASE NOTES

Equitable Distribution After a Judgment of Absolute Divorce. — Under this section, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Quoted in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-13.1. Action or proceeding for custody of minor child.

Local Modification. — Gaston and Mecklenburg: 1987 (Reg. Sess., 1988), c. 1036, s. 2.

Legal Periodicals. —
For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

CASE NOTES

Cited in In re Arends, — N.C. App. —, 364 S.E.2d 169 (1988).

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State.

CASE NOTES

I. IN GENERAL.

Cited in Mussallam v. Mussallam, — N.C. —, 364 S.E.2d 364 (1988).

III. RIGHT OF PARENTS TO CUSTODY.

B. As Between Parents.

Custody of Child Upheld Where Father Never Visited. — Where plaintiff mother had had de facto custody of five-year old child since his birth, and defendant, who had acknowledged paternity of the child when he was there, had not visited the child in a substantial length of time, nor had he requested visitation privileges or custody, formal award of custody to mother would be upheld. Craig v. Kelley, — N.C. App. —, 366 S.E.2d 249 (1988).

IV. VISITATION RIGHTS.

Grandparents May Not Be Awarded Visitation Rights When Custody Is Not in Issue. — While subsection (b1) of this section authorizes the court to provide for the visitation rights of grandparents when the custody of minor children is being litigated, it does not authorize the court to enter such an order when the custody of the children is not in issue. Moore v. Moore, — N.C. App. —, 365 S.E.2d 662 (1988).

As parents with lawful custody of their children have the prerogative of determining with whom they shall associate. Moore v. Moore, — N.C. App. —, 365 S.E.2d 662 (1988).

§ 50-13.2A. Action for visitation of an adopted grandchild.

CASE NOTES

There is reasonable basis for classification elicited in this section, and therefore, the classification does not violate the equal protection guarantees of either the State or federal Constitutions. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

This section must be read in pari materia with § 50-13.7(a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Trial court did not err in allowing grandparents to intervene in adoption proceeding pursuant to this section without holding a preliminary evidentiary hearing to determine whether a substantial relationship existed between the movants and grandchildren, where the trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it, and without the necessity of a preliminary hearing the trial court made a preliminary determination that the grandparents had a right to intervene. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Evidence held sufficient to support the trial court's conclusion that grandparents had established a substantial relationship with their grandchildren. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

There existed substantial change of circumstances when visitation rights of grandparents arbitrarily terminated by the natural mother when the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and based upon that, the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Where adoption of two grandchil-

dren by stepfather not finalized until one month after the entry of the judgment awarding grandparents visitation, whatever rights he was to gain in becoming an adoptive parent had not vested at the time of the hearing, and therefore the adjudication of the issues before the court did not require his presence in the suit. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Trial court's findings of fact held to establish fitness of the grandparents and that the welfare of the children would be subserved by granting them visitation. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

§ 50-13.3. Enforcement of order for custody.

CASE NOTES

Cited in McLemore v. McLemore, — N.C. App. —, 366 S.E.2d 495 (1988).

§ 50-13.4. Action for support of minor child.

Legal Periodicals. —

For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

For note on child support provisions as a limit on the doctrine of necessaries, in light of Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986), see 65 N.C.L. Rev. 1308 (1987).

For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina", see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

I. IN GENERAL.

Subsection (a) does not specify that it requires judicial determination of custody before its provision can be utilized by a person or agency bringing an action for support. Craig v. Kelley, — N.C. App. —, 366 S.E.2d 249 (1988).

Cited in Smith v. Davis, — N.C. App. —, 364 S.E.2d 156 (1988).

II. INSTITUTION OF ACTION.

Subsection (a) does not specify that it requires judicial determination of custody before its provision can be utilized by person or agency bringing action for support. Thus, where mother in her proceeding for modification of support order also requested a formal adjudication of custody, which request was granted, plaintiff met the custody requirements of subsection (a). Craig v. Kelley, — N.C. App. —, 366 S.E.2d 249 (1988).

IV. AMOUNT OF SUPPORT.

A. In General.

Non-interest Bearing Demand Note Not By Itself a Gift. — The fact that no demand had been made on a non-interest bearing demand note from defendant's parents did not render it a gift, and the trial court's finding that the transaction was a gift was erroneous. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

In child support action, trial court must first determine primary liability for minor child's support under subsection (b). The court then determines the actual amount of support necessary to meet the minor child's reasonable needs pursuant to subsection (c). McLemore v. McLemore, — N.C. App. —, 366 S.E.2d 495 (1988).

Under this section and § 50-13.7, party's ability to pay child support ordinarily determined by party's actual income at time support award

made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

The inclusion of a gift when calculating a defendant's income for child support purposes was an error, where there was no evidence on the part of defendant's parents that such a gift would be reoccurring. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Earnings of Child. — In a case involving child support payments, the trial court erred in refusing to admit the children's tax returns into evidence, the only information concerning the estate and earnings of the children. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

Method of Payment Is within Discretion of Court. — In utilizing the provision in subsection (e) of this section that payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein as the court may order, the trial court is vested with broad discretion, and is not limited to ordering any one of the designated methods of payment. In keeping with the court's powers, an order under this section will be upheld barring an abuse of that discretion. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure payment of alimony and child support was a proper exercise of its discretion in applying the provisions of subsection (e) of this section and § 50-16.7(a) and (c) and would be affirmed. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

Determination of trial court not necessary to make finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her "good faith." Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

Court's findings insufficient to support awarding no support under subsection (c) since the court failed to determine what were the reasonable needs of the minor child for health, education, and maintenance. McLemore v. McLemore, — N.C. App. —, 366 S.E.2d 495 (1988).

Trial court erred in concluding reduction in income of father, custodial parent, due to leaving employment to return to school could not be considered on motion to increase plaintiff's child support obligations. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

VII. FINDINGS AND CONCLUSIONS.

Remand for Further Findings. — The findings of fact in a case for child support, were insufficient to determine whether the trial court gave due regard to the estates of the parties and the case must be remanded for further findings on this matter, even though there was ample evidence contained in the record about the estates of both parties. Sloan v. Sloan, 87 N.C. App. 392, 360 S.E.2d 816 (1987).

§ 50-13.5. Procedure in actions for custody or support of minor children.

(d) Service of Process; Notice; Interlocutory Orders. —

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-4.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

(1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4; 1987 (Reg. Sess., 1988), c. 893, s. 3.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective October 1, 1988, added subdivision (d)(3).

Legal Periodicals. —

For article, "Equating a Stepparent's Rights and Liabilities Vis-A-Vis Custody, Visitation and Support upon Dissolution of the Marriage with Those of the Natural Parent — An Equitable Solution to a Growing Dilemma?", see 17 N.C. Cent. L.J. 1 (1988).

§ 50-13.6. Counsel fees in actions for custody and support of minor children.

Legal Periodicals. —

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

I. IN GENERAL.

Attorneys' fees are not recoverable in an action for equitable distribution, etc. —

In accord with main volume. See Holder v. Holder, — N.C. App. —, 361 S.E.2d 891 (1987).

Findings of Fact Must Support Reasonableness, etc. —

An order awarding counsel fees in a child support or alimony action must

contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

Stated in Craig v. Kelley, — N.C. App. —, 366 S.E.2d 249 (1988); McLemore v. McLemore, — N.C. App. —, 366 S.E.2d 495 (1988).

§ 50-13.7. Modification of order for child support or custody.

CASE NOTES

I. IN GENERAL.

Section 50-13.2A must be read in pari materia with subsection (a), which therefore requires a showing of a substantial change of circumstances. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Applied in Bowen v. Gilliard, — U.S. —, 107 S. Ct. 3008, — L. Ed. 2d — (1987).

Quoted in Craig v. Kelley, — N.C. App. —, 366 S.E.2d 249 (1988).

II. MODIFICATION, GENERALLY.

The trial court must determine the present reasonable needs, etc. —

In accord with the main volume. See Smith v. Smith, — N.C. App. —, 365 S.E.2d 688 (1988).

To properly determine child's present reasonable needs, etc. —

In accord with the main volume. See Smith v. Smith, — N.C. App. —, 365 S.E.2d 688 (1988).

Inclusion of Estimated Expenses for Items That Custodial Parent Cannot Currently Afford Is Not Improper. — In support modification proceedings it was not improper for the court to include in its findings estimated expenses for certain items that plaintiff could not currently afford; simply because a custodial parent is unable to afford a certain item or expense is no reason to disqualify that item as a reasonable need of the child. Findings of fact as to actual past expenditures are meant to aid the trial court in determining the reasonable needs of the children, not to hamper the court's ability to assess the children's reasonable needs. Smith v. Smith, — N.C. App. —, 365 S.E.2d 688 (1988).

Evidence of Child-Oriented Expenses in Modification Hearings. — In seeking a modification of child support, the moving party must present evidence of child-oriented expenses, including the amount of those expenses at the time of the original support hearing. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

Where although father, the custodial parent, presented some evidence of present and future expenses, he presented no evidence of child-oriented expenses at the time of the prior hearing, the trial court did not have all of the evidence necessary to establish a change of circumstances and did not err in refusing to modify plaintiff's child support. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

III. CHANGE IN CIRCUMSTANCES.

There existed substantial change of circumstances when visitation rights of grandparents arbitrarily terminated by natural mother when the grandparents had established a continuing substantial relationship with their grandchildren since the entry of earlier custody order, and based upon that, the court found sufficient facts to justify its conclusion that it was in the best interest of the grandchildren to maintain a continuing relationship with the grandparents through the granting of visitation privileges. Hedrick v. Hedrick, — N.C. App. —, 368 S.E.2d 14 (1988).

