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EMAIL TO: All Sheriffs
FROM: Eddie Caldwell
Executive Vice President and General Counsel
North Carolina Sheriffs' Association
SENT: March 20, 2020
SUBJECT: G.S. 42-36.2 - Execution on Writ for Possession of Property ---
Impact of the Coronavirus Pandemic

The Issue

G.S. § 42-36.2(a), regarding execution on a Writ for Possession of Property, provides that the sheriff **shall** execute the writ "no more than five days from the sheriff's receipt thereof" (emphasis added).

In consideration of the coronavirus pandemic, there have been discussions about whether or not a sheriff can voluntarily decide to not comply with this General Statute and not execute the writ within 5 days as required by the statute.

While everyone recognizes the predicament likely faced by tenants being evicted during the coronavirus pandemic, the landlord has followed proper legal process and has obtained from the court a Writ for Possession of Property. Therefore, the law of North Carolina requires that the sheriff **shall** execute the writ "no more than five days from the sheriff's receipt thereof" (emphasis added).

The Sheriff's Legal Obligation

We are not aware of and have not found any legal authority in the General Statutes or in case law that authorizes the sheriff to fail to follow this statute, nor any legal authority in the General Statutes or in case law that authorizes the sheriff to fail to follow any other General Statute.

The Landlord's Option to Stop Execution of the Writ for Possession of Property

The person who does have the authority to stop the execution of the Writ for Possession of Property in a summary ejectment court case is the landlord. G.S. § 42-36.2(a)(2) provides that the sheriff shall remove the tenant's property within the 5 day time period **unless**: "the landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has



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paid all court costs charged to him and has satisfied his indebtedness to the landlord.”

Upon receipt of such a statement from the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed such a statement, the clerk shall make an entry of satisfaction on the judgment docket.

The Governor's Executive Orders

We are not aware of and have not found any legal authority for the Governor to authorize or direct a sheriff to fail to follow this statute. No such authority is contained in the recent Governor's Executive Orders No. 117 and No. 118. Also, no such authority can be found in the General Statutes that authorize issuance of the Governor's Executive Orders.

The Order of the Chief Justice of the Supreme Court of North Carolina

On March 19, 2020, the Chief Justice entered an Order that provides, in pertinent part:

Extension of Time and Periods of Limitation Pursuant to N.C.G.S. § 7A-39(b)(1)

I order that all pleadings, motions, notices, and other documents and papers that were or are due to be filed in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely filed if they are filed before the close of business on 17 April 2020.

I further order that all other acts that were or are due to be done in any county of this state on or after 16 March 2020 and before the close of business on 17 April 2020 in civil actions, criminal actions, estates, and special proceedings shall be deemed to be timely done if they are done before the close of business on 17 April 2020.

After much thoughtful analysis and discussion among Association attorneys and several sheriffs' office legal advisors, two different reasonable interpretations of the Chief Justice's Order have been identified. Since there is no legal process or mechanism for us to clarify the intent or determine the correct scope of the Chief Justice's Order, **both potential interpretations are attached at the end of this message**. Either of them, or neither of them, may ultimately be determined by our courts to be a correct interpretation of the Chief Justice's Order. We are sharing this email with the staff of Governor Cooper and Chief Justice Beasley so they are aware of the various interpretations.

Trial Court Judges

Although nothing has been documented in writing, some sheriffs have advised that they asked their local trial court judges if the judges could or would enter an Order authorizing the sheriff to not comply with the requirement in G.S. § 42-36.2(a), regarding execution on a Writ for Possession of Property, that provides that the sheriff shall execute the writ “no more than five days from the sheriff's receipt thereof (emphasis added). Those sheriffs report that their judges advised that neither the judge nor the sheriff had any authority to authorize non-compliance with the mandatory provision of the statute.

Accountability of the Sheriff

G.S. § 162-8 provides that a sheriff must furnish a bond. A claim could be filed against the sheriff's bond for the sheriff's failure to make "the due execution and return of process, the payment of fees and moneys collected, and the faithful execution of his office as sheriff."

