February 2012

Legislative Survey

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Legislative Survey

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BUSINESS & BANKING

A. Letters of Credit – UCC Rewrite


In Act 73 of 1999, the General Assembly enacted legislation that revised Article 5 of the Uniform Commercial Code.\(^1\) Article 5 of Chapter 25 of the North Carolina General Statutes addresses letters of credit. A letter of credit is defined by the statute as “a definite undertaking . . . by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.”\(^2\) Most notably, revised Article 5 provides that issuers of letters of credit “observe standard practice of financial institutions that regularly issue letters of credit.”\(^3\) Additionally, in an attempt to accommodate current technology and communication media, revised Article 5 allows letters of credit to be “inscribed on a tangible medium or . . . stored in an electronic or other medium [that may be] retrievable in perceivable form.”\(^4\)

2. Issuer’s Rights and Obligations

An issuer is required to honor a presentation that facially appears strictly to comply with the terms and conditions of the letter of credit.\(^5\) Whether a presentation strictly complies with the terms and conditions of the letter of credit shall be determined according to the standard practice of financial institutions whose regular practice it is to issue letters of credit.\(^6\) If a presentation is made to a person the issuer has designated to give value under a letter of credit, and who has by agreement or by custom and practice undertaken to give value, and the presentation appears to strictly comply with the terms and conditions of the letter of credit but is in fact forged or fraudulent, the issuer is required to honor the presentation if the nominated person has given value in good

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2. § 1, 1999 N.C. Sess. Laws 73.
3. Id.
4. Id.
5. Id.
6. Id.
faith and without notice of the forgery or fraud. The issuer, however, is not responsible for the performance or non-performance of the underlying contract or transaction.

3. Warranties

Revised Article 5 sets forth warranties to protect the issuer and the applicant of a letter of credit. If its presentation is honored, the beneficiary warrants (1) to the issuer that there is no fraud or forgery in the presentation, and (2) to the applicant that “the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.” The warranties set forth in Article 5 are in addition to other warranties set forth in Articles 3, 4, 7, and 8 of the Uniform Commercial Code that address the presentation or transfer of documents.

4. Remedies

In the event an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary is entitled to recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer’s obligation is not for the payment of money, the beneficiary is entitled to specific performance or an amount equal to the value of the performance. In either of the above scenarios, the claimant may recover incidental but not consequential damages. The claimant has no duty under revised Article 5 to take action to avoid damages, but if the claimant takes such action and avoids damage, the amount of recovery from the issuer will be reduced by the amount of damages avoided.

In the event an issuer wrongfully dishonors a demand presented under a letter of credit or otherwise breaches its obligation to the applicant, the applicant is entitled to “recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the

7. Id.
8. § 1, 1999 N.C. Sess. Laws 73.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id.
breach.”¹⁵ Under this section, attorneys’ fees and other litigation costs shall be awarded to the prevailing party in an action.¹⁶

5. **Statute of Limitations**

Revised Article 5 provides for a statute of limitations period of one year “after the expiration date of the relevant letter of credit or one year after the cause of action accrues, whichever occurs later.”¹⁷ A cause of action accrues at the time of the breach, and is not dependent upon the aggrieved party’s knowledge of the breach.¹⁸


Act 73 of 1999 made conforming amendments to other related Uniform Commercial Code sections. Article 1, Article 2, and Article 9 received minor changes to reflect the addition of revised Article 5, the most notable of which was made to N.C. Gen. Stat. § 25-9-304(1), which was re-written to include the statement, “A security interest in the rights to proceeds of a written letter of credit can be perfected only by the secured party’s taking possession of the letter of credit.” N.C. Gen. Stat. § 25-9-305 was also amended with an addition of the same statement.

**Phillip Lewis**

B. **Uniform Prudent Investor Act**

The General Assembly in Act 215 adopted the Uniform Prudent Investor Act as a new prudent investor standard that is applicable to trustees of express trust. These include charitable, inter vivos, and testamentary trusts.¹⁹ Under this act the investor has been given greater investment discretion in the management of the trust.²⁰ In evaluating the soundness of a trustee’s investment and management decisions one should no longer look to individual investments in isolation but in the context of the portfolio as a whole and as part of an overall investment strategy.²¹ The Act requires that the investments of the trust be diver-

¹⁵. *Id.*
¹⁶. *Id.*
¹⁷. *Id.*
¹⁸. *Id.*
²⁰. *Id.*
²¹. *Id.*
sified unless the purpose of the trust can be better served without diversification. 22 The Act also imposes on the trustee the duty to act solely in the interest of the beneficiaries. 23 If there are two or more beneficiaries the Act requires the trustee to act impartially. 24 Investment cost must be kept reasonable. Compliance with these rules is to be determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. 25 This Act became effective January 1, 2000 and applies to trusts existing on that date as well as trusts created after that date. 26 However, for trusts created prior to January 1, 2000, the Act only applies to actions or omissions occurring after January 1, 2000. 27

James C. Cummings

C. Electronic and Phone Proxies

In Act 138 of 1999, the General Assembly expressly authorized the appointment of multiple proxies by electronic or telephonic communication. The existing law had not expressly given this authorization, but merely implied it. 28 The new Act expressly allows shareholders to appoint one or more proxies by an electronic mail message or other form of electronic, wire, or wireless communication that provides a written statement appearing to have been sent by the shareholder. 29 The Act also allows in the case of a public corporation, any kind of electronic or telephonic transmission, even if not accompanied by written communication, if under the circumstances the corporation can reasonably assume that the appointment was made or authorized by the shareholder. 30

Windy Smith

22. Id.
23. Id.
24. Id.
30. Id.
D. New Laws Governing Mergers

In Act 369 of 1999, the General Assembly revised the laws governing mergers to allow for a more standard form for mergers, consolidations and conversions among business entities.31 N.C. Gen. Stat. § 55-1-20(f), which discusses filing requirements, was rewritten to include the possibility of a document being submitted by an unincorporated entity.32 Later in N.C. Gen Stat. § 55-1-40 the term unincorporated entity was defined as “a domestic or foreign limited liability company as defined in G.S 57C-1-03, a domestic or foreign limited partnership as defined in G.S. 59-102, or any other partnership as defined in G.S. 59-36, whether or not formed under the laws of this State, including a registered limited liability partnership as defined in G.S. 59-32 and any other limited liability partnership formed under a law other than the laws of this State.”33

The General Assembly added section 55-11-10 to the current sections dealing with mergers among corporations to include mergers with an unincorporated entity.34 In this new section the General Assembly explains what must be included in the written plan of merger.35 Each business entity must approve the written plan and then the surviving entity must file the articles of merger with the Secretary of State.36 The articles of merger must set forth: (1) the plan of merger, (2) for each merging business entity, its name, type of business entity, and the state or country whose laws govern its organization and internal affairs, (3) the name and address of the surviving business entity, (4) a statement that the plan of merger has been approved by each merging business entity in the manner required by law, and (5) the effective date and time of merger if it is not to be effective at the time of filing of the articles of merger.37

The new section continues by setting out what the effects of the merger are on the business entities.38 This section is similar

32. § 1.1, 1999 N.C. Sess. Laws 369 (to be codified at N.C. Gen. Stat. § 55-1-20(f)).
35. Id.
36. Id.
37. Id.
38. Id.
to N.C. Gen Stat. § 55-11-6, which discusses the effects of a merger among corporations. The only differences are in N.C. Gen. Stat. § 55-11-6(e)(7). This subsection explains that if the resulting business entity is not a domestic corporation the entity agrees to pay to the dissenting shareholders the amount they are entitled under N.C. Gen. Stat. § 55-13. 39

The General Assembly went through the same process in changing the nonprofit statutes as it had done with the statutes dealing with corporations. 40 First, it changed N.C. Gen. Stat. § 55A-1-20(f), which deals with the filing requirements, to include the possibility of an unincorporated entity. 41 Then the General Assembly used the same language as it had done with corporations to deal with the merger of a nonprofit corporation with an unincorporated entity. 42 The language of N.C. Gen. Stat. § 55A-11-09 mirrors N.C. Gen. Stat. § 55-11-6.

Next, the General Assembly went through the statutes dealing with limited liability companies. 43 It dealt with the filing requirements as it had done with corporations and nonprofit organizations except it inserts the term business entities. 44 This term serves the same purpose as unincorporated entity served in the previous changes. It allows the possibility of documents being submitted by all kinds of businesses, not just limited liability companies. The General Assembly repealed Article 9 of Chapter 57C and added Article 9A. 45 This change includes the addition of a section on conversions. 46 N.C. Gen. Stat. §57C-9A-01 lays out what entities may convert to a domestic limited liability company. 47 It then sets out the requirements for the plan of conversion that must be approved by the converting business entity, and the requirements for the filing of the articles of organization by the

39. Id.
44. § 3.1, 1999 N.C. Sess. Laws 369 (to be codified at N.C. Gen. Stat. § 57C-1-20(f)).
46. Id.
47. Id.
converting business entity.48 These requirements are similar to the plans for merger requirements that are involved in the corporations and the nonprofit organization section. The effects of the conversion are stated in N.C. Gen. Stat. § 57C-9A-04 and are the same effects as if a merger had taken place.

N.C. Gen. Stat. §§ 57C-9A-04 to 08 discuss the merger of a domestic limited liability company with other business entities and lays out the same process that the General Assembly did for corporations in N.C. Gen. Stat. § 55-11-10 and for nonprofit organizations in N.C. Gen. Stat. § 55A-11-09.49 The steps, as in the corporation and nonprofit corporation statutes, include the approval of a written plan of merger and the filing of the approved plan with the Secretary of State.50 The new section then describes the effects of the merger which are the same effects as in the corporations and nonprofit corporations sections.51

Article 2 of Chapter 59 of the General Statutes, dealing with partnerships, was amended to bring it into conformity with the changes in the other statutes in this Act.52 These changes were made in relation to domestic partnerships in N.C. Gen. Stat. §§ 59-73.1 to 73.7 and to domestic limited partnerships in N.C. Gen. Stat. §§ 59-1007 to 1014.53 The changes allow for merger with other business entities and set forth the same steps as in the corporations, nonprofit, and limited liability companies sections.54 It also gives the steps for different business entities to be able to convert to a domestic limited partnership.55 These steps are the same as in the limited liability company sections on conversion.