Showing of Changed Circumstances Held Insufficient. —

In a case where the sole finding of fact regarding a change of circumstances was a general finding that the child was older and that inflation had occurred, this, standing alone, was inadequate to support an order of increased support

payments. Holder v. Holder, — N.C. App. —, 361 S.E.2d 891 (1987).

In a child custody order modifying the rights of defendant, the evidence was insufficient to show a substantial change in circumstances since the only change was defendant's new job enabling him to keep child with him at work and plaintiff's plans to marry, her increased income and that she no longer lived with her mother. Hinton v. Hinton, — N.C. App. —, 362 S.E.2d 287 (1987).

Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, — N.C. App. —, 366 S.E.2d 247 (1988).

Reduction of Custodial Parent's Income on Return to School. — Trial court erred in concluding reduction in income of father, custodial parent, due to leaving employment to return to school could not be considered on motion to increase wife's child support obligations. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

V. FINDINGS AND DISCRETION OF TRIAL COURT.

Under § 50-13.4 and this section, party's ability to pay child support ordinarily determined by party's actual income at time support award made or modified. However, if there is a finding by the trial court that the party was acting in bad faith by deliberately depressing his or her income or otherwise disregarding the obligation to pay child support, then the party's capacity to earn may be the basis for the award. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

Good Faith Finding Required. — Determination of the trial court that it was not necessary to make a finding of bad faith in reduction of income where the party seeking support modification was the custodial parent was not supported by current case law, nor was the trial court correct in concluding that when a custodial parent sought a change of child support based upon a reduction in income, that custodial parent had to request the court to make a finding of fact as to his or her good faith. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

Must Be Sufficient Evidence of Proscribed Intent. — A trial court's conclusion underlying imposition of the earnings capacity rule must be based upon evidence that the actions which reduced the party's income were not taken in good faith. There must be sufficient evidence of the proscribed intent. Fischell v. Rosenberg, — N.C. App. —, 368 S.E.2d 11 (1988).

§ 50-13.9. Procedure to insure payment of child support.

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 50-13.10. Past due child support vested; not subject to retroactive modification; entitled to full faith and credit.

Legal Periodicals. — For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

§ 50-16.1. Definitions.

CASE NOTES

I. IN GENERAL.

Cited in Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

IV. DEPENDENT SPOUSE.

For a spouse to be "actually substantially dependent" upon the other spouse. —

The term "actually substantially dependent," as used in the first portion of the definition in subdivision (3), means that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation; thus to qualify as a dependent spouse under that portion of subdivision (3), the spouse seeking alimony must be actually without means for providing for his or her accustomed standard of living. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

Spouse Not Dependent. —

Where the uncontradicted evidence disclosed that the year before the parties separated, the plaintiff had an income of $18,339.97 and the defendant had an income of $20,475.11, and the year they separated, the plaintiff's income was $19,301.46 and the defendant's income was $24,447.26, and that during the last year that they lived together, they maintained separate bank accounts and divided household expenses, evidence did not support the ultimate finding that the plaintiff was substantially and materially dependent upon the defendant for her support and maintenance, and the trial court erred in awarding the plaintiff alimony. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

§ 50-16.2. Grounds for alimony.

CASE NOTES

III. ABANDONMENT.

Constructive abandonment may be shown by mental or physical cruelty, or wilful failure of the defaulting spouse to fulfill obligations of the marriage. Ellinwood v. Ellinwood, — N.C. App. —, 362 S.E.2d 584 (1987).

Proof of constructive abandonment may not be based on evidence of actions after the parties separated. Ellinwood v. Ellinwood, — N.C. App. —, 362 S.E.2d 584 (1987).

Findings of Trial Court Held Insufficient on Question of Abandonment. — The findings and conclusions of the trial court were held insufficient to resolve the question raised by the defendant as to whether the plaintiff did in fact abandon the defendant, either actually or constructively, and would therefore be vacated and remanded for more detailed findings and conclusions with respect to the defendant's claim for alimony. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

§ 50-16.3. Grounds for alimony pendente lite.

CASE NOTES

I. IN GENERAL.

Purpose of alimony pendente lite is to give a dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would defeat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

Cited in Holder v. Holder, — N.C. App. —, 361 S.E.2d 891 (1987).

IV. AMOUNT.

Award Upheld. — Award of $400.00 per month for support and maintenance pendente lite upheld. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

V. REVIEW ON APPEAL.

Order denying alimony pendente lite and attorney fees is interlocutory decree from which lies an immediate appeal does not lie. Wilson v. Wilson, — N.C. App. —, 367 S.E.2d 363 (1988).

Denial of Attorney's Fees Held Interlocutory. — Denial of attorney's fees under § 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under this section, so that appellant was not yet entitled to attorney's fees under § 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect his fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, — N.C. App. —, 365 S.E.2d 181 (1988).

§ 50-16.4. Counsel fees in actions for alimony.

CASE NOTES

I. IN GENERAL.

Award of counsel fees is appropriate whenever it is shown. —

To recover attorney's fees pursuant to this section in an action for alimony, the spouse must be entitled to the relief demanded, must be a dependent spouse, and must have insufficient means to subsist during the prosecution of the suit and to defray the expenses thereof. Caldwell v. Caldwell, 82 N.C. App. 225, 356 S.E.2d 821, cert. denied, 320 N.C. 791, 361 S.E.2d 72 (1987).

The requirements which a spouse must meet before a request for attorney's fees pendente lite can be granted are as follows: (1) the party requesting the award must be a "dependent spouse" as defined in § 50-16.1(3); (2) the party must be entitled to alimony pendente lite; and (3) the court must find that the dependent spouse is without sufficient means to subsist during the prosecution or defense of the suit and to defray the attendant expenses thereof. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

III. FINDINGS.

Upon Which Determination of Reasonableness, etc. —

An order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorney's hourly rate in comparison to the customary charges of attorneys practicing in that general area. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

In Combined Actions Findings Should Not Reflect Fees Attributable to Equitable Distribution. — In a combined action for alimony, child support, and equitable distribution, findings should reflect that the fees awarded are attributable to work only on the alimony and/or child support actions. Holder v. Holder, — N.C. App. —, 361 S.E.2d 891 (1987).

Recital that appellee's attorney rendered valuable services not sufficient to support court's conclusion that appellee is entitled to recover $2,500.00 in attorney's fees. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

IV. REVIEW ON APPEAL.

Denial of Attorney's Fees Held Interlocutory. —

Denial of attorney's fees under this section was not a final order of the trial court, where at the time appellant's motion was filed there had been no determination that his client, defendant, was entitled to alimony pendente lite under § 50-16.3, so that appellant was not yet entitled to attorney's fees under this section, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect fees, no substantial right of ap-

pellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, — N.C. App. —, 365 S.E.2d 181 (1988).

§ 50-16.5. Determination of amount of alimony.

CASE NOTES

Standard of Living Determinations. — Although the court did not make any detailed findings as to the couple's accustomed standard of living, where the findings which it made allowed the court to determine the couple's accustomed standard of living, a specific finding regarding the standard of living was not necessary. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

§ 50-16.7. How alimony and alimony pendente lite paid; enforcement of decree.

CASE NOTES

I. IN GENERAL.

Trial court's creation of a trust consisting of certain real and personal property owned by the parties in order to secure the payment of alimony and child support was a proper exercise of its discretion in applying the provisions of § 50-13.4(e) and of subsections (a) and (c) of this section, and would be affirmed. Weaver v. Weaver, — N.C. App. —, 364 S.E.2d 706 (1988).

§ 50-16.9. Modification of order.

CASE NOTES

II. CHANGE OF CIRCUMSTANCES.

Refusal to Reduce Alimony Upheld. — Where although plaintiff ex-wife, at time of hearing, made $22,788.00 per year, she had a debt of $20,000.00, much of which was attributable to defendant's failure to make past alimony payments, the trial court did not err in failing to reduce defendant ex-husband's alimony payments to her. Patton v. Patton, — N.C. App. —, 364 S.E.2d 700 (1988).

Held Failure to Show Substantial Change of Circumstances. — Findings of fact found by the trial court held supported by the evidence and clearly and more than amply supported the court's conclusion that defendant had failed to show a substantial change of circumstances that would warrant a modification of consent judgment providing for alimony and child support. Outlaw v. Outlaw, — N.C. App. —, 366 S.E.2d 247 (1988).

III. SEPARATION AGREEMENTS, CONSENT JUDGMENTS, ETC.

The power of the court to enforce its judgment, etc. —

Once a separation agreement is incorporated into a court order, it loses its character as a contract and becomes a court order, which must then be enforced through the contempt powers of the court. Pitts v. Broyhill, — N.C. App. —, 364 S.E.2d 738 (1988).

Surrender of Right to Enforce Agreement as Consideration for New Agreement. — Contractual surrender of plaintiff's right to bring an action to enforce portion of separation agreement which was incorporated in divorce decree was sufficient legal detriment to constitute consideration under a new agreement. Pitts v. Broyhill, — N.C. App. —, 364 S.E.2d 738 (1988).

IV. REMARRIAGE OF DEPENDENT SPOUSE.

Obligation Held to Terminate. —

Where in consent judgment incorporating parties' deed of separation and property settlement, $400.00 per month payment was twice denominated "alimony," while there was no reference whatsoever to the distribution of stock, vehicles, and other property, the $400.00 payment was alimony, and defendant's obligation to make such payments terminated upon plaintiff's remarriage in accordance with the mandate of subsection (b) of this section. Garner v. Garner, — N.C. App. —, 363 S.E.2d 670 (1988).

V. MODIFICATION OF FOREIGN JUDGMENTS AND MODIFICATION BY FOREIGN COURTS.

North Carolina law applies prospectively from the date of registration under Chapter 52A, the Uniform Reciprocal Enforcement of Support Act. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Alimony orders registered pursuant to § 52A-26, et seq., retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under § 52A-30 the obligor may apply, just as at a civil action instituted under subsection (c) of this section, for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under Chapter 52A, the Uniform Reciprocal Enforcement of Support Act, rather than under subsection (c) of this section. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

Legal Periodicals. —

For comment, "Conflicts of Law in Divorce Litigation: A Looking-Glass World?", see 10 Campbell L. Rev. 145 (1987).

§ 50-19. Maintenance of certain actions as independent actions permissible.

CASE NOTES

Quoted in Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110 (1987).

§ 50-20. Distribution by court of marital property upon divorce.

Legal Periodicals. —

For a 1987 note on equitable distribution law as it relates to personal injury awards in divorce actions, see 65 N.C.L. Rev. 1332 (1987).

For a note on the continued prohibition of contingency fees in divorce actions, see 65 N.C.L. Rev. 1378 (1987).

For article, "The Equitable Distribution of Professional Degrees upon Divorce in North Carolina," see 10 Campbell L. Rev. 69 (1987).

For note relating to revocation of the marital presumption and adoption of the analytic approach to the classification of personal injury settlements, in light of Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986), see 22 Wake Forest L. Rev. 931 (1987).

CASE NOTES

I. GENERAL CONSIDERATION.

Jurisdiction Must Meet Minimum Contacts Standard. — In an equitable distribution action, the court is exercising jurisdiction over the interests of persons in property and not over a status of the parties. Exercise of this jurisdiction must meet the minimum contacts standard. Carroll v. Carroll, — N.C. App. —, 363 S.E.2d 872 (1988).

Personalty in State Is Not Sufficient to Confer Jurisdiction. — The fact that there exists some personal property in North Carolina in which a nonresident defendant may have an interest because of the equitable distribution statute is not alone sufficient to establish jurisdiction over defendant or his property. Carroll v. Carroll, — N.C. App. —, 363 S.E.2d 872 (1988).

Jurisdiction Not Shown. — Where defendant had not lived in North Carolina during any part of the parties' marriage, although certain property of the parties was located in North Carolina, and there was no indication of any action by defendant purposefully directed towards this state, the trial court lacked jurisdiction over defendant and his property for equitable distribution purposes and therefore could not properly determine the equitable distribution claim. Carroll v. Carroll, — N.C. App. —, 363 S.E.2d 872 (1988).

Right to Equitable Distribution Must Be Asserted Before Final Divorce. — Under § 50-11, a judgment of absolute divorce destroys the right to equitable distribution unless the right is asserted prior to judgment of absolute divorce. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Trial court erred in granting defendant wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Cited in Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987).

II. MARITAL AND SEPARATE PROPERTY.

A. In General.

Three-Step Analysis of Equitable Distribution. — A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets. These steps are: (1) To determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

There may be both marital and separate ownership interests in the same property. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

"Source of Funds" Rule, etc. — The courts have adopted a source of funds approach to distinguish marital and separate contributions to a single asset. Under the source of funds approach, each party retains as separate property the amount he contributed to purchase the property plus passive appreciation in value. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

For the purpose of classification of property, the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution, no new property may be added to the marital estate after the date of separation. Becker v. Becker, — N.C. App. —, 364 S.E.2d 175 (1988).

Debt, as well as assets, must be classified as marital or separate property; if the debt is classified as marital, the court must value the debt and distribute it pursuant to subsection (c). Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

The burden of proof is on the party seeking to classify a debt as marital. If the debt is classified as separate, the court must value it and then, pursuant to subdivision (c)(1), consider it in making a distribution. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Presumption of gift of property to which title is taken by the entirety is limited to real property acquired by both spouses, as tenants by the entirety, in exchange for the separate property of one of them. The presumption does not extend to jointly held personal property which is acquired in exchange for the

separate property of one spouse, as to do so would seem to defeat the legislative intent of subdivision (b)(2) of this section. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

Effect of Dissolution of Tenancy by Entirety. — Although conveyances from wife to husband dissolved tenancy by the entirety in the parcels of land and vested title thereto solely in the husband, as provided by § 39-13.3(c), husband nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired is ipso facto marital property. Thus, contrary to the husband's contention, dissolving of the tenancy by entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512 (1987).

Fact that both names were on note, standing alone, was not sufficient to show an intent to make a gift to the marital estate. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

B. Marital Property Generally.

This section mandates a complete listing of marital property.

In accord with first paragraph of main volume. See Cornelius v. Cornelius, 87 N.C. App. 269, 360 S.E.2d 703 (1987).

Presumption May Be Overcome, etc. —

In accord with 2nd paragraph in the main volume. See McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

In order for property to be considered marital property it must be acquired before date of separation and must be owned at date of separation. Foster v. Foster, — N.C. App. —, 368 S.E.2d 26 (1988).

Marital property valued as of date of parties' separation. This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under subdivision (c)(11a) or (12), respectively. Mishler v. Mishler, — N.C. App. —, 367 S.E.2d 385 (1988).

Vested Stock Options. — Stock options granted an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled, and which may, therefore, be said to be vested as of the date of separation, are marital property. Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

With regard to failure of trial court to equally divide the marital debts, subdivision (c)(11a) not controlling where the payment of the marital debts in question was ordered as a part of the award of alimony pendente lite. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

C. Separate Property Generally.

Separate property remains separate property when it is exchanged for other separate property unless the conveyance states a contrary intention. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

Wife's Contribution to Husband's Separate Property. — Fact that wife's contributions to husband's separate property, a beach condominium, consisted of those functions which a homemaker performs did not disentitle her from having the appreciation in the property's value classified as marital property. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

Courts have consistently recognized interest acquired by nontitled spouse in separately-owned property which increases in value due to the personal efforts of the nontitled spouse. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

There is no rule of law which even intimates that a nontitled spouse should be penalized and not allowed a return on his or her investment because the efforts expended were characteristic of those which a caring and loving spouse would have performed in any event. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

Nonvested Stock Options. — Stock options granted to an employee by his or her employer which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter are not vested, and should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

D. Professional and Business Licenses.

Criteria for admissibility of an expert opinion as to the value of a pro-

fessional association set out in Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266, disc. rev. denied, 314 N.C. 543, 335 S.E.2d 316 (1985), are factors for the court to consider in valuing the professional interest, and are not criteria for admissibility of the expert's opinion. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

E. Pension and Retirement Benefits.

Benefits of amended pension plan which listed the vesting date prior to the date of separation were properly classified as marital property, and the court was also correct in valuing the pension at its net value, by subtracting the taxes which defendant had paid thereon. Mishler v. Mishler, — N.C. App. —, 367 S.E.2d 385 (1988).

III. DISTRIBUTION OF PROPERTY.

A. In General.

And Equal Division Is Mandatory, etc. —

In accord with the main volume. See Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

Equal division of marital property is mandatory unless the trial court determines that equal is not equitable. Coleman v. Coleman, — N.C. App. —, 365 S.E.2d 178 (1988).

Equal division of the marital property mandatory, unless the court determines in the exercise of its discretion that such a distribution is inequitable. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

Burden of Proving, etc. —

The burden is on the party seeking an unequal division of marital assets to prove by a preponderance of the evidence that an equal division is not equitable. Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

Trial Judge Must Consider Distributional Factors. — Where the trial court's valuation of the marital home on the date of separation, the trial judge did not properly consider the post-separation appreciation as a distributional factor under subdivision (c)(11a) or (12). The trial judge must consider those distributional factors raised by the evidence of post-separation appreciation under subdivisions (c)(11a) and (12). Truesdale v. Truesdale, — N.C. App. —, 366 S.E.2d 512 (1988).

B. Factors to Be Considered.

Marital Debt. —

In accord with main volume. See Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Distribution of Marital Debts. —

Since the assets and obligations of a husband and wife are reciprocally related, there can be no complete and equitable distribution of their property without also considering and distributing their debt. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Credit for Decreasing Marital Debt. — The court must credit a former spouse with at least the amount by which he decreased the principal owed on marital debt by using his separate funds. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

Marital Residence. —

A trial court is not foreclosed from considering the post-separation use of the marital residence in reaching its decision as to whether an equal distribution is equitable. Becker v. Becker, — N.C. App. —, 364 S.E.2d 175 (1988).