The General Assembly added section 10 to N.C. Gen. Stat. § 58-10, which allows a mutual insurance company to convert to a stock insurance company.56 Such conversions must be approved by the Commissioner of Insurance who looks at the conversion to make sure that the policyholder in the mutual insurance company

48. Id.
49. Id.
50. Id.
53. Id.
54. Id.
55. Id.
is treated fairly and equitably.\textsuperscript{57} Further provisions state that directors, officers, or employees of the insurer can not receive compensation for the conversion other than compensation paid in the ordinary course of business.\textsuperscript{58}

N.C. Gen. Stat. § 55A-13-02(b) is a section that was rewritten to include a provision that allows a distribution to members of a not-for-profit homeowner's association.\textsuperscript{59} Distributions can be made when there is a surplus of funds and when distributions are made in proportion to the dues collected from the members.\textsuperscript{60}

Elizabeth Arias

E. \textit{Structured Settlement}

In Act 367 of 1999, the General Assembly created the North Carolina Structured Settlement Protection Act. The Act creates new minimum requirements for transfers of structured settlement rights in order for the transfers to be valid and enforceable.\textsuperscript{61} The transfer must be authorized in advance in a final order of a court of competent jurisdiction or a responsible administrative authority.\textsuperscript{62} The authorization must be based on the following: (1) the transfer complies with the requirements of the law; (2) the transferee provides to the payee a disclosure statement with certain information contained therein; (3) the transfer is in the best interest of the payee; (4) the payee has received independent professional advice regarding the legal, tax, and financial implications of the transfer; (5) the transferee has given written notice of all relevant tax payer identification information to the annuity issuer; (6) the discount rate used in determining the net amount payable to the payee does not violate any statutory requirements; (7) any brokers' commissions, service charges, application fees, notary fees and other commissions, fees, costs, expenses, and charges payable do not exceed two percent of the net amount payable to the payee; and (8) the transfer of the structured settlement payment rights is fair and reasonable.\textsuperscript{63} If these express findings are

\begin{itemize}
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} §7, 1999 N.C. Sess. Laws 369 (to be codified at N.C. Gen. Stat. § 55A-13-02(b)).
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Act of July 19, 1999, 1999 N.C. Sess. Laws 367
  \item \textsuperscript{62} § 1, 1999 N.C. Sess. Laws 367.
  \item \textsuperscript{63} Id.
\end{itemize}
made by the court, it may order a transfer. If the court authorized the transfer, the structured settlement obligor must execute an acknowledgement of assignment letter on behalf of the transferee for the amount to be transferred.

If the structured settlement agreement was entered into after commencement of litigation, the court where the action was pending has exclusive jurisdiction over the transfer. If it was entered into prior to commencement of litigation, the Superior Court Division has nonexclusive original jurisdiction over the transfer.

Not less than 30 days prior to the scheduled hearing on the transfer, the transferee must file and serve on all interested parties, and on the Attorney General, a notice of the proposed transfer and the application for its authorization. Interested parties includes the payee, any beneficiary designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under the terms of the structured settlement. The Attorney General has standing to raise, appear, and be heard on any matter relating to an application for transfer. Interested parties have 30 days to appear and answer the petition.

The provisions of the Act may not be waived. Any payee who has transferred to a transferee without complying with the Act may bring an action against the transferee to recover damages up to five thousand dollars ($5,000).

F. Year 2000 Consumer Protection Act

In Act 308 of 1999, the General Assembly limited the liability from Y2K failures by providing an affirmative defense to certain parties. The Act's "Year 2000 problem" includes the common computer programming practice of using two-digit fields to represent a year, resulting in erroneous data calculations.
establishes that the person's default, failure to pay, breach, omission, or other violation that is the basis of the claim against the person, was caused by a year 2000 problem associated with an electronic device that is not owned, controlled, or operated by the person, and, if it were not for the year 2000 problem, the person would have been able to satisfy the obligations that are the basis of the claim, then the person is entitled to an affirmative defense. If an affirmative defense is established, the court will dismiss the claim without prejudice. This dismissal does not affect a default that occurred before the disruption. It also does not apply to claims for personal injury or wrongful death. The granting of the affirmative defense does not impair, extinguish, discharge, satisfy, or otherwise affect the underlying obligation.

An individual who establishes an affirmative defense may dispute directly with a credit reporting agency any item relating to the affirmative defense. If the individual requests, the credit reporting agency must include the individual's statement of explanation regarding an item of information that the agency denies is inaccurate or a statement concerning the content of the individual's consumer file.

Windy Smith

G. Regulation of Cotton Gins, Cotton Warehouses, and Cotton Merchants

The North Carolina General Assembly amended Chapter 106 to regulate cotton gins, cotton warehouses, and cotton merchants. The Act defines a "cotton gin," "cotton merchant," and a "cotton warehouse."

Any person, including a cotton marketing cooperative or association, who wishes to conduct business as a cotton gin, cotton warehouse, or cotton merchant must register with the Commissioner of Agriculture. An application for registration shall be

75. Id.
76. Id.
77. Id.
78. Id.
79. Id.
80. § 1, 1999 N.C. Sess. Laws 308.
81. Id.
83. Id.
84. Id.
completed on or before July 1st of each year, and a fee of twenty-five dollars ($25) shall be submitted with the application.85 Any application by a person who is not licensed and bonded under the U.S. Warehouse Act must be accompanied by a bond in the amount of three hundred thousand dollars ($300,000) by a company authorized to issue surety bonds in North Carolina.86 The registration certificate must be conspicuously displayed at the applicant's place of business.87

Cotton gins, cotton warehouses, cotton merchants, and cotton cooperatives or associations must keep records of producer-owned cotton transactions for 7 years.88 They shall not market, obligate for sale, or otherwise dispose of producer-owned cotton without written consent from the producer.89 Within 48 hours of ginning, cotton gins must produce a document, to the person from whom the cotton was received, showing the bale number and weight for each bale of cotton ginned.90

Violation of any of the provisions of this section shall be grounds for denial, suspension, or revocation of registration.91 Engaging in business under this section without being registered is punishable as a Class 2 misdemeanor and the Commissioner of Agriculture may obtain injunctive relief to prevent further violations of the act.92

Evan B. Horwitz

H. Dissenters' Rights Amendment

In an amendment to N.C. Gen. Stat. § 55-13-02, the General Assembly has limited the right of shareholders to dissent in certain situations.93 The statute provides that shareholders have the right to dissent; however, this right is not unlimited. The amendment extends and clarifies the boundaries of when a shareholder has a right to dissent.94

85. Id.
86. Id.
87. Id.
88. § 1, 1999 N.C. Sess. Laws 412.
89. Id.
90. Id.
91. Id.
92. Id.
94. Id.
Unless the articles of incorporation, bylaws, or a board of directors resolution provide otherwise, a shareholder may not dissent because of a corporate action if the shares are listed on a national security exchange or held by two thousand shareholders of record or "designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc." 95 The last provision is a new limitation on shareholders right to dissent. 96 

The amendment became effective on October 1, 1999. 97

Dennis Martin

95. Id.
96. Id.
CIVIL PROCEDURE

A. Default Judgments - Rule 55

The General Assembly amended Rule 55 of the North Carolina Rules of Civil Procedure. The amendment allows the court to enter a default judgment without a hearing if: (1) the motion specifically notifies the other party that the court will decide the motion without a hearing unless the other party files, within 30 days, a written response stating the grounds for opposing the motion, and (2) the other party must fail to respond within the 30 days. 2

B. Appealing Clerk's Decision

The General Assembly clarified and revised the procedures governing appeals or transfers from Clerks of Superior Court to the trial courts by replacing old statutes with the new Article 27A in Chapter 1 of the General Statutes. The new Article 27A consists of three new statutes governing the following: (1) appeals or transfers of rulings by a clerk in civil actions, (2) orders and judgments in special proceedings, and (3) estate matters.

In civil actions in which the clerk exercises the judicial powers of that office, a party has 10 days to appeal to the appropriate trial court. On appeal, the judge of that court may hear and determine all matters unless it appears that: (1) the matter is one that only the clerk can handle, or (2) justice would be better served if the judge dismissed the matter appealed. If one or both of these appear, then the judge has to remand the matter back to the clerk.

A special proceeding before the clerk shall be transferred to the trial court whenever an issue of fact, an equitable defense, or a request for equitable relief is made in the pleadings. The clerk can still decide these matters if the proceeding is not transferred

2. Id.
4. Id.
5. Id.
6. Id.
7. Id.
or is remanded. A party may appeal an order or judgment entered by a clerk in a special proceeding to the appropriate court for a hearing de novo.

In estate matters, the Act authorizes the clerk to determine all issues of fact and law. On appeal, the judge may review the order of the clerk for the purpose of only the following: (1) whether the findings of fact are supported by the evidence, (2) whether the conclusions of law are supported by the findings of facts, and (3) whether the order or judgment is consistent with the conclusions of law and applicable.

Billy Kessler

8. Id.
10. Id.
CRIMINAL LAW

A. Threatening Court Officers

N.C. Gen. Stat. § 14-16.6 et seq. was amended to create the criminal offense of endangering or threatening "court" officers.¹ These "court" officers include judges, district attorneys or their assistants, public defenders, court reporters, court counselors, magistrates, and Clerks of Superior Court and their assistants and deputies.² An assault on an officer is a Class I felony, and it is a Class F felony if the assault results in serious bodily injury. It is also a Class I felony to threaten to kill or inflict serious bodily injury upon an officer. Such an offense was already in existence for legislative and executive officers.