Misconduct during the marriage, etc. —

In accord with the main volume. See Coleman v. Coleman, — N.C. App. —, 365 S.E.2d 178 (1988).

In case involving equitable distribution, trial court required to consider liabilities of each party, whether the debts are joint or individual. Mishler v. Mishler, — N.C. App. —, 367 S.E.2d 385 (1988).

Attribution of husband's payment of $3,000 debt accumulated by wife and minor children for necessities after date of separation to husband's continuing obligation to support his minor children did not constitute an improper use of child support to inflate the income of either party in violation of subsection (f) of this section, but, rather, was a determination that the debt was incurred to purchase necessities after the parties' separation. Beightol v. Beightol, — N.C. App. —, 367 S.E.2d 347 (1988).

IV. VALUATION OF PROPERTY.

As for the test for determining the date of separation under the equitable distribution statutes, see Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

Post-separation appreciation of marital property itself neither marital nor separate property. Such appre-

ciation must instead be treated as a distributional factor under subdivision (c)(11a) or (12). Truesdale v. Truesdale, — N.C. App. —, 366 S.E.2d 512 (1988).

When Separation Held to Occur. — Where at all times prior to December 26, 1983, the relationship between plaintiff and defendant was of such a character as to give the appearance that they were husband and wife living together and that they held themselves out to be such, their separation, as that term is defined by case law, did not occur until December 26, 1983. Hall v. Hall, — N.C. App. —, 363 S.E.2d 189 (1987).

Trial Court Is Required to Value Property Stipulated to Be Marital. — When parties to an equitable distribution action make a valid stipulation that certain property is to be classified as marital property, the trial court is nonetheless required to value and distribute that property. Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

Property Must Be Valued Before It Is Distributed. — Subsection (c) of this section requires the trial court to determine what is marital property, then to find the net value of the property, and finally to make an equitable distribution of that property; thus, where the court made some findings and conclusions regarding marital property, but did not place a value on the marital home, its order that the marital home be sold for not less than $140,000 was at least premature, as the court had not placed a value upon the marital property. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

Valuation Held Erroneous. — Evidence held insufficient to support trial court's valuation of marital home for purposes of equitable distribution of the marital property. Coleman v. Coleman, — N.C. App. —, 365 S.E.2d 178 (1988).

V. AGREEMENTS.

Distribution Agreement Should Be Written, Executed, and Acknowledged. —

Without the signature of both the husband and the wife, an agreement may not conform to the requirements of subsection (d) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Judgment which effectuated a distribution of the parties' marital property pursuant to an agreement that was not signed by both husband and wife was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by § 50-21(a). Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Where there was no evidence of a written agreement nor any affirmative assurance that the parties were in agreement concerning the division of personal property, the trial court's reliance on the parties' oral agreement or existing division of personal property was error and all marital personal property should have been included in the equitable distribution. Holder v. Holder, — N.C. App. —, 361 S.E.2d 891 (1987).

Handwritten agreement which was not acknowledged before a certifying officer as defined in § 52-10(b) was not binding upon the court and the court was free to distribute the property. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

Condition in Separation Agreement Not Met. — Condition in separation agreement that if the parties lived continuously separate and apart for a full year then in that event wife would transfer her interest in residence and lot to husband as part of property settlement was not met where the evidence showed that on a number of occasions during the year the parties had had sexual relations. Higgins v. Higgins, — N.C. —, 364 S.E.2d 426 (1988), (decided prior to § 52-10.2).

The absence of a divorce decree did not cancel buy-sell agreement which provided that wife could purchase husband's equity in property "within one year of the date of the entry of an order of divorce"; that if she did not exercise her right of purchase within that time, he could purchase her equity for the same amount within 90 days after "the termination of the one-year period as is hereinabove set forth"; and that if neither bought the equity of the other, the property would be listed for sale with a licensed real estate broker and upon it being sold, the net proceeds would be equally divided. Riley v. Riley, 86 N.C. App. 636, 359 S.E.2d 252 (1987).

VI. ALIMONY AND CHILD SUPPORT.

Purpose of alimony pendente lite is to give dependent spouse immediate support and allow her to maintain her action. Giving supporting spouse credit for equitable distribution purposes for various payments made as part of alimony pendente lite would de-

feat the purpose of alimony pendente lite by penalizing the dependent spouse in the final distribution of the marital assets. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

Equitable Distribution to Be Decided Before Permanent Alimony. — Where alimony, child support, and equitable distribution of marital property are requested, the equitable distribution of the property must be decided first. Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987).

VIII. FINDINGS OF COURT.

Factors in Subsection (c) Need Not Be Addressed Where Distribution Is Equal. —

Where court found that an equal division was equitable, the court was not required to make findings of fact with regard to liabilities and the other factors listed in subsection (c). Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512 (1987).

Where trial court determines equal distribution equitable, judge need not make findings on statutory or nonstatutory factors. Therefore, absent a showing that an equal division is inequitable and arbitrary, such a division is mandatory and specific findings of statutory factors under subsection (c) and nonstatutory factors are not necessary to sustain the judgment. Morris v. Morris, — N.C. —, 367 S.E.2d 408 (1988).

IX. RIGHTS CREATED BY SUBSECTION (K).

Insurance Policies. — At the time of separation there were no vested rights under insurance policy on the life of party's son. The rights only vested at his death, and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property, since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff's assets and therefore the proceeds from the insurance policy were separate property of plaintiff. Foster v. Foster, — N.C. App. —, 368 S.E.2d 26 (1988).

X. DISCRETION OF TRIAL COURT AND APPELLATE REVIEW.

Equitable distribution order should not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered has resulted in an obvious miscarriage of justice. Morris v. Morris, — N.C. App. —, 367 S.E.2d 408 (1988).

In complex litigation of equitable distribution, appellate court will not remand judgment for obviously insignificant errors. Mishler v. Mishler, — N.C. App. —, 367 S.E.2d 385 (1988).

§ 50-21. Procedures in actions for equitable distribution of property.

CASE NOTES

Judgment effectuating a property distribution pursuant to an agreement that was not signed by both spouses was a court-ordered equitable distribution granted before absolute divorce, and as such was expressly prohibited by subsection (a) of this section. Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

Jurisdiction over Out-of-State Property. — Subsection (a) of this section simply authorizes jurisdiction over the property of the defendant located outside North Carolina once due process concerns are satisfied. Carroll v. Carroll, — N.C. App. —, 363 S.E.2d 872 (1988).

Marital property valued as of date of parties' separation. This valuation date is used to determine the equitable distributive share of each party. However, where there is evidence of active or passive appreciation of the marital assets after that date, the court must consider such appreciation as a factor under § 50-20(c)(11a) or (12), respectively. Mishler v. Mishler, — N.C. App. —, 367 S.E.2d 385 (1988).

Cited in Collar v. Collar, 86 N.C. App. 109, 356 S.E.2d 405 (1987); Byrd v. Owens, 86 N.C. App. 418, 358 S.E.2d 102 (1987).

ARTICLE 2.

Expedited Process for Child Support Cases.

§ 50-30. Findings; policy; and purpose.

(a) Findings. — The General Assembly makes the following findings:

(1) There is a strong public interest in providing fair, efficient, and swift judicial processes for establishing and enforcing child support obligations. Children are entitled to support from their parents, and court assistance is often required for the establishment and enforcement of parental support obligations. Children who do not receive support from their parents often become financially dependent on the State.

(2) The State shall have laws that meet the federal requirements on expedited processes for obtaining and enforcing child support orders for purposes of federal reimbursement under Title IV-D of the Social Security Act, 42 U.S.C. § 66(a)(2). The Secretary of the Department of Health and Human Services may waive the expedited process requirement with respect to one or more district court district as defined in G.S. 7A-133 on the basis of the effectiveness and timeliness of support order issuance and enforcement within the district.

(3) The State has a strong financial interest in complying with the expedited process requirement, and other requirements, of Title IV-D of the Social Security Act, but the State would incur substantial expense in creating statewide an expedited child support process as defined by federal law.

(4) The State's judicial system is largely capable of processing child support cases in a timely and efficient manner and has a strong commitment to an expeditious system.

(5) The substantial expense the State would incur in creating a new system for obtaining and enforcing child support orders would be reduced and better spent by improving the present system.

(b) Purpose and Policy. — It is the policy of this State to ensure, to the maximum extent possible, that child support obligations are established and enforced fairly, efficiently, and swiftly through the judicial system by means that make the best use of the State's resources. It is the purpose of this Article to facilitate this policy. The Administrative Office of the Courts and judicial officials in each district court district as defined in G.S. 7A-133 shall make a diligent effort to ensure that child support cases, from the time of filing to the time of disposition, are handled fairly, efficiently, and swiftly. The Administrative Office of the Courts and the Department of Human Resources shall work together to improve procedures for the handling of child support cases in which the State or county has an interest, including all cases that qualify in any respect for federal reimbursement under Title IV-D of the Social Security Act. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 86.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial districts" in the second sentence of subdivision (a)(2), and for "judicial district" in the third sentence of subsection (b).

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

§ 50-33. Waiver of expedited process requirement.

(a) DHR to Seek Waiver. — The Department of Human Resources, with the assistance of the Administrative Office of the Courts, shall vigorously pursue application to the Secretary of the Department of Health and Human Services for waivers of the federal expedited process requirement.