Billy Kesler

B. Changes in the Sex Offender Registry Laws

The General Assembly amended N.C. Gen. Stat. § 14-208.6 to broaden to whom the law applies.³ Previously, offenses against a minor required that an enumerated offense be committed against a minor by one other than the minor's parent or legal custodian. However, the new law has struck out legal custodian, leaving only parents as those not covered by the statute.⁴ Generally, the law requires registration on the Sex Offender Registry of any person who commits and is convicted of either of the following: a sexually violent offense or an offense against a minor.⁵ These two terms encompass a variety of different offenses, which are listed in the statute.⁶ An important advent with the new law is that it requires placement on the registry not only for those adjudicated to have committed one of the enumerated offenses but also for those adjudicated to have solicited the commitment of or conspired to com-

2. Id.
4. Id.
5. Id.
6. Id.
mit one of the enumerated offenses. Another novel feature of the re-worked law is that the court is allowed to place a person's name on the registry if that person is convicted of aiding and abetting the commission of one of the enumerated offenses. If a person is convicted of aiding and abetting the commission of one of the enumerated offenses, the court sentencing the individual may place that person on the registry if placement on the registry furthers the purpose of the law.

Daniel A. Ettefagh

C. Financial Identity Fraud

In Act 449 of 1999, the General Assembly created the criminal offense of financial identity fraud. The Act makes it against the law for a person "who knowingly obtains, possesses, or uses personal identifying information of another person" without consent, "with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name or for the purpose of avoiding legal consequences." Financial identity fraud is punishable as a Class H felony, except when the victim has been arrested, detained, or convicted as a result of this offense, then it is punishable as a Class G felony. In addition to being criminally liable under financial identity fraud, a person may be found liable in a civil action for damages of up to the greater of five thousand dollars ($5,000) for each incident or three times the amount of damages actually incurred by the victim. The violator may also be enjoined from future acts against the victim. In addition, the court may award reasonable attorney's fees to the prevailing party. For the purposes of venue, in a criminal prosecution under the Act, the crime is considered to be committed in any county in which any part of the fraud took place, regardless of

9. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
whether the defendant was ever actually present in that county.\textsuperscript{16} The Act authorizes the Attorney General to investigate any matters concerning financial identity fraud and refer cases to the district attorney in the county where the crime occurred.\textsuperscript{17}

\textit{J. Bryan Boyd}

\section*{D. Controlled Substances Amendments}

The General Assembly amended N.C. Gen. Stat. § 90-95 to add both methamphetamine and amphetamine to the list of phencyclidine, cocaine, coca leaves, or "any salt, isomer, salts of isomers, compound, derivative or preparation thereof" of these substances so that an individual found guilty of possession of such is punishable as a Class I felony.\textsuperscript{18}

The following chemicals were added to the list of immediate precursor chemicals: anhydrous ammonia, iodine, lithium, red phosphorous, and sodium.\textsuperscript{19} Possession of an immediate precursor chemical with intent to manufacture, possession, or distribution of such with knowledge or reasonable belief that the chemical will be used to manufacture a controlled substance is punishable as a Class H felony.\textsuperscript{20}

N.C. Gen. Stat. § 90-95 (h)(3a), which discussed the possession, manufacture, sale, delivery, or transportation of amphetamine was deleted and N.C. Gen. Stat. § 90-95(h)(3b), which discusses the possession, manufacture, sale, delivery, or transportation of methamphetamine was amended to include amphetamine.\textsuperscript{21} It now states that anyone who possesses, manufactures, sells, delivers, or transports twenty-eight grams or more of methamphetamine or amphetamine is guilty of "trafficking in methamphetamine or amphetamine".\textsuperscript{22} Twenty-eight grams or more, but less than two hundred grams is punishable as a Class F felony with a minimum prison sentence of seventy months and a maximum of 84 months and a fine not less than fifty thousand dollars ($50,000).\textsuperscript{23} Two hundred grams or more, but less than

\begin{flushleft}
\textsuperscript{16} § 1, 1999 N.C. Sess. Laws 449.  \\
\textsuperscript{17} Id.  \\
\textsuperscript{18} Act of July 19, 1999, § 1, 1999 N.C. Sess. Laws 370.  \\
\textsuperscript{19} Id.  \\
\textsuperscript{20} Id.  \\
\textsuperscript{21} Id.  \\
\textsuperscript{22} Id.  \\
\textsuperscript{23} Id.
\end{flushleft}
four hundred grams is punishable as a Class E felony with a minimum prison sentence of 90 months and a maximum of 117 months and a fine not less than one hundred thousand dollars ($100,000). More than four hundred grams is punishable as a Class C felony with a minimum prison sentence of 225 months and a maximum of 279 months and a fine not less than two hundred fifty thousand dollars ($250,000).

Subsection (c) was added to N.C. Gen. Stat. § 90-95.3 which states that a person convicted of the manufacture of controlled substances will be ordered by the court to pay restitution of actual cost to the law enforcement agency that cleaned the laboratory used for such manufacture.

The General Assembly added ketamine to the list of Schedule III controlled substances in N.C. Gen. Stat. § 90-91. Schedule III controlled substances have a potential for abuse that may lead to mild or moderate physical dependence or high psychological dependence. However, they also have currently accepted medical uses.

Kathy A. Mercogliano

25. Id.
28. Id.
A. Stop Threats & Acts of School Violence

1. Bomb Threats and Hoaxes Against Public Buildings

The General Assembly amended N.C. Gen. Stat. §§ 14-69.1 and 14-69.2 by increasing the penalty for second and subsequent convictions for making bomb threats and perpetrating bomb hoaxes against public buildings.\(^1\) In both instances the conviction was increased from a Class H felony to a Class G felony.\(^2\)

2. Criminal Penalty for Bombs on Educational Property

The General Assembly amended N.C. Gen. Stat. § 14-269.2 by increasing the criminal offenses of possessing or carrying any bomb, grenade, or powerful explosive on educational property or encouraging a minor to possess or carry on school property from a Class I felony to a Class G felony.\(^3\)

3. Driver's Licenses Revocations

The General Assembly amended N.C. Gen. Stat. §§ 20-13.2 and 20-17 by making it mandatory for the Division of Motor Vehicles to revoke for one year a person's drivers' license or permit upon conviction of certain crimes involving the use or threat of bombs in public buildings or on educational property.\(^4\)

4. Civil Liability/Parents

The General Assembly created a new law N.C. Gen. Stat. § 1-538.3 that enables a school board to bring a civil action against the parent or guardian of a minor who is convicted of: malicious use of explosives, malicious damage to occupied property by use of an explosive, making a false bomb threat against a public building, perpetrating a bomb hoax against a public building, bringing a bomb onto educational property or a felony offense involving injury to persons or property by use of a gun or other firearm.\(^5\)

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2. Id.
The school board must prove the offense occurred on educational property and the parent or guardian knew or reasonably should have known of the minor's likelihood to commit the act, had the opportunity and ability to control the minor and made no reasonable effort to correct or restrain or properly supervise the minor.\textsuperscript{6}

5. **Automatic Student Suspension**

The General Assembly now requires a board of education to suspend any student for 365 days who: brings or possesses at school a firearm or explosive device, makes a false bomb threat against the school or perpetrates a bomb hoax against a school.\textsuperscript{7}

**B. Teacher/Student/No Sex Acts**

1. **Taking Indecent Liberties with a Student**

In Act 300 of 1999 the General Assembly made it a class I felony for a first offense defendant who is a teacher, school administrator, student teacher, or coach, and four years older than a student to take indecent liberties with the student.\textsuperscript{8} Taking indecent liberties includes both touching and non-touching offenses but does not include vaginal intercourse or a sexual act as defined by N.C. Gen. Stat § 14-27.1.\textsuperscript{9} Consent is not a defense.\textsuperscript{10} This statute does not apply if the couple is married.\textsuperscript{11}

2. **Sexual Intercourse with a Student**

The General Assembly also made it a class G felony for a teacher, school administrator, student teacher, or coach, who is at least four years older than the student to engage in vaginal intercourse with the student.\textsuperscript{12} Personnel less than 4 years older than the student are guilty of a Class A1 misdemeanor.\textsuperscript{13} Consent is not a defense.\textsuperscript{14} The Act does not apply if the defendant is lawfully

\textsuperscript{6} Id.
\textsuperscript{7} § 7, 1999 N.C. Sess. Laws 257.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
married to the student. Student means a person enrolled in kindergarten through grade 12.16

C. Evaluate Charter Schools

1. Three Year Study of Charter Schools

In Act 27 of 1999 the General Assembly directed the State Board of Education to conclude its review and evaluation of charter schools in North Carolina by January 1, 2002.16 The board is to report to the Joint Legislative Education Oversight Committee with recommendations to modify, expand, or terminate the charter school approach.17 The board is to report on the impact of charter schools on public schools, student progress in charter schools, best practices resulting from charter schools and other appropriate information.18

James C. Cummings

D. Protection of Public School Employees Against Retaliation for Complaints of Sexual Harassment

The General Assembly amended Article 22 of Chapter 115C by making it illegal for an employee of a local board of education to be disciplined solely for the reason that he/she has filed a written complaint alleging sexual harassment by students, other local board employees, or school board members.19 However, this protection does not apply if the employee knows or has reason to believe that the report is false.20

Evan B. Horwitz

E. Weapons on Campus or Other Educational Property

With Senate Bill 1096, the General Assembly modified N.C. Gen. Stat. § 14-269.2, the prohibition against weapons on educational property. The statute has been broadened in terms of what

15. Id.
17. Id.
18. Id.
20. Id.
"educational property." encompasses.\textsuperscript{21} Under the new law, it is a Class I felony for "any person to carry or possess any gun, rifle, pistol, or other firearm of any kind, or any dynamite cartridge, bomb, grenade, mine, or other powerful explosive as defined in G.S. 14-284.1, on educational property."\textsuperscript{22} Further, the presence of a firearm is a violation of the new law when it is possessed at curricular or extracurricular activities that are sponsored by the school but do not necessarily take place on property owned by the school.\textsuperscript{23} The use of the term "school" has been broadened as well to include community colleges.\textsuperscript{24}

A person is not guilty of violation of this section if they come into possession of a firearm by taking or receiving the weapon from another person or finding the weapon and the person tenders the weapon to law enforcement authorities, directly or indirectly, as soon as it is practical to do so.\textsuperscript{25}

Finally, the bill provides that in some instances, violation will result in a Class 1 misdemeanor instead of a Class I felony.\textsuperscript{26} Violation will be a Class 1 misdemeanor when the gun, rifle, pistol, or other firearm is on educational property (as defined above) or at a curricular or extracurricular event sponsored by the school and the following conditions are met: (1) the person with the firearm is not a student who goes to the school on the educational property, (2) the person is not an employee who works at the school on the educational property, (3) the person is not a student attending a curricular or extracurricular event sponsored by the school where the student is enrolled, (4) the person is not an employee at the curricular or extracurricular event that is sponsored by the school where the employee works, (5) the firearm is not loaded, (6) the firearm is in a motor vehicle, and (7) the firearm is in a locked container or locked firearm rack.\textsuperscript{27}

\textit{Daniel A. Ettefagh}

\begin{footnotesize}
\begin{enumerate}
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item § 1, 1999 N.C. Sess. Laws 211.
\end{enumerate}
\end{footnotesize}
ENVIRONMENTAL LAW

A. Clean Water Act of 1999

1. In Relation to Swine Farms

In Act 329 of 1999, there are several changes that affect swine farmers. The Act extends the moratorium on the construction or expansion of swine farms and on lagoons and animal waste management systems for swine farms from September 1, 1999 to July 1, 2001.1 The pilot program for inspection of animal waste management systems implemented by the Department of Environment and Natural Resources (hereinafter “DENR”) was extended from October 31, 1998 to July 1, 2001. Under the Act, Brunswick County was added to the pilot program.2

The General Assembly added Part VIII to the Act which requires, as of October 1, 1999, the owner or operator of any animal waste management system to issue a press release to all print and electronic media providing general coverage in the county of discharge for any release of 1,000 gallons or more of animal waste that reaches surface waters.3 The Act also requires the operator to publish a notice for any release of 15,000 gallons or more of animal waste that reaches surface waters of the State.4 This notice must be published in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge.5

2. Increase Civil Penalties for Violations of Water Quality Laws

The civil penalty for a water quality violation listed in N.C. Gen. Stat. § 143-215.6A was increased from ten thousand dollars ($10,000) to twenty-five thousand dollars ($25,000).6 This

4. Id.
5. Id.
increase does not apply for a violation of a reporting requirement or in a situation where a fine has not been imposed on the offender within a certain period of years. This period will start at three years on October 1, 1999 and increase in one-year increments to five years on October 1, 2002.

3. Wetlands and Conservation Easements

The Act authorizes the DENR to distribute funds from the Wetlands Restoration Fund and property from the Wetlands Restoration Program to federal and state agencies, local governments, and private nonprofit conservation organizations. The purpose of these distributions is “to promote projects for the restoration enhancement, preservation, or creation of wetlands.” A recipient of the funds described above “shall grant a conservation easement in the real property or interest in real property with the funds to the Department in a form that is acceptable to the Department.” The Act also directs the DENR to maintain an inventory of all properties and easements held under the Wetlands Restoration Program. This inventory must provide a list of all conservation easements held by the Department. The DENR must include the inventory in the annual report required by N.C. Gen. Stat. § 143-214.13(a).

4. Municipal and Domestic Waste Treatment Systems

The Act places reporting requirements on the operators of municipal and industrial waste treatment systems identical to those for operators of animal wastewater systems. In the event of a discharge of 1,000 gallons or more of untreated waste or wastewater to the surface waters of the State, as of October 1, 1999, an industrial waste treatment system owner or operator must issue a press release to all print and electronic news media that provide general coverage in the county where the discharge occurred set-

7. §§ 5.3-5.7, 1999 N.C. Sess. Laws 329 (to be codified at N.C. Gen. Stat. § 143-215.6A(b1)).
8. Id.
11. Id.
13. Id.
14. Id.
ting out the details of the discharge. In the event of a discharge of 15,000 gallons or more the operator must publish the notice in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge.

In order to obtain a permit for a new municipal or domestic wastewater treatment system or for the expansion of an existing system, an applicant must prepare and consider an engineering, environmental, and fiscal analysis of alternatives to a proposed facility. Such facilities are only required to adhere to the mandates of this section and make these considerations if they will discharge to the surface waters of the State.

Benjamin H. Hervey

B. Strengthen Sedimentation Act

In Act 379 of 1999, the General Assembly made several amendments aimed at strengthening the Sedimentation Pollution Control Act of 1973. The Act added the provision that approval of draft erosion plans by the Commission is conditioned upon the plan complying with Federal and State water quality laws, regulations, and rules. The maximum civil penalty for a violation of the Sedimentation Act (other than a stop work order) was raised to five thousand dollars ($5,000) from the previous penalty of five hundred dollars ($500). In addition to the increased civil penalty, the Act eliminates the date of notice as the date upon which a penalty can be assessed and changes it to the date of the violation itself. The Act eliminates a provision limiting the total amount of fees collected to one third of the total administrative and per-

16. Id.
18. Id.
20. Id.
22. Id.
sonnel costs. The Act further requires that general contractors, upon taking their examinations to be licensed in the State, have knowledge of the Sedimentation Act by answering questions concerning the Act on their exam.

C. Strengthen Littering Law

In Act 454 of 1999, the General Assembly made several amendments in an effort to strengthen the littering law under N.C. Gen. Stat. § 14-399. Fines for the first offense of littering less than 15 pounds and for non-commercial purposes was increased to a minimum of two hundred fifty dollars ($250) up to a maximum of one thousand dollars ($1,000). The fine for a second offense committed within three years of the date of a prior offense was increased to a minimum of five hundred dollars ($500) up to a maximum of two thousand dollars ($2,000). The fines for littering more than 15 pounds but less than 500 pounds for non-commercial purposes was increased to a minimum of five hundred dollars ($500) up to a maximum of two thousand dollars ($2,000). The Act further requires violators of the littering law that litter more than 500 pounds or any amount that is hazardous waste or for commercial purposes to remove litter, repair property, and serve mandatory community service. The Act defines "commercial purposes" as litter by a business, corporation, or entity for economic gain.

D. Waterfowl Hunting License Changes

In Act 339 of 1999, the General Assembly extended waterfowl hunting privileges to individuals who own a comprehensive hunting license under N.C. Gen. Stat. § 113-270.1D(a). The definition of waterfowl was amended to include migratory birds belonging to the Family Anatidae, such as: wild ducks, geese, brant, and swans. The fee charged for a migratory waterfowl

24. § 7, 1999 N.C. Sess. Laws 379 (to be codified at N.C. Gen. Stat. § 87-10(b)).
26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
hunting license was increased to ten dollars ($10) from the previous fee of five dollars ($5). The Act also requires applicants who wish to participate in a managed migratory waterfowl hunt to provide satisfactory proof that they in fact are the holders of a hunting license that has waterfowl hunting privileges. In addition the fee for an application to participate in a managed hunt was increased to ten dollars ($10) from the previous fee of five dollars ($5).

J. Bryan Boyd

33. § 6, 1999 N.C. Sess. Laws 339 (to be codified at N.C. Gen. Stat. § 113-270.3(b)(5)).
34. § 7, 1999 N.C. Sess. Laws 339 (to be codified at N.C. Gen. Stat. § 113-291.2(a)).
35. Id.
ESTATES & TRUSTS

A. Administration of Estates—Personal Representative Qualifications

N.C. Gen. Stat. § 28A-4-2 is a list of disqualifications from serving as a personal representative.1 During the 1999 session, the General Assembly amended the statute by removing subsection (6) of the statute, which had automatically disqualified aliens as personal representatives.2 The effect of the amendment is to allow aliens to be personal representatives so long as they are not disqualified by one of the other categories.3

The Act became effective on January 1, 2000 and will be applicable only to decedents dying on or after that date.4

B. Obligation of Decedent’s Estate for Funeral Expenses

Through amendments to N.C. Gen. Stat. § 28A-19-8, the General Assembly changed the law regarding the obligations of a decedent’s estate for funeral and related expenses.5

Under the current statute, “any person authorized... to dispose of a decedent’s body may bind a decedent’s estate for funeral expenses and related charges ...”6 Related charges include interest, finance charges, and any charges incurred on behalf of the estate in the execution and/or delivery “of any agreements, promissory notes, and other instruments relating to the estate.”7 This provision is applicable regardless of whether a personal representative has been appointed as of the time the expenses are incurred.8

Under the statute the decedent’s estate will be “primarily liable” to the personal representative or to the funeral home for any

3. Id.
4. Id.
6. § 1, 1999 N.C. Sess. Laws 166.
7. Id.
8. Id.

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expenses relating to the funeral or to any third-party creditor that pays for the funeral.\footnote{9}

The Act became effective as of October 1, 1999.\footnote{10}

C. New Lapse Statute

N.C. Gen. Stat. § 31-42 answers the question of who takes a devise when the devisee predeceases the testator. Under the old statute, issue of a deceased devisee had to be "qualified issue" in order to take, which meant they would have to be an heir of the testator within the meaning of the Intestate Succession Act to prevent the devise from lapsing.

In an effort to make North Carolina's lapse statute less restrictive, the General Assembly revised the statute.\footnote{11} The new statute eliminates the concept of "qualified issue" and sets new guidelines to determine who takes when a devisee predeceases a testator.\footnote{12}

Under subsection (a), issue of a predeceased devisee take the place of the devisee so long as he/she is a grandparent of the testator or a descendant of a grandparent of the testator.\footnote{13} If the devisee is not a grandparent or a descendant of a grandparent of the testator, "or if a devise otherwise fails," then the devise will lapse.\footnote{14}

The act became effective on January 1, 2000 and is only applicable to decedents dying on or after that date.\footnote{15}

D. An Act to Clarify Attorney-in-Fact Gifts

In amending N.C. Gen. Stat. § 32A-2(14-15), the General Assembly has clarified when an attorney-in-fact may make a gift to himself through exercise of the power of attorney granted to him.\footnote{16} The amended Act allows attorneys-in-fact to make gifts when "expressly authorized by the power of attorney under G.S. 32A-2(15)."\footnote{17}
The amendment to N.C. Gen. Stat. 32A-2(15) allows an attorney in fact to make a gift to himself if it is in keeping with “the principal’s personal history of making or joining in the making of lifetime gifts.”