(b) Districts That Do Not Qualify. — In any district court district as defined in G.S. 7A-133 that does not qualify for a waiver of the federal expedited process requirement, an expedited process shall be established as provided in G.S. 50-34. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 87.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" in subsection (b).

§ 50-34. Establishment of an expedited process.

(a) Districts Required to Have Expedited Process. — In any district court district as defined in G.S. 7A-133 that is required by G.S. 50-33(b) to establish an expedited child support process, the Director of the Administrative Office of the Courts shall notify the chief district court judge and the clerk or clerks of superior court in the district in writing of the requirement. The Director of the Administrative Office of the Courts, the chief district court judge, and the clerk or clerks of superior court in the district shall implement an expedited child support process as provided in this section.

(b) Procedure for Establishing Expedited Process. — When a district court district as defined in G.S. 7A-133 is required to implement an expedited process, the Director of the Administrative Office of the Courts, the chief district judge, and the clerk of superior court in an affected county shall determine by agreement whether the child support hearing officer or officers for that county shall be one or more clerks or one or more magistrates. If such agreement has not been reached within 15 days after the notice required by subsection (a) when implementation is required, the Director of the Administrative Office of the Courts shall make the decision. If it is decided that the hearing officer or officers for a county shall be magistrates, the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position. If it is decided that the hearing officer or officers for a county shall be the clerk or assistant clerks, the clerk of superior court in the county shall designate the person or persons to serve as hearing officer, and the chief district judge, the clerk of superior court, and the Director of the Administrative Office of the Courts shall ensure his or their qualification for the position.

(c) Public To Be Informed. — When an expedited process is to be implemented in a county or district court district as defined in G.S. 7A-133, the chief district court judge, the clerk or clerks of superior court in affected counties in the district, and the Administrative Office of the Courts shall take steps to ensure that attorneys, the general public, and parties to pending child support cases in the county or district are informed of the change in procedures and helped to understand and use the new system effectively. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 88.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" near the beginning of subsections (a), (b) and (c).

§ 50-36. Child support procedures in districts with expedited process.

(a) Scheduling of Cases. — The procedures of this section shall apply to all child support cases in any district court district as defined in G.S. 7A-133 or county in which an expedited process has been established. All claims for the establishment or enforcement of a child support obligation, whether the claim is made in a separate action or as part of a divorce or any other action, shall be scheduled for hearing before the child support hearing officer. The initiating party shall send a notice of the date, time, and place of the hearing to all other parties. Service of process shall be made and notices given as provided by G.S. 1A-1, Rules of Civil Procedure.

(b) Place of Hearing. — The hearing before the child support hearing officer need not take place in a courtroom, but shall be conducted in an appropriate judicial setting.

(c) Hearing Procedures. — The hearing of a case before a child support officer is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed; however, the hearing officer may require the parties to produce and may consider financial affidavits, State and federal tax returns, and other financial or employment records. Except as otherwise provided in this Article, the hearing officer shall determine the parties' child support rights and obligations and enter an appropriate order based on the evidence and the child support laws of the State. All parties shall be provided with a copy of the order.

(d) Record of Proceeding. — The record of a proceeding before a child support hearing officer shall consist of the pleadings filed in the child support case, documentation of proper service or notice or waiver, and a copy of the hearing officer's order. No verbatim recording or transcript shall be required or provided at State expense.

(e) Transfer to District Court Judge. — Upon his own motion or upon motion of any party, the hearing officer shall transfer a case for hearing before a district court judge when the case involves:

(1) A contested paternity action;
(2) A custody dispute;
(3) Contested visitation rights;
(4) The ownership, possession, or transfer of an interest in property to satisfy a child support obligation; or
(5) Other complex issues.

Upon ordering such a transfer, except in cases of contested paternity, the hearing officer shall also enter a temporary order that

provides for the payment of a money amount or otherwise addresses the child's need for support pending the resolution of the case by the district court judge. The chief district court judge shall establish a procedure for such transferred cases to be given priority for hearing before a district court judge. (1985 (Reg. Sess., 1986), c. 993, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 89.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective January 1, 1989, substituted "district court district as defined in G.S. 7A-133" for "judicial district" in the first sentence of subsection (a).

Chapter 50A.
Uniform Child Custody Jurisdiction Act.

§ 50A-1. Purposes of Chapter; construction of provisions.

CASE NOTES

What Law Governs. — The issue of a state court's jurisdiction over child custody matters is governed by the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Schrock v. Schrock, — N.C. App. —, 365 S.E.2d 657 (1988).

Applicability of Chapter to Permanent Custody Situations. — The jurisdictional prerequisites of the Uniform Child Custody Jurisdiction Act (UCCJA) only govern in permanent custody situations. In re Arends, — N.C. App. —, 364 S.E.2d 169 (1988).

Chapter 50B is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in this Chapter. Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

Whenever the relief sought under Chapter 50B is a determination of custody or visitation rights, the existence of subject matter jurisdiction over the action is governed by this Chapter, just as it is in any other custody dispute. Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

The question of subject matter jurisdiction may be raised at any point in a proceeding under the Uniform Child Custody Jurisdiction Act, and such jurisdiction cannot be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district courts of this State possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore, the real question under the Uniform Child Custody Jurisdiction Act is whether jurisdiction is properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Full Faith and Credit Properly Refused. — Refusal of North Carolina court to give full faith and credit to a Michigan custody award was not improper, where Michigan's exercise of jurisdiction was not consistent with the Parental Kidnapping Act, 28 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction Act. Schrock v. Schrock, — N.C. App. —, 365 S.E.2d 657 (1988).

Power to Award Custody to Foster Parents. — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Cited in Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984).

§ 50A-2. Definitions.

CASE NOTES

Home State. — Findings held to sufficiently establish that North Carolina was the home state of child and to establish that child and at least one parent had a significant connection with North Carolina. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Modification Decree. — North Carolina decree modifying a prior custody decree by a Virginia court was improper

under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, where the Virginia court had continuing jurisdiction and had not declined to exercise it. Meade v. Meade, 650 F. Supp. 205 (M.D.N.C. 1986), aff'd, 812 F.2d 1473 (4th Cir. 1987).

Applied in Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

§ 50A-3. Jurisdiction.

CASE NOTES

Subdivision (a)(2) of this section essentially confers jurisdiction where it is in the child's best interest, because the child and at least one parent have significant ties to the state, and where substantial evidence pertaining to the child's present or future well-being and activities exists within the state. Brookshire v. Brookshire, — N.C. App. —, 365 S.E.2d 307 (1988).

Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Jurisdiction over Petition Brought by DSS. — The district court had jurisdiction over the subject matter of petition filed, signed and verified by county division of social services, which alleged that child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Personal jurisdiction over the nonresident parent is not a requirement under this Chapter. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Exercise of Jurisdiction Where Foreign Order Is Pending or Has Been Entered. — When a North Carolina court is considering jurisdiction in a custody proceeding, and a prior order is pending or has been entered by a court of another state, the North Carolina court may exercise jurisdiction if it determines (1) that the court of the other state no longer has jurisdiction and North Carolina has jurisdiction under one of the four alternatives listed in this section, or (2) the court of the other state did not exercise jurisdiction in substantial conformity with the UCCJA and North Carolina has jurisdiction pursuant to this section. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Service of Process on Defendant in State Sufficient to Establish Jurisdiction. — The singular fact that defendant was served with process while present within this state was sufficient to establish in-personam jurisdiction over him for purposes of a child custody and support action. Brookshire v. Brookshire, — N.C. App. —, 365 S.E.2d 307 (1988).

Exercise of Jurisdiction Upheld. — Where the oldest two of the three minor children of the parties had been born in North Carolina, both plaintiff and defendant grew up in the state, both maternal and paternal grandparents of the minor children resided within the state, and plaintiff and the minor children had moved to the state from Ohio in June, 1985, with the intention of becoming permanent residents, and at the time of the entry of the order had become permanent residents of the state, the district court properly exercised subject matter jurisdiction over custody and support action. Brookshire v. Brookshire, — N.C. App. —, 365 S.E.2d 307 (1988).

North Carolina decree modifying a prior custody decree by a Virginia court was improper under the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A, where the Virginia court had continuing jurisdiction and had not declined to exercise it. Meade v. Meade, 650 F. Supp. 205 (M.D.N.C. 1986), aff'd, 812 F.2d 1473 (4th Cir. 1987).

Findings held to sufficiently establish that North Carolina was the home state of child and to establish that the child and at least one parent had a significant connection with North Carolina. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Parental Rights Proceedings. — While a determination of jurisdiction

over child custody matters will precede a determination of jurisdiction over parental rights, it does not supplant the parental rights proceedings; the language of § 7A-289.22(4) is that it shall not be "used to circumvent" Chapter 50A, not that it shall "be in conformity with" Chapter 50A. In re Leonard, 77 N.C. App. 439, 335 S.E.2d 73 (1985).

Ex Parte Order for Temporary Custody. — Once the trial court has gained jurisdiction by establishing one of the bases for jurisdiction listed in subsection (a), it may enter an ex parte order for temporary custody prior to service of process or notice, if the circumstances of the case render it appropriate. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Finding that the husband "is on active duty with the United States Marine Corps and is stationed at Camp Lejeune, North Carolina" is sufficient to satisfy the home state rule requirement that a parent or person acting as parent continues to live in this State. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Cited in Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

§ 50A-4. Notice and opportunity to be heard.