This Act is applicable to all powers of attorney executed on or after October 1, 1999.

E. Division of Trusts

N.C. Gen. Stat. §§ 32-27(25a) and 36A-136(24) provide trustees with greater authority to divide a trust into two separate, identical trusts or into two separate non-identical trusts so long as it is in the best interest of the beneficiaries.

Under the altered statutes, a trustee may create a separate, identical trust out of any “addition or contribution” to a then existing trust. A trustee may do this in order to give the trust beneficiary a tax benefit.

The trustee may also create or divide a trust into two or more separate, non-identical trusts. However, the new trust must not be inconsistent with the terms of the governing instrument and the new trust “must provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.”

Furthermore, in order to exercise the authority granted under these statutes, the trust must be funded in one of three ways: (1) by pro rata allocation of the assets of the original trust, (2) based upon the fair market value of the assets at the date of division, or (3) in a manner fairly reflecting the net appreciation or depreciation of the trust assets measured from the valuation date to the date of division.

This Act became effective on October 1, 1999.

22. Id.
23. Id.
24. Id.
25. Id.
F. Modification and Termination of Irrevocable Trusts

Through this Act, the General Assembly repealed Article 11 of Chapter 36A of the General Statutes and replaced it with an entirely new statute. The purpose of the statute is to allow modification and termination of irrevocable trusts under limited circumstances.

Under the new N.C. Gen. Stat. § 36A, a trust settlor who is the sole beneficiary of a trust may, without approval of the court, compel termination of an irrevocable trust so long as he is “sui juris” (i.e., born, ascertained, and neither a minor nor legally incapacitated). Under the statute, the settlor has the authority to modify or terminate the trust, even though the purpose of the trust has not yet been achieved. Where the settlor is not the sole beneficiary, the trust may be modified or terminated so long as the settlor and all the beneficiaries are sui juris and consent to such action.

If any beneficiary does not consent to such action or is not sui juris, the other beneficiaries may still bring an action in superior court to compel partial termination or modification of the trust. If the settlor consents to alteration of the trust, the court, in its discretion, may allow it. However, in making its determination the court should consider whether such alteration will “substantially impair” the interest of the non-consenting beneficiaries or beneficiaries that are not sui juris.

The new statute also allows beneficiaries to bring an action in superior court to modify or terminate a trust without the consent of the settlor. In order to prevail in the action, all beneficiaries must consent and the court must find either that the alteration will not interfere with a “material purpose” of the trust or that the purpose for modifying the trust “substantially outweighs the interest in accomplishing [the] material purpose of the trust.”

29. § 2, 1999 N.C. Sess. Laws 266.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. § 2, 1999 N.C. Sess. Laws 266.
36. Id.
For purposes of the statute, if the beneficiary is not sui juris, consent may be obtained from an appointed guardian ad litem.\textsuperscript{37}

The statute provides that the court has, within its discretion, the authority to modify or terminate trusts in certain circumstances.\textsuperscript{38} In order to exercise this authority the court must find that: (1) the trust purpose has been fulfilled, (2) the purpose of the trust has become illegal or impossible to fulfill, or (3) that, due to a change in circumstances, the continuation of the trust would defeat or "substantially" impair the purposes of the trust.\textsuperscript{39} Furthermore, in any situation in which the decision to modify or terminate a trust is left to the discretion of the court, the court should take into consideration any tax consequences of such alteration and whether the trust instrument created inalienable interests in the beneficiaries.\textsuperscript{40} These considerations may be important in the court's final decision, but they are not determinative.

The Act also creates special exceptions for modification and termination of small trusts.\textsuperscript{41} First, the court may modify or terminate a small trust if it finds that the fair market value of the trust assets is so low that the cost of continuing the trust would defeat or substantially impair the purpose of the trust.\textsuperscript{42} Second, a trustee may, without approval of the court, terminate a trust if he makes a good faith determination that the fair market value of the trust assets are worth $50,000 or less and the cost of continuing the trust would defeat or substantially impair the purpose of the trust.\textsuperscript{43} Under these circumstances, the trustee incurs no liability for termination and distribution of the trust property even though there are beneficiaries not sui juris.

The Act goes on to state that if trust property is to be distributed to a minor or to an incompetent, the property may be distributed to the guardian of the beneficiary or the guardian of the estate.\textsuperscript{44} This distribution must comply with either the North Carolina Uniform Transfer to Minors Act or the North Carolina Custodial Trust Act.\textsuperscript{45} Finally, it is provided that any proceeding

\begin{itemize}
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} § 2, 1999 N.C. Sess. Laws 266.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\end{itemize}
The new statute became effective January 1, 2000, and is applicable to all trusts, regardless of whether they were created before or after this date. However, the small trust provision pertaining to trustees does not apply to trusts created before October 1, 1991 if the trust instrument contained a spendthrift provision or other similar protective provisions.\(^\text{46}\)

\textit{Dennis Martin}

\(^\text{46}\) § 3, 1999 N.C. Sess. Laws 266.
EVIDENCE

A. Journalists’ Testimonial Privilege

The General Assembly amended Article 7 of Chapter 8 of the General Statutes by adding section 8-53.9 which created a qualified privilege for journalists protecting against disclosure in any legal proceedings of any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist.¹ In order to overcome the privilege, one must show by the greater weight of the evidence, that the testimony or production sought: (1) is relevant and material to the proper administration of the legal proceeding; (2) that it cannot be obtained from alternate sources; (3) and that it is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought.²

An order to compel, any testimony or production shall be issued only after notice to the journalist and a hearing that must find clear and specific findings.³ A journalist has no privilege against disclosure of any testimony or production obtained as a result of the journalist’s eyewitness observations of criminal or tortious conduct including any physical evidence, or visual or audio recording of the observed conduct.⁴

B. Computerized Evidence

Recognizing new technology, the General Assembly amended evidence rules, codified in N.C. Gen. Stat. §§ 8-45.1, 8-45.3, 8-34, 153A-436, and 160A-490, to allow records of any business, institution, member of a profession or calling, or any department or agency of government that are kept in the regular course of business and stored on any form of permanent, computer readable media, such as a CD-ROM.⁵ The medium used to store the information must not be subjected to erasure or alteration.⁶ These provisions also apply to documents produced by the Department of

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2. Id.
3. Id.
4. Id.
6. Id.
Revenue, the Office of the Governor, Treasurer, Auditor, Secretary of State, Attorney General, Adjutant General, the Department of Cultural Resources, counties, and cities. 7

C. Impeachment - Rule 609

The General Assembly expanded Rule 609(a) of the North Carolina Rules of Evidence.8 This amendment expands the types of prior criminal records of a witness that are admissible for attacking the credibility of the witness. "Evidence that the witness has been convicted of a felony, or a Class A1, Class 1 or Class 2 misdemeanor" are admissible, so long as the information can be obtained from the witness or the public record.9

Billy Kessler
A. Family Law Arbitration Act

Chapter 50 of the North Carolina General Statutes was amended when the General Assembly added Article 3 entitled the Family Law Arbitration Act. This Act provides that upon agreement of the parties, there can be an arbitration of all issues arising from the marital relationship, except divorce. Under the Act the parties right to modification is preserved if there is a substantial change in circumstances of alimony, child support, or child custody. The Act allows for the default rules to be applied if the parties have not supplied such information in their agreement. For example, the Act provides the number of arbitrators, the rights of the parties, and the right to consolidate issues. The Act also sets out the procedures for confirming, changing, modifying, correcting, or vacating an award. The parties cannot waive their right to counsel and in all instances have the right to an attorney at the arbitration hearing.

The Article generally applies only to agreements entered into on or after October 1, 1999 and is not retroactive. The one instance in which an agreement made before this date can be effected by the provisions of the Family Law Arbitration Act is when the parties subsequently consent that their agreement made before October 1, 1999 will be bound by the Act.

Ashley P. Maddox

B. Uniform Child-Custody Jurisdiction and Enforcement

The Uniform Child-Custody Jurisdiction Act (UCCJA) in Article 1 of Chapter 50A of the General Statutes was repealed and Article 2, known as the Uniform Child-Custody Jurisdiction and

2. § 1, 1999 N.C. Sess. Laws 185.
3. Id.
5. Id.
7. Id.
8. Id.
Enforcement Act (UCCJEA) was enacted. The first part of the UCCJEA contains the Act's general provisions. The Act first defines terms that are important in child custody cases. It then states that adoption proceedings and proceedings pertaining to emergency medical care for a child are excluded from the Act. Indian tribes and foreign countries are treated as "states" for the most part under this Act.

The second part of the UCCJEA deals with jurisdictional matters. A North Carolina court shall have jurisdiction over the proceeding if it is the home state of the child. However, physical presence of a child or party is not necessary for a court to have jurisdiction. A court of North Carolina may communicate and cooperate with a court in another state concerning a child-custody proceeding. A court of North Carolina that has made a custody determination also has exclusive continuing jurisdiction until the child, the child's parent, and the person acting as a parent no longer reside in this state or no longer have a significant connection with this state. North Carolina courts also have temporary jurisdiction over children in some emergency situations until the appropriate state can enter a permanent order. The Act states that even though a court of this state has jurisdiction, it may decline jurisdiction because it is an inconvenient forum, which is determined based on several factors listed in the Act. Attorney's fees are no longer recoverable under the section dealing with improper forum. Further, the court must decline to exercise jurisdiction if it gains jurisdiction because the person seeking the jurisdiction has engaged in unjustifiable conduct. There are three exceptions to this section, and attorney's fees and costs may be awarded in unjustifiable conduct jurisdiction situations.