CASE NOTES

Cited in Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-5. Service of notice.

CASE NOTES

Cited in Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-6. Simultaneous proceedings in other states.

CASE NOTES

What Law Governs. — The issue of a state court's jurisdiction over child custody matters is governed by this Chapter, the Uniform Child Custody Jurisdiction Act, and the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. Schrock v. Schrock, — N.C. App. —, 365 S.E.2d 657 (1988).

Full Faith and Credit Properly Refused. — Refusal of North Carolina court to give full faith and credit to a Michigan custody award was not improper, where Michigan's exercise of jurisdiction was not consistent with the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and the Uniform Child Custody Jurisdiction Act. Schrock v. Schrock, — N.C. App. —, 365 S.E.2d 657 (1988).

Exercise of Jurisdiction Upheld. — District court was not precluded from exercising subject matter jurisdiction over custody and support action by subsection (a) of this section, where there was no proceeding concerning the custody of the minor children pending in a court of another state when plaintiff filed her complaint. Brookshire v. Brookshire, — N.C. App. —, 365 S.E.2d 307 (1988).

Applied in Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Cited in Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

§ 50A-7. Inconvenient forum.

CASE NOTES

Without a showing that the best interests of the child would be served if another state assumed jurisdiction, North Carolina courts should not defer jurisdiction pursuant to this section. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Discretion of Trial Court. — Deferring jurisdiction on inconvenient forum grounds rests in the sound discretion of the trial court. Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985).

Applied in Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

§ 50A-8. Jurisdiction declined by reason of conduct.

CASE NOTES

Effect of Subsection (b). — Under this section, if the petitioner has wrongfully withheld a child from the person entitled to custody, subsection (b) prohibits the court from exercising its jurisdiction to modify the custody decree of another state, unless the court concludes that such exercise is required in the interest of the child, and if the petitioner has violated any other provision of the custody decree of another state, subsection (b) provides that the court, in its discretion, may decline to exercise its jurisdiction if this is just and proper under the circumstances. Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

§ 50A-9. Information under oath to be submitted to the court.

CASE NOTES

Purpose of Oath Requirement. — An obvious purpose of the requirement of this section that certain information be presented under oath is to enable the court to determine whether it should properly exercise jurisdiction, under the UCCJA, of a child custody dispute. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Affidavit Not Prerequisite to Jurisdiction Obtained under § 7A-523. — Where the court obtained jurisdiction over a juvenile matter pursuant to § 7A-523, and not this Chapter, the affidavit referred to in this section was not a prerequisite to its jurisdiction. In re Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

Where Texas decree made no findings of fact to support its exercise of jurisdiction in determining custody of child, the North Carolina trial court correctly found and concluded that the Texas court had not assumed jurisdiction over the custody determination in substantial conformity with the UCCJA or upon a finding of factual circumstances meeting the jurisdictional requirements of this chapter. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-13. Recognition of out-of-state custody decrees.

CASE NOTES

Where the court of another state has not properly assumed jurisdiction, the courts of this state are not bound to recognize and enforce the out-of-state judgment. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

§ 50A-14. Modification of custody decree of another state.

CASE NOTES

Cited in Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

§ 50A-15. Filing and enforcement of custody decree of another state.

CASE NOTES

Failure to Award Fees and Expenses Upheld. — Where the court determined that plaintiff had not violated Texas custody decree and that defendant was not entitled to its enforcement in North Carolina, there was no abuse of discretion in the court's failure to award attorney's fees and travel expenses to plaintiff. Brewington v. Serrato, 77 N.C. App. 726, 336 S.E.2d 444 (1985).

Cited in Mussallam v. Mussallam, 83 N.C. App. 213, 349 S.E.2d 618 (1986); Mussallam v. Mussallam, — N.C. —, 364 S.E.2d 364 (1988).

§ 50A-23. International application.

CASE NOTES

Cited in Mussallam v. Mussallam, 83 N.C. App. 213, 349 S.E.2d 618 (1986); Mussallam v. Mussallam, — N.C. —, 364 S.E.2d 364 (1988).

§ 50A-25. Emergency orders.

Nothing in this Chapter shall be interpreted to limit the authority of the court to issue an interlocutory order under the provisions of G.S. 50-13.5(d)(2); or a secure or nonsecure custody order under the provisions of G.S. 7A-573. (1979, c. 110, s. 1; 1985, c. 689, s. 22.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "or a secure or nonsecure custody order under the provisions of G.S. 7A-573" for "or an immediate custody order under the provisions of G.S. 7A-284" at the end of the section.

Chapter 50B.

Domestic Violence.

§ 50B-1. Domestic violence; definition.

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party by a current or former spouse of the aggrieved party or by a person of the opposite sex with whom the aggrieved party lives or has lived as if married:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party in fear of imminent serious bodily injury by the threat of force.

(b) Notwithstanding the provisions of subsection (a) above, domestic violence also means the commission of one or more of the following acts upon a minor residing with or in the custody of the aggrieved party by a current or former spouse of the aggrieved party or by a person of the opposite sex with whom the aggrieved party lives or has lived as if married:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury;

(2) Placing the minor in fear of imminent serious bodily injury by the threat of force; or

(3) Committing any act defined in G.S. 14-27.2 through 14.27.7. (1979, c. 561, s. 1; 1985, c. 113, s. 1; 1987, c. 828; 1987 (Reg. Sess., 1988), c. 893, ss. 1, 3.)

Effect of Amendments. —

The 1987 (Reg. Sess., 1988) amendment, effective October 1, 1988, designated the first paragraph as subsection (a), in the introductory language of subsection (a) and in subdivision (2) thereof made the same changes as were made by Session Laws 1987, c. 828, as noted in the main volume, and added subsection (b). In addition, the amendment repealed Session Laws 1987, c. 828.

Legal Periodicals. —

For comment, "North Carolina's Domestic Violence Act: Preventing Spouse Abuse?", see 17 N.C. Cent. L.J. 82 (1988).

CASE NOTES

This Chapter is not designed to establish alternative grounds for jurisdiction over custody disputes apart from those set forth in Chapter 50A. Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

Jurisdiction over Custody and Visitation Rights Is Governed by Chapter 50A. — Whenever the relief sought under this Chapter is a determination of custody or visitation rights, the existence of subject matter jurisdiction over the action is governed by Chapter 50A, just as it is in any other custody dispute. Danna v. Danna, — N.C. App. —, 364 S.E.2d 694 (1988).

Cited in State v. Getward, — N.C. App. —, 365 S.E.2d 209 (1988).

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders.

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter.

(b) Emergency Relief. — A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party.

(c) Ex Parte Orders. — Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter such orders as it deems necessary to protect the aggrieved party or minor children from such acts provided, however, that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse. Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. (1979, c. 561, s. 1; 1985, c. 113, ss. 2, 3; 1987 (Reg. Sess., 1988), c. 893, s. 2.)

Effect of Amendments. — The 1987 (Reg. Sess., 1988) amendment, effective October 1, 1988, inserted "or by filing a motion in any existing action filed under Chapter 50 of the General Statutes" in the first sentence of subsection (a), in subsection (b) inserted the heading "Emergency relief," and rewrote the second sentence, which read "A hearing shall be held within 10 days of the filing of the motion," and rewrote subsection (c).

Chapter 51.

Marriage.

Article 1.

General Provisions.

§ 51-1.1. Certain marriages performed by ministers of Universal Life Church validated.

CASE NOTES

Where the marriage was never invalidated, this section applied to validate it. The net effect of this section was to render the marriage valid from its inception, as it was voidable, rather than void. Fulton v. Vickery, 73 N.C. App. 382, 326 S.E.2d 354, cert. denied, 313 N.C. 599, 332 S.E.2d 178 (1985).

§ 51-2. Capacity to marry.

(a) All unmarried persons of 18 years, or older, may lawfully marry, except as hereinafter forbidden. In addition, persons over 16 years of age and under 18 years of age may marry, and the register of deeds may issue a license for such marriage, only after there shall have been filed with the register of deeds a written consent to such marriage, said consent having been signed by the appropriate person as follows:

(1) By the father if the male or female child applying to marry resides with his or her father, but not with his or her mother;

(2) By the mother if the male or female child applying to marry resides with his or her mother, but not with his or her father;

(3) By either the mother or father, without preference, if the male or female child applying to marry resides with his or her mother and father;

(4) By a person, agency, or institution having legal custody, standing in loco parentis, or serving as guardian of such male or female child applying to marry.

Such written consent shall not be required for an emancipated minor if a certificate of emancipation issued pursuant to Article 56 of Chapter 7A or a certified copy of a final decree or certificate of emancipation from this or any other jurisdiction is filed with the register of deeds.

(R.C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C.S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186; 1967, c. 957, s. 1; 1969, c. 982; 1985, c. 608.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, added the sentence at the end of subsection (a).

§ 51-3. Want of capacity; void and voidable marriages.

CASE NOTES

Wife, who knowingly entered a bigamous marriage, was subsequently estopped from asserting the invalidity of that marriage in order to avoid the consequences flowing from her wrongful conduct; therefore, the trial court correctly terminated husband's obligation to pay alimony under the separation agreement. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Bigamous Marriages Are Void. — A bigamous marriage is a nullity, with no legal rights flowing from it, and can be collaterally attacked at any time. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Applied in Heiser v. Heiser, 71 N.C. App. 223, 321 S.E.2d 479 (1984).

ARTICLE 2.

Marriage Licenses.

§ 51-12: Repealed by Session Laws 1985, c. 589, s. 27, effective January 1, 1986.

Editor's Note. — Session Laws 1985, c. 589, s. 65 is a severability clause.

§ 51-13. Penalty for violation of §§ 51-9 to 51-12.

Any violation of G.S. 51-9 to 51-12, or any part thereof, by any person charged herein with the responsibility of its enforcement shall be declared a misdemeanor and shall be punishable by a fine of fifty dollars ($50.00) or imprisonment for 30 days, or both. (1939, c. 314, s. 3; 1985, c. 689, s. 23.)

Editor's Note. —

Section 51-12, referred to in this section, is repealed, effective January 1, 1986, by Session Laws 1985, c. 589, s. 27.

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "51-12" for "51-13" in the catchline and substituted "51-12" for "51-14" near the beginning of the section.

§ 51-18.1. Correction of errors in names in application or license; amendment of names in application or license.

(a) When it shall appear to the register of deeds of any county in this State that the names of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name and names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction.

(b) When the name of a party to a marriage has been changed by court order as the result of a legitimation action or other cause of action, and the party whose name is changed present a signed affidavit to the register of deeds indicating the name change and requesting that the application for a marriage license, the marriage license, and the marriage certificate of the officiating officer be amended by substituting the changed name for the original name, the register of deeds may amend the records as requested by the party, provided the other party named in the records consents to the amendment. (1953, c. 797; 1959, c. 344; 1987, c. 576.)

Effect of Amendments. — The 1987 amendment, effective July 8, 1987, added "amendment of names in application or license" at the end of the catchline, designated the first paragraph as subsection (a), and added subsection (b).

Chapter 52.

Powers and Liabilities of Married Persons.

§ 52-2. Capacity to contract.

CASE NOTES

I. GENERAL CONSIDERATION.

Wife is liable for necessary medical expenses provided for husband. North Carolina Baptist Hosps., 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 52-4. Earnings and damages.

Legal Periodicals. —

For a 1987 note on equitable distribution law as it relates to personal injury awards in divorce actions, see 65 N.C.L. Rev. 1332 (1987).

For note relating to revocation of the marital presumption and adoption of the analytic approach to the classification of personal injury settlements, in light of Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986), see 22 Wake Forest L. Rev. 931 (1987).

CASE NOTES

This section is not inconsistent with or repugnant to § 50-20. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

This section governs legal interests in property during an ongoing marriage, while § 50-20 governs its disposition after divorce. Johnson v. Johnson, 317 N.C. 437, 346 S.E.2d 430 (1986).

§ 52-8. Validation of contracts failing to comply with provisions of former § 52-6.

CASE NOTES

This section is a curative statute. —

This section was amended in 1981 in an attempt to cure deeds which lack the certification that the transaction was not unreasonable or injurious to the wife. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

Applicability of Section. —

Deed executed in 1947, which was void because the then applicable provisions of former §§ 47-39 and 52-12 were not complied with, in that the clerk of court failed to find that the transaction was not "unreasonable or injurious" to grantor's wife, could not be cured by this section as amended in 1981, where the rights of wife's devisees in the property vested in 1978 upon her death. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

§ 52-10. Contracts between husband and wife generally; releases.

Legal Periodicals. —

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For 1984 survey, "Intestate Succession of Illegitimate Children in North Carolina," see 63 N.C.L. Rev. 1274 (1985).

For note on contractual agreements as a means of avoiding equitable distribution, in light of Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984), see 21 Wake Forest L. Rev. 213 (1985).

CASE NOTES

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

Same rules which govern interpretation of contracts generally apply to separation agreements. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984).

What Contracts Included. —

In accord with main volume. See Brawley v. Brawley, — N.C. App. —, 361 S.E.2d 759 (1987).

Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984).

Release and Quitclaim of Property Rights. — This section allows husband and wife to enter a separation agreement which releases and quitclaims any property rights acquired by marriage, and that a release will bar any later claim on the released property. Such a valid separation agreement is an enforceable contract between husband and wife. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984).

Prior Agreement as Bar to Equitable Distribution. — When a prior separation agreement fully disposes of the spouses' property rights arising out of the marriage, it acts as a bar to equitable distribution. Blount v. Blount, 72 N.C. App. 193, 323 S.E.2d 738 (1984).

A separation agreement which contained no specific references to any real property, but only to personal property, held to have nevertheless fully disposed of the parties' property rights arising out of the marriage and thus to act as a bar to equitable distribution. Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986).

Separation agreement which released each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship in and to any and all property," fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

Agreement as Bar to Pension Rights. — Separation agreement entered into on August 2, 1982, which contained no reference to defendant-husband's military pension, but specifically provided that each party was forever barred from any or all rights or claims not therein reserved which arose out of the marital relation and that each released and relinquished all claims or interest in and to all property of the other, whether then owned or subsequently acquired, barred an award to plaintiff-wife under the Equitable Distribution Act of a share in defendant-husband's military pension; the subsequent amendment of the act effective August 1, 1983, to include military pensions as marital property did not permit plaintiff-wife to avoid the release provisions of the agreement. Morris v. Morris, 79 N.C. App. 386, 339 S.E.2d 424, cert. denied, 316 N.C. 733, 345 S.E.2d 390 (1986).

Acts Sufficient to Qualify as an Acknowledgment. — When defendant and wife signed a separation agreement in front of a notary, the defendant performed acts sufficient to qualify as an acknowledgment under the statute, since no rights of creditors or third parties were involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

A certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

Handwritten agreement which was not acknowledged before a certifying officer as defined in subsection (b) of this section was not binding upon the court, and the court was free to distribute the property, pursuant to § 50-20. McLean v. McLean, — N.C. App. —, 363 S.E.2d 95 (1987).

Applied in McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910 (1985); Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512 (1987).

Stated in Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986); Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

§ 52-10.1. Separation agreements.

Legal Periodicals. —

For 1984 survey, "Property Settlement or Separation Agreement: Perpetuating the Confusion," see 63 N.C.L. Rev. 1166 (1985).

For note on contractual agreements as a means of avoiding equitable distribution, in light of Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984), see 21 Wake Forest L. Rev. 213 (1985).

CASE NOTES

Sections 52-10 and 52-10.1 were enacted without providing women any extra protection not offered to men; therefore, a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985).

The law in North Carolina strongly favors enforcing contracts as written, wherever they may be entered into. Policy does not favor allowing spouses to escape their lawful support obligations simply by crossing state lines. White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985).

A strict adherence to the statutory formalities is required by this section. Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987).

This section requires that a separation agreement be in writing and be acknowledged by both parties before a certifying officer, not a party to the contract, as defined by statute. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

Modification of Separation Agreement Must Be Pursuant to this Section. — In North Carolina, the modification of an original separation agreement must be made pursuant to the formalities and requirements of this section. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

An attempt to orally modify a separation agreement would fail to meet the formalities and requirements of this section. Therefore, the findings of the trial court would not support, much less require, a conclusion that the parties modified their separation agreement when plaintiff told defendant, upon learning of his remarriage, that she was making him a wedding present of the payments under the agreement. Greene v. Greene, 77 N.C. App. 821, 336 S.E.2d 430 (1985).

Equitable Distribution Barred by Agreement. — Separation agreement which released each spouse from the common law rights incident to marriage (dower, curtesy, inheritance, descent, and distribution), as well as "all other rights arising out of the marital relationship in and to any and all property," fully disposed of the parties' property rights arising out of the marriage and thus acted as a bar to equitable distribution. Hagler v. Hagler, 319 N.C. 228, 354 S.E.2d 228 (1987).

Agreement Not Signed by Wife Was Invalid and Did Not Bar Equitable Distribution. — Having determined that a separation agreement was not valid and enforceable under North Carolina law because only the husband acknowledged the execution of the sepa-

ration agreement before the certifying officer and further, that the parties intended North Carolina law to govern, although the agreement was executed in Maryland, the Court of Appeals of North Carolina held that the agreement was invalid and did not bar the wife's claim for equitable distribution under § 50-21. Morton v. Morton, 76 N.C. App. 295, 332 S.E.2d 736, cert. denied and appeal dismissed, 314 N.C. 667, 337 S.E.2d 582 (1985).

Acts Sufficient to Qualify as an Acknowledgment. — When defendant and wife signed a separation agreement in front of a notary the defendant performed acts sufficient to qualify as an acknowledgment under the statute, since no rights of creditors or third parties were involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

A certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved. Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

Applied in White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); McLeod v. McLeod, 74 N.C. App. 144, 327 S.E.2d 910 (1985).

Cited in Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Peak v. Peak, 82 N.C. App. 700, 348 S.E.2d 353 (1986); Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987).

§ 52-10.2. Resumption of marital relations defined.

"Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations. (1987, c. 664, s. 1.)

Editor's Note. — Session Laws 1987, c. 664, s. 4 makes this section effective October 1, 1987.