11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
17. Id.
18. Id.
19. Id.
20. Id.
21. Id.
about the child's present address and the present addresses of the persons with whom the child lives and information concerning any current or past custody proceedings must be included in the first pleading or in an attached affidavit. The court must seal this information and not disclose it to the other party or to the public if a party alleges under oath or in an affidavit that the health, safety, or liberty of a party or child would be jeopardized by disclosure of the information.

The third part of the UCCJEA concerns enforcement of child-custody determinations. The Act states that North Carolina courts must enforce an order for the return of a child made under the Hague Convention on International Child Abduction. A court of North Carolina must also recognize and enforce a child-custody determination by a court of another state if it is in substantial conformity with this Act. Custody determinations of other states which may be enforced in North Carolina include temporary visitation and registered child-custody determinations. The Act details a registration process by which North Carolina courts can confirm another state's custody order and the process by which a person can contest the validity of the order. The Act also describes the process by which an expedited enforcement of a child-custody determination can be obtained. This process includes a hearing in which the court orders that a party may take immediate physical custody of the child, unless one or more of three defenses listed is applicable to prevent this order. The party may file for the issuance of a warrant to effectuate the court order if the child is immediately likely to suffer serious physical harm or be removed from this state. An appeal may be taken from a final order in a proceeding under part three of the UCCJEA. Also, the prevailing party, including a state, shall be

23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
29. Id.
30. Id.
31. Id.
32. Id.
awarded necessary expenses, costs, and attorney's fees incurred during the course of the proceedings.\textsuperscript{33}

\textit{Sydney L. Lohr}

\section*{C. Safe Families Act}

The Safe Families Act passed by the General Assembly makes amendments to the domestic violence laws of North Carolina. The Act provides that if the state is able to get a federal government grant, by February 1, 2000, all domestic violence orders issued by a county sheriff and any modifications, terminations, or dismissals thereof are to be promptly entered into the National Crime Information Center registry.\textsuperscript{34} The Act formerly provided for orders to be entered in the Division of Criminal Information Network.\textsuperscript{35} Protective orders issued by another state or an Indian tribe are to be afforded full faith and credit by the North Carolina court system.\textsuperscript{36} Protective orders need not be registered to be given such status, but may be registered with the clerk of the superior court in any county.\textsuperscript{37}

To register a protective order, one must provide a copy of the order and an affidavit of the person protected by the order, stating that "to the best of that person's knowledge" the order is still in effect.\textsuperscript{38} The Act adds a new section to Chapter 50B, which provides that knowingly giving a false statement that a protective order is in effect is a Class 2 misdemeanor.\textsuperscript{39} Once a copy is registered with the clerk, a copy should then be sent to the sheriff of that county.\textsuperscript{40} An order should be entered in the National Crime Information Center registry if it has not already been entered by the issuing state.\textsuperscript{41} Notice of the registration of a protective order is not given to the defendant.\textsuperscript{42}

\begin{thebibliography}{9}
\bibitem{33} Id.
\bibitem{35} Id.
\bibitem{38} Id.
\bibitem{40} Id.
\bibitem{41} Id.
\end{thebibliography}
Violation of protective orders under the Act is a Class A1 misdemeanor.\(^{43}\) The Act provides for warrantless arrests of those in breach of a protective order upon a finding by law enforcement of probable cause that a defendant is in violation of such an order.\(^{44}\) The Act also broadens the prior warrantless arrest statute by allowing the inclusion of assaults, which have taken place between those with a personal relationship.\(^{45}\)

Lastly, the Safe Families Act repeals the portion of section 50B-5(a) of the General Statutes, which allowed law enforcement officers to ignore the complaint of an individual that had made multiple domestic violence complaints in the previous 48 hours.\(^{46}\) The Act now requires law enforcement to provide assistance as soon as practicable when an individual alleges that he/she or a minor child has been the victim of domestic violence.\(^{47}\)

Ashley P. Maddox

D. Protection from Violent Caregivers

In Act 318 of 1999, the General Assembly amended several provisions of the Juvenile Code within Chapter 7B. The purpose of the Act is to improve the protection of children from violence-prone caregivers. When a child is removed from the home due to physical abuse, the new Act requires the director to conduct a thorough review of the background of any alleged abuser.\(^{48}\) This review is to include a criminal history check and a review of any available mental records.\(^{49}\) A criminal history definition has been added and includes any conviction or pending indictment of a crime involving violence against a person.\(^{50}\) If the review shows that the alleged abuser has a history of violent behavior against people, the director is to petition the court to order the alleged abuser to submit to a complete mental health evaluation.\(^{51}\) The court must rule on the petition before returning the child to the

\(^{44}\) Id.
\(^{45}\) §7, 1999 N.C. Sess. Laws 23 (to be codified at N.C. Gen. Stat. § 15A-401(b)).
\(^{47}\) Id.
\(^{49}\) Id.
home.\textsuperscript{52} If the court finds the alleged abuser has a history of violent behavior against people, the court must order the alleged abuser to submit to the mental health evaluation.\textsuperscript{53} In determining whether the child may return to the home, the court must consider the mental health evaluation of the alleged abuser.\textsuperscript{54}

Prior to the Act, only a parent was under the authority of the court when a juvenile was adjudicated as abused, neglected or dependent.\textsuperscript{55} Under the new Act, the court has authority over a parent, guardian, custodian, stepparent, adult member of the juvenile's household, or adult relative entrusted with the juvenile's care.\textsuperscript{56} The court may require these individuals to undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication.\textsuperscript{57} The court may condition legal custody or physical placement of the juvenile on the individual's compliance with the plan of treatment.\textsuperscript{58}

\textbf{E. Increased Child Abuse Penalty}

In Act 451 of 1999, the General Assembly increased the criminal penalty for child abuse in certain cases. A parent or any other person providing care to or supervision of a child less than 16 years of age who (1) intentionally inflicts any serious bodily injury to the child or (2) intentionally assaults a child which results in serious bodily injury to the child, or which results in the permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.\textsuperscript{59} In other cases of child abuse, the penalty is a Class E felony.\textsuperscript{60} The new Act defines "serious bodily injury" as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of

\begin{footnotesize}
\begin{enumerate}
\item 53. Id.
\item 57. Id.
\item 58. Id.
\item 60. Id.
\end{enumerate}
\end{footnotesize}
the function of any bodily member or organ, or that results in pro-
longed hospitalization.  

Windy Smith

F. Community Service Dispositional Alternative for Level 2 Offenses

The General Assembly amended the Juvenile Code in N.C. Gen. Stat. § 7B-2506(23) by revising the community service disposi-
tional alternatives available to a judge, in cases of juvenile offenders who have been found delinquent for Level 2 offenses. The Act makes it clear that the juvenile may be ordered to serve up to 200 hours of community service, but there is not a 100 hour minimum.

G. Misuse of Laser Pointers

A new section was added to Article 8 of Chapter 14 of the General Statutes prohibiting the misuse of laser devices. The Act creates a new criminal offense of “Criminal use of laser device.” The Act defines the term “laser,” and makes it unlawful to intentionally point a laser device at a law enforcement officer or at another person’s head or face, while the device is emitting a laser beam. The Act exempts law enforcement officers, health care professionals, and others who are licensed or authorized by law to use a laser device if it is used in the performance of the person’s official duties. The Act does not apply to laser tag, paintball guns, and other similar games either.

Sydney L. Lohr

H. Threats Against Spouses and Children

In Act 262 of 1999, the North Carolina General Assembly expanded two statutes to make threats against a “person’s child,
sibling, spouse, or dependent” a criminal act.\textsuperscript{69} North Carolina Gen. Stat. § 14-277.1(a) was altered to make it a Class 1 misdemeanor to communicate such a threat orally or written.\textsuperscript{70} Section 14-196(a) made these threats on third parties Class 2 misdemeanors when communicated through the use of telephone or electronic-mail.\textsuperscript{71} Prior to amendment, these statutes only criminalized threats made directly to the party being threatened.

\textit{Ashley P. Maddox}

\begin{itemize}
\item \textsuperscript{69} Act of July 9, 1999, 1999 N.C. Sess. Laws 262.
\item \textsuperscript{70} § 2, 1999 N.C. Sess. Laws 262.
\item \textsuperscript{71} § 1, 1999 N.C. Sess. Laws 262.
\end{itemize}
A. Life and Health Insurance Amendments

1. Disability Income Insurance

In Act 351 of 1999, the General Assembly set forth standards for disability income insurance. A disability income insurance policy is defined as "a policy of accident and health insurance that provides payments when the insured is unable to work because of illness, disease, or injury." The Act requires every disability income insurance policy to include provisions disclosing terms of renewability, initial and subsequent conditions of eligibility, and preexisting conditions. Most notably, the Act provides that if "an insurer does not seek a prospective insured's medical history in the application or enrollment process, the insurer shall not deny a claim for disabilities that commence more than 24 months after the effective date of the insured person's coverage on the grounds the disability is caused by a preexisting condition." The insurer may contest coverage, however, if the insured fraudulently misrepresented his or her health condition during the application process.

2. Reconstructive Surgery Conforming Changes

In Act 351 of 1999, the General Assembly amended previously enacted legislation that required insurers to cover the cost of breast reconstruction surgery following a mastectomy. The effect of the 1999 amendments is to broaden available coverage for post-mastectomy surgical reconstructions. The statute formerly required every policy of accident or health insurance that provided coverage for a mastectomy to provide coverage for reconstructive breast surgery "resulting from a mastectomy." As amended, it requires such policies to provide coverage for any reconstructive surgery.
breast surgery "following a mastectomy." The amended statute further mandates coverage "for prostheses and physical complications in all stages of mastectomy, including lymphademas." The Act requires written notice of the availability of the coverage provided by this Act to be delivered to each person eligible for such coverage upon initial coverage and annually thereafter.

3. Viatical Settlements

Viatical settlement regulation was clarified and strengthened under Act 351 of 1999. A viatical settlement contract is a "written agreement entered into between a viatical settlement provider and a viator that establishes the terms under which the viatical settlement provider will pay consideration that is less than the expected death benefit of the viator's [life insurance] policy in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the policy to the viatical settlement provider." A viator is defined by the statute as "the owner or holder of a policy insuring the life of an individual who has an illness or condition that is catastrophic, life-threatening, or chronic, and who enters into or seeks to enter into a viatical settlement agreement." The Act enlarges the definition of "viatical settlement contract" to include a contract for a loan that is secured primarily by an individual life insurance policy, but not including a loan made by a life insurance company pursuant to the terms of a life insurance contract. All persons acting as viatical service providers, representatives, or brokers must register with the Commissioner of Insurance. Under the 1999 amendment, a viatical settlement broker may represent only the viator, and owes a fiduciary duty to the viator to act in the best interest of the viator and according to the viator's instructions. The viator's right to rescind a viatical settlement contract is shortened from thirty to fifteen days after the receipt of the contract consideration by the viator. The 1999 amendment also requires

8. Id.
9. Id.
10. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
viatical settlement providers to maintain records of each settlement for five years after the death of the viator.  

4. **Family Leave Credit Insurance**

Section five of Act 351 of 1999 provides for regulation of family leave credit insurance. Family leave credit insurance is defined under this section as "insurance on a debtor in connection with a specified loan or other credit transaction to provide payment to a creditor of the debtor for the installment payments or other periodic payments becoming due when the debtor suffers a loss of income because of a voluntary, employer-approved leave of absence [if based on specific] qualifying events." The specific qualifying events include (1) an accident involving sickness or incapacitation of an immediate family member who requires the assistance of the insured person, (2) the birth of a child to the insured, (3) adoption of a child by the insured, (4) the insured person's principal residence is in a federally declared disaster area, (5) the insured person being called to military duty, and (6) the insured person being called to jury duty. Permissible exclusions from coverage include the retirement or voluntary resignation from employment, or the involuntary unemployment, of the insured person, including a termination of employment due to willful or criminal misconduct of the insured person. An additional permissible exclusion from coverage can be based on the disability of the insured person. Persons less than 71 years old, and who have worked for wages for at least 30 hours per week for the previous five weeks, are eligible for coverage. This section requires every insurer writing family leave coverage insurance to file a report of the previous year's actuarial experience for such coverage.

*Phillip Lewis*

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19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
B. Insurance Covering Contraceptives

In Act 213 of 1999, the General Assembly amended Chapter 58 of the General Statutes by adding section 58-3-176, requiring every insurer that provides health plans covering prescription drugs to also provide coverage for prescription contraceptive drugs or devices. Coverage is extended to any medical procedure involving the insertion or removal of any medically necessary contraceptive device. The same deductibles, coinsurance, and other limitations that apply to prescription drugs shall also apply to contraceptive drugs or devices. Coverage for outpatient services shall also apply to coverage for contraceptive outpatient services. Contraceptive drugs or devices that are covered are identified as those that prevent pregnancy, are approved by the FDA, and are prescribed by a health care provider authorized to prescribe medications under the laws of this state. Two drugs not covered under this Act are “RU-486” or its equivalent and “Preven” or its equivalent. Under this Act, an insurer may not deny eligibility or make any attempt to prohibit future coverage of health benefits to avoid complying with this Act. An exception to the Act is that a religious employer may request an insurer to exclude coverage of contraceptives that are contrary to its religious beliefs. The insurer must provide written notice to each person covered under the plan that their employer has requested the exclusion of contraceptives from the health plan. This notice must appear in 10-point type or larger in the health benefit plan, application, and sales brochure. However, contraceptives that are essential to life or health shall not be excluded from a health insurance policy under any circumstances.

J. Bryan Boyd

26. Id.
27. Id.
28. Id.
29. Id.
30. Id.
32. Id.
33. Id.
34. Id.
35. Id.
A. Mobile Pharmacies

N.C. Gen. Stat. § 90-85.3 was amended by the General Assembly to include mobile pharmacy, in the Pharmacy Practice Act.¹ To be classified as a mobile pharmacy, a pharmacy must meet three criteria.² A mobile pharmacy is a pharmacy that is (1) either self-propelled or movable by a self-propelled vehicle, (2) operated by a non-profit corporation, and (3) dispenses prescription drugs to those "whose family income is less than two hundred percent (200%) of the federal poverty level" and do not receive reimbursement from Medicare, Medicaid, private insurance, or other governmental agencies at either no cost or reduced costs.³

Subsection (a1) was added to N.C. Gen. Stat. § 90-85.21 which states that a mobile pharmacy must register with the Board of Pharmacy annually.⁴ A mobile pharmacy is a single pharmacy and must pay the registration fee as such.⁵ However, the address of every location where the mobile pharmacy dispenses prescription drugs must be provided to the Board.⁶

B. Electronic Medical Records

The General Assembly has added a section to N.C. Gen. Stat. § 130A-115(c) which allows a physician responsible for completing and signing the medical certification of death to use an electronic signature or facsimile signature "when specifically approved by the State Registrar".⁷

N.C. Gen. Stat. § 90-412 was added to Article 29 of Chapter 90.⁸ It provides that licensed, certified, or registered health care providers or facilities may create and maintain electronic medical records in lieu of paper records.⁹ If a "consent to treatment or

2. Id.
3. Id.
5. Id.
6. Id.
9. Id.
authorization to disclose medical record information" is in writing, this writing must be preserved and its existence and location documented in the electronic record. Individuals authorized to authenticate the entries in the medical record may do so by either written, electronic, or digital signature. The medical entries should also be verified for correctness and labeled with the author's identification by the author. The legal rights and responsibilities are the same for both paper records as well as electronic records.

C. Confidentiality of Medical Information

The General Assembly amended N.C. Gen. Stat. § 58-67-180 to clarify that confidential information obtained by health maintenance organizations related to the diagnosis, treatment, or health of an individual may be disclosed pursuant to a court order.

N.C. Gen. Stat. § 131E-310 was amended in a similar fashion to clarify that confidential information obtained by provider sponsored organizations related to the diagnosis, treatment, or health of an individual may be disclosed pursuant to a court order.

Kathy A. Mercogliano

10. Id.
11. Id.
12. Id.
13. Id.
A. Funeral Procession

The General Assembly added a new section to Chapter 20 of the General Statutes by codifying the rules of the road regarding a "funeral procession." A funeral procession is defined as two or more vehicles accompanying the remains of a deceased person traveling to the funeral in which the lead vehicle is a law enforcement vehicle, funeral director or the lead vehicle displays a flashing amber or purple light, sign, pennant, flag or other insignia furnished by a funeral home indicating a funeral procession.

The Act created for the funeral procession rules require that each car in the procession operate with its lights illuminated. The lead vehicle is to obey all traffic-control signs but once it has progressed across the intersection all other vehicles can proceed without stopping provided they exercise reasonable care. Drivers in a procession shall operate on the right side of the road following the vehicle ahead as closely as reasonable and prudent. Drivers in a procession shall also yield the right-of-way to law enforcement vehicles. Drivers shall also proceed at the posted minimum speed. A driver coming in the opposite direction can choose to yield to the procession by slowing down or by pulling completely off the road if they choose to stop. Drivers proceeding in the same direction, but not in the procession shall not pass the procession except when the highway is marked for two lanes of travel in the same direction. Drivers not in the procession shall not knowingly drive between cars in the procession regardless of their traffic sig-

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
8. Id.
9. Id.
nal unless they have been directed to do so or they can do so safely without crossing the path of the funeral procession.\(^{10}\)

James C. Cummings

### B. Unlawful Use of Drivers License

In Act 299 of 1999, the General Assembly amended N.C. Gen. Stat. § 20-30, making it against the law to "present, display, or use a drivers license or learners permit that contains a false or fictitious name in the commission or attempted commission of a felony."\(^{11}\) An individual who violates this crime is guilty of a Class I felony.\(^{12}\) The Act also creates a Class I felony under N.C. Gen. Stat. § 20-37.8 for anyone who presents, displays, or uses a special identification card containing a false name in the commission or attempted commission of a felony.\(^{13}\)

J. Bryan Boyd

### C. DUI Amendments

1. Lower Tolerance For Repeat Offenders

Effective July 1, 2000, alcohol concentration tolerances for repeat offenders of impaired driving statutes will be lowered.\(^{14}\) Additionally, drivers having their licenses restored must agree to submit to chemical analysis at the request of law enforcement officers having reasonable grounds to believe the driver is operating a motor vehicle in violation of the lowered limitation.\(^{15}\) The Department of Motor Vehicles (DMV) is required to place the following alcohol concentration restrictions on restored licenses. For the first restoration the legal limit is reduced to 0.04.\(^{16}\) Second or subsequent restorations result in a 0.00 legal limit.\(^{17}\) The 0.00 limit also applies if the revocation was based upon: (1) a DWI conviction in a commercial vehicle, (2) driving while less than 21 years old after consuming alcohol or drugs, (3) felony death by

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10. Id.
12. Id.
17. Id.
vehicle, manslaughter or negligent homicide involving impaired driving, or (4) any revocation based upon these new lowered concentrations. The restrictions will remain on the driver’s license for: (1) seven years from the date of restoration if the person’s license was permanently revoked, (2) until the person’s twenty-first birthday if the revocation was for a conviction of driving while less than 21 years old after consuming alcohol or drugs, or (3) three years in all other cases. A driver that operates a motor vehicle in violation of the lowered restriction or willfully refuses to submit to chemical analysis will have their license revoked for an additional year.