CASE NOTES

Cited in Higgins v. Higgins, — N.C. —, 364 S.E.2d 426 (1988).

§ 52-12. Postnuptial crimes and torts.

CASE NOTES

Cited in Lawson v. Lawson, 321 N.C. 274, 362 S.E.2d 269 (1987).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

§ 52A-1. Short title.

CASE NOTES

Applied in White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985).

Cited in Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985).

§ 52A-4. Remedies additional to those now existing.

CASE NOTES

Applied in Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987).

§ 52A-9. How duties of support are enforced.

CASE NOTES

The language "all duties of support" in this section includes all common law duties of support, all statutory duties of support, and duties growing out of judgments or decrees for alimony or child support, both as to amounts in arrears and as to amounts owed currently or in the future. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

This Chapter, North Carolina's version of the Uniform Reciprocal Enforcement of Support Act (URESA), clearly embraces alimony orders. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

§ 52A-10.1. Official to represent obligee; responding.

CASE NOTES

Service of Brief. — While under this section the Attorney General is the attorney of record for the petitioner obligee for purposes of appeal, the better practice would be for the appellant's brief to be served upon both the district attorney and the Attorney General. Grimes v. Grimes, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

§ 52A-10.3. Official to represent plaintiff; initiating.

If this State is acting as an initiating state the prosecuting attorney upon the request of the court (in the case of a person or member of a family receiving public assistance, at the request to the court by the county director of social services) shall represent the plaintiff in any proceeding under this Chapter. The county director of social services in making such a request will provide written verification of the indigency of the person and the fact that the person or the family is receiving public assistance. In counties where the services of a special county attorney are available for social services matters as set out in G.S. 108A-16 through 108A-18, such special county attorney, instead of the prosecuting attorney, shall represent the obligee, the county or the plaintiff in any proceeding under this Chapter when the county has a right to invoke the provisions of this Chapter under G.S. 52A-8.1. (1975, c. 656, s. 1; 1985, c. 689, s. 24.)

Effect of Amendments. — The 1985 amendment, effective July 11, 1985, substituted "G.S. 108A-16 through 108A-18" for "G.S. 108-20 through 108-22" in the third sentence.

§ 52A-19. Rules of evidence.

CASE NOTES

Remand for Findings and Conclusions. — While plaintiff's allegations in her verified complaint established prima facie that the reasonable needs of the parties' children were in the amount of $778.00 per month and that defendant had the relative ability to pay $650.00 per month support for his children, it remained for the trial court to make the necessary findings of fact and conclusions of law, and the case would be remanded for this purpose. Grimes v. Grimes, 78 N.C. App. 208, 336 S.E.2d 664 (1985).

§ 52A-21. Application of payments.

A support order made by a court of this State pursuant to this Chapter does not nullify and is not nullified by a support order made by a court of this State pursuant to any other law or by a support order made by a court of any other state pursuant to a substantially similar act or any other law regardless of priority of issuance, unless otherwise specifically provided by the court in accordance with G.S. 50-13.7 and G.S. 50-13.10. Amounts paid for a particular period pursuant to any support order made by the court of another state shall be credited against the amounts accruing or accrued for the same period under any support order made by the court of this State. (1975, c. 656, s. 1; 1987, c. 739, s. 5.)

Editor's Note. — Session Laws 1987, c. 739, s. 7 is a severability clause.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "in accordance with G.S. 50-13.7 and G.S. 50-13.10" at the end of the first sentence.

CASE NOTES

Entitlement to Enforce Prior Support Order Made by Court of Another State. — The plaintiff who accepted payments under a North Carolina Uniform Reciprocal Enforcement of Support Act (URESA) order did not abandon her rights to child support payments awarded under a prior South Carolina support order; she was entitled to bring an action to enforce the South Carolina order, and the defendant was entitled to receive credit for the payments he made under the URESA order. Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987).

§ 52A-26. Registration.

CASE NOTES

Constitutionality of Orders under URESA. — Orders pursuant to this Chapter, the Uniform Reciprocal Enforcement of Support Act (URESA), do not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

North Carolina law applies prospectively from the date of registration under this Chapter, the Uniform Reciprocal Enforcement of Support Act (URESA). Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Registered alimony orders retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under § 52A-30 the obligor may apply, just as at a civil action instituted under § 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Effect of Registration on Foreign Alimony Order That Is Retroactively Modifiable. — Registration under § 52A-26 et seq. cannot entitle a foreign alimony order that is retroactively modifiable in the jurisdiction of its rendition to the full faith and credit protection of the United States Constitution, since the full faith and credit clause is applicable only to judgments that are unconditional and certain, or at least capable of being made so. However, § 52A-30 authorizes the courts of this state by comity to extend to foreign alimony orders the selfsame recognition and effect due them in the jurisdiction of their rendition. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

§ 52A-29. Registration procedure; notice.

CASE NOTES

Constitutionality of Orders under URESA. — Orders pursuant to Uniform Reciprocal Enforcement of Support Act (URESA) do not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Two-Step Process Contemplated. — The provisions of this section and § 52A-30 contemplate a two-step process: (1) registration, and (2) enforcement. Allsup v. Allsup, — N.C. —, 363 S.E.2d 883 (1988).

Registration under this section does not prejudice, etc. —

An obligee may not strip an obligor of

rights and defenses otherwise available by the simple expedient of litigating under this chapter, the Uniform Reciprocal Enforcement of Support Act (URESA), rather than § 50-16.9(c). Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

North Carolina law applies prospectively from the date of registration under this Chapter, the Uniform Reciprocal Enforcement of Support Act (URESA). Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Under § 52A-30(a), registration of Tennessee decree in this state treated as any other support order issued by North Carolina court. Thereafter, either party could request modifications in the order. Jenkins v. Jenkins, — N.C. App. —, 367 S.E.2d 4 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Registered alimony orders retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under § 52A-30 the obligor may apply, just as at a civil action instituted under § 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it would could hve been so modified in the jurisdiction where granted." Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Cited in Jenkins v. Jenkins, — N.C. App. —, 367 S.E.2d 4 (1988).

§ 52A-30. Effect of registration; enforcement procedure.

CASE NOTES

Constitutionality of Orders under URESA. — Orders pursuant to Uniform Reciprocal Enforcement of Support Act (URESA) do not violate a respondent's right to due process and equal protection under the Constitutions of the United States and North Carolina. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

This section establishes, etc. — The provisions of § 52A-29 and this section contemplate a two-step process: (1) registration, and (2) enforcement. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

An obligee may not strip an obligor of rights and defenses otherwise available by the simple expedient of litigating under this Chapter, the Uniform Reciprocal Enforcement of Support Act (URESA), rather than § 50-16.9(c). Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

North Carolina law applies prospectively from the date of registration under this Chapter, the Uniform Reciprocal Enforcement of Support Act (URESA). Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Under subsection (a), registration of Tennessee decree in this state treated as any other support order issued by North Carolina court. Thereafter, either party could request modifications in the order. Jenkins v. Jenkins, — N.C. App. —, 367 S.E.2d 4 (1988).

But Not Retroactively. — Registration is a ministerial duty of the clerk, not exercising any power over the obligor's person or property. Such registration cannot lawfully transform foreign alimony orders that are modifiable as to past-due installments in the jurisdiction of rendition into North Carolina orders subject to North Carolina law retrospectively. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Once a foreign alimony order is registered, it loses its identity as an order of the foreign court and becomes an order of the North Carolina court for all purposes. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

But registered alimony orders retain, for their lifespan prior to registration, their foreign identity, and the laws of the foreign jurisdiction apply in any subsequent enforcement proceeding. This means that at any enforcement proceeding under § 52A-30 the obligor may apply, just as at a civil action instituted

under § 50-16.9(c), for a new order modifying or superseding the foreign order "to the extent that it could have been so modified in the jurisdiction where granted." Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Effect of Registration on Foreign Alimony Order That Is Retroactively Modifiable. — Registration under § 52A-26 et seq. cannot entitle a foreign alimony order that is retroactively modifiable in the jurisdiction of its rendition to the full faith and credit protection of the United States Constitution, since the full faith and credit clause is applicable only to judgments that are unconditional and certain, or at least capable of being made so. However, § 52A-30 authorizes the courts of this state by comity to extend to foreign alimony orders the selfsame recognition and effect due them in the jurisdiction of their rendition. Allsup v. Allsup, — N.C. App. —, 363 S.E.2d 883 (1988).

Cited in Jenkins v. Jenkins, — N.C. App. —, 367 S.E.2d 4 (1988).

§ 52A-30.1. Income withholding.

Income withholding pursuant to G.S. 110-136.3 through 110-136.10 is available as a remedy to allow withholding from income derived in this State to enforce support orders from other states. (1985 (Reg. Sess., 1986), c. 949, s. 8.)

Editor's Note. — Section 10 of Session Laws 1985 (Reg. Sess., 1986), c. 949, makes this section effective October 1, 1986.

Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

Chapter 52B.

Uniform Premarital Agreement Act.

Editor's Note. — The official commentary to this Act has been printed in the main volume through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Act may be ordered from them at a cost of $3.00 at 645 North Michigan Avenue, Suite 510, Chicago, Illinois, 60611, (312) 321-9710.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1988

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1988 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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Attorney General of North Carolina