2. Right to Hearing for Refusal to Submit to Chemical Analysis or Violating New Alcohol Concentration Restrictions

Drivers that refuse to submit to chemical analysis or violate their lower alcohol concentration restrictions are entitled to an administrative hearing prior to the revocation taking effect. If the hearing is properly requested, the driver is allowed to retain their driver’s license until the completion of the hearing. The driver is entitled to subpoena the charging officer, the chemical analyst and/or any other witnesses the driver deems necessary. The hearing is limited to consideration of the following issues: (1) whether the charging officer had reasonable grounds to believe that the driver violated the alcohol concentration restriction, (2) whether the driver was notified of their right to refuse chemical analysis, and (3) whether the driver’s license was under a special alcohol restriction; and (4) whether the driver submitted to the analysis of the charging officer, and if so, whether the concentration was greater than the license restriction. If the revocation is sustained, the driver must surrender their license at the hearing. The unsuccessful driver may petition the local Superior Court for discretionary review. Superior Court review is exclu-

18. Id.
19. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
sively limited to a review of the hearing record and only determines whether the hearing officer followed proper procedures and made sufficient findings of fact to support the revocation. There is no further appeal.

3. *Ignition Interlock*

Effective July 1, 2000, an ignition interlock system is required for the license restoration if revocation resulted from a DWI where the alcohol concentration was 0.16 or more or the driver has been convicted of an additional DWI within the preceding seven years of the current offense. A driver subject to this restriction may only drive a vehicle equipped with an ignition interlock system, must personally activate the ignition interlock before driving, and can not drive with an alcohol concentration of 0.04 or greater. The requirement shall remain in effect for one year if the revocation period was one year, for three years if the revocation period was four years, or for seven years if the revocation was a permanent revocation. A person violating any of the restrictions may be charged with the offense of driving while license revoked, and, if charged, will have their license immediately suspended until resolution of the charge. If the driver is not charged with driving while license revoked, shall have their license revoked by DMV for a period of one year, though they are entitled to administrative fact finding hearing. Ignition interlock readings at 0.04 or greater are not admissible at the administrative hearing or at the judicial DWLR charge as long as the driver subsequently blew less than 0.04 prior to beginning driving.

4. *Limited Driving Privilege Alcosensor Admissibility*

The refusal to submit to or the results of an Alcosensor may be admitted into evidence as proof that the holder of a limited driving privilege has consumed alcohol.

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28. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. § 6, 1999 N.C. Sess. Laws 406 (to be codified at N.C. Gen. Stat. § 20-179.3(j)).
5. Possession of Alcoholic Beverages

The General Assembly enhanced the penalty for the purchase or possession of alcoholic beverages by persons 19 or 20 years old from an infraction to a class 3 misdemeanor. However, a conviction can be expunged from the violator's criminal record, upon application to the court, if the date of conviction was prior to the violator's 21st birthday.

6. Other DWI Charges

The odor of alcohol on the breath of the driver is insufficient evidence by itself to prove beyond a reasonable doubt that a person was operating a commercial vehicle after consuming alcohol, unless the driver was offered and refused an alcohol screening test or chemical analysis. Notwithstanding any other provision of law, the results of an alcohol screening test may be used as evidence to determine if alcohol was present in the commercial driver's body. These provisions apply equally to the offense of operating a school bus, school activity bus, or child care vehicle after consuming alcohol.

Chadwick C. Lee

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39. Id.
PROPERTY

A. Forfeiture of Property Rights by Slayers

The General Assembly amended the slayer statute to provide that if the decedent dies intestate, any property which would have passed to the slayer by intestate succession shall pass to the slayer's living issue who would have been entitled to an interest in the property, if the slayer had predeceased the decedent.\(^1\) The property will be distributed to such issue per stirpes.\(^2\) If the slayer does not have any issue who would have been entitled to the property by intestate succession, then the property shall be distributed as if the slayer had predeceased the decedent.\(^3\)

If the decedent dies testate, then the property shall pass by the lapse statute, which is governed by N.C. Gen. Stat. § 31-42(a).\(^4\)

B. Elimination of Stamps for Deed Tax

The General Assembly removed the requirement that tax stamps be used to indicate whether the excise tax on conveyances of real estate had been paid.\(^5\) However, before the instrument may be recorded, the Register of Deeds must collect the tax due and mark the instrument to show the amount of tax paid and that it has been paid.\(^6\)

C. Tax Liens on Real Property

The General Assembly amended this section to improve the procedures for notifying owners and advertising tax liens on real property.\(^7\) After the governing body orders the tax collector to advertise the tax liens, the tax collector must send a notice to the listing owner and the record owner of each piece of property that

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2. Id.
3. Id.
4. Id.
6. Id.
is affected by the liens. The notice must be sent by first-class mail to the owner's last known address at least 30 days before the advertisement is to be published. The notice must state the principal amount of unpaid taxes and inform the listing owner that his/her name will appear in a newspaper advertisement of delinquent taxes. Any failure to mail the notice will not affect the validity of the tax lien or any foreclosure action.

When real property has been transferred by the listing owner after January 1, the posted notice and newspaper advertisement shall set forth the record owner of each parcel of land that has a lien for unpaid taxes, followed by a notation that the property was transferred to the record owner and the name of the listing owner.

The Act also allows foreclosure proceedings to begin 30 days after the advertisement, instead of 6 months.

Evan B. Horwitz

D. Unclaimed Property Act

In 1999 the General Assembly amended Chapter 116B of the General Statutes by adding Article 4, the “North Carolina Unclaimed Property Act.” This Act revises previous unclaimed property laws of North Carolina.

Article 4 details the presumptions associated with abandoned property. The Article consolidates the presumptions of abandonment with the indicators of interest, which are used to rebut the presumptions. Article 4 amended some of the time periods after which various types of property are presumed abandoned. Important changes include: changing the time period for money orders, cashier and teller checks, and certified checks uniformly to seven years (independent of amount), setting the time period for demand or savings deposits at five years (independent of amount),
reducing the time period for money owed to a retail customer from five to three years, changing the time period for life insurance and annuity contracts from five to three years, changing the time period for property held by a government entity from five years to one, changing the wages or other compensation for personal services from five to two years, and changing the time period for deposits or refunds owed to a subscriber by a utility from five years to one. 18

The Unclaimed Property Act adds to the list of property not abandoned gift certificates and electronic gift cards that bear no expiration date, prepaid calling cards issued by telephone utilities, manufactured home buyer’s deposits that dealers are authorized to retain, and certain credit balances maintained between business associations. 19

The Act explains the criteria for determining whether property that is presumed abandoned is subject to the custody of the state. 20 Holders of property presumed to be abandoned may deduct reasonable charges for the owner’s failure to retrieve the property only if there is a valid and enforceable written contract between the parties. 21 Holders of property presumed to be abandoned must make a good faith effort to locate the apparent owner of the property by sending written notice by first-class mail to the apparent owner. 22 Verified reports concerning the property must be made to the treasurer by holders of property presumed to be abandoned before November 1 of the year, and this Act imposes an additional ten dollar ($10) extension fee for processing the late report. 23

The new Article imposes a five-year statute of limitation for an action or proceeding to be brought by the Treasurer to enforce the law in situations where the holder of the presumed abandoned property has filed the required report. 24 Article Four provides that the Treasurer may provide pre-compliance reviews of holders’ compliance programs if requested by holders to ensure proper compliance with this Chapter. 25 The Unclaimed Property Act

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18. Id.
19. Id.
20. Id.
22. Id.
23. Id.
24. Id.
25. Id.

http://scholarship.law.campbell.edu/clr/vol22/iss2/5
increases the civil penalties that the Treasurer may charge for noncompliance to one thousand dollars ($1000) a day for the willful failure to report property and for filing of fraudulent reports up to a maximum of twenty-five thousand dollars ($25,000), plus twenty-five percent of the value of any property that should have been reported but was not.  

The new Act also changes the interest rate that is charged on non-reported but reportable property to not less than five percent but not greater than sixteen percent. Finally, the new Act requires persons who enter into agreements to try to locate abandoned property for a fee to pay a one hundred dollar ($100) per year registration fee to the Treasurer when they register annually.

B. Keith Faulkner

E. Exceptions to the Late Listing Penalty

The General Assembly amended and modified Chapter 105 to require the board of commissioners of each county to install a permanent listing system and obtain approval of that system from the Department of Revenue. The assessor, not the property owner, is responsible for listing all real property on the abstracts and tax records. Also, the 10% penalty for late listing does not apply to real property if there have been no improvements or change in ownership since it was last listed.

Evan B. Horwitz

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26. Id.
28. Id.
30. Id.
31. § 2, 1999 N.C. Sess. Laws 297 (to be codified at N.C. Gen. Stat. 105-312(h)).
WORKER'S COMPENSATION

A. Judicial Discretion in Subrogation of Employers' Liens Under Workers' Compensation

With Act 194, the General Assembly has re-worked N.C. Gen. Stat. § 97-10.2(j) to provide much greater guidance with regards to the subrogation of recoveries by employees under worker's compensation.1 Previously, the judge had the authority to determine the amount of the employee's subrogation of recovery against a third party if the employer had a lien and applied for the subrogation.2 However, the judge could only reduce such amounts if the judgement was less than the lien or there was a settlement in the case between the employee and the third party.3 The subrogation award was up to the judge's discretion, but there was little by way of guidance as to whether the judge should lessen the recovery and by how much the recovery should be lessened, if the judge should so decide.4 Under the new law, the judge can reduce the amount of the recovery of the employee regardless of the comparison between the lien and the recovery.5 Either party can apply for the reduction, but the amount, as indicated previously, is left up to the discretion of the judge.6 The General Assembly explicitly lists many factors, which the judge shall consider in deciding the subrogation amount.7 Initially, the judge shall consider, in addition to the amount of the recovery, any accrued or prospective workers' compensation benefits.8 There are many other statutory factors that the judge shall consider in his decision of whether reduction of the employee's recovery is appropriate and the extent of that reduction.9 Those listed include the following: "[T]he anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the

3. Id.
4. Id.
5. § 1, 1999 N.C. Sess. Laws 194.
6. Id.
7. Id.
8. Id.
9. Id.
future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, [and] the need for finality in the litigation." The list is not all-inclusive and ends by giving the court the authority to consider any other factors which it may deem to be "just and reasonable" in its determination of whether to subrogate the recovery and the amount that the subrogation is to take.\footnote{10} \footnote{11}

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