G.S. § 128-16 provides that the sheriff "shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes:

- (1) For willful or habitual neglect or refusal to perform the duties of his office.
- (2) For willful misconduct or maladministration in office."

An action to remove the sheriff "may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding." G.S. § 128-17.

How an action under this statute might end up and how the Chief Justice's order could impact any such hearing is unknown at this point. Therefore, as is always the case where the actions of a sheriff could be viewed as failing to perform a duty mandated by our General Statutes, we recommend you consult with your own legal advisor or county attorney prior to making the decision to stop executing Writs for Possession of Property that have been ordered by the courts.

Alternative Interpretation A

It has been suggested that the part of the Chief Justice's Order, in the second paragraph, that provides that "all other acts....shall be deemed to be timely done if they are done before the close of business on 17 April 2020" should be interpreted to mean that sheriffs do not have to comply with the 5 day deadline clearly specified in G.S. § 42-36.2 for execution of a Writ for Possession of Property.

This order was issued pursuant to G.S. § 7A-39(b)(1), which states in pertinent part: "the Chief Justice may by order entered pursuant to this subsection extendthe time period or period of limitation within which pleadings, motions, notices, and other documents and papers may be timely filed and other acts may be timely done in civil actions, criminal actions, estates, and special proceedings...."

If G.S. § 7A-39(b)(1) could, by this Order, extend the time period for execution on all Writs for Possession of Property until April 17, 2020, then it must be concluded that this Order also extended the time period and deadlines until April 17, 2020 for the following additional mandatory actions:

1. --- Mandatory domestic violence arrests would be extended from being immediate until April 17, 2020. G.S. § 50B-4.1(b) --- A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a valid protective order excluding the person from the residence or household occupied by a victim of

- domestic violence or directing the person to refrain from doing any or all of the acts specified in G.S. § 50B-3(a)(9).
2. --- An arrested domestic violence defendant would be held in custody, instead of a maximum of 48 hours, until April 17, 2020. G.S. § 15A-534.1(b). A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.
 3. --- Instead of being held within 96 hours of arrest, the first appearance for arrested defendants would be continued until April 17, 2020. G.S. § 15A-601(c). Unless the defendant is released pursuant to Article 26 of this Chapter, Bail, first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, whichever occurs first.
 4. --- Instead of a law enforcement officer taking an arrested defendant for an Initial Appearance before a magistrate “without unnecessary delay,” the officer would not have to take the defendant for an Initial Appearance until April 17, 2020. G.S. § 15A-511(a) (1). A law-enforcement officer making an arrest with or without a warrant must take the arrested person without unnecessary delay before a magistrate as provided in G.S. § 15A-501.
 5. --- For Involuntary Commitment (IVC) respondents, instead of an officer taking the respondent for a First Examination “without unnecessary delay,” the officer would have until April 17, 2020 to do so. G.S. § 122C-263(a). Without unnecessary delay after assuming custody, the law enforcement officer or the individual designated or required to provide transportation pursuant to G.S. § 122C-251(g) shall take the respondent to a facility or other location identified by the LME/MCO in the community crisis services plan adopted pursuant to G.S. § 122C-202.2 that has an available commitment examiner and is capable of performing a first examination in conjunction with a health screening at the same location, unless circumstances indicate the respondent appears to be suffering a medical emergency in which case the law enforcement officer will seek immediate medical assistance for the respondent.
 6. --- For Involuntary Commitment (IVC) respondents, instead of the respondent getting a physician’s examination within 24 hours of arrival at a 24-hour facility, the examination would be delayed until April 17, 2020. G.S. § 122C-266(a). Except as provided in subsections (b) and (e), within 24 hours of arrival at a 24-hour facility described in G.S. § 122C-252, the respondent shall be examined by a physician.

There are numerous other General Statutes with similar deadlines. It seems unlikely that the Chief Justice’s Order would be intended to or be found to extend all of the above deadlines and all other deadlines in the General Statutes to April 17, 2020. And, if the Chief Justice’s Order was intended to do so, undoubtedly the Order could have precisely said so and left nothing to interpretation or speculation.

Alternative Interpretation B

Authority of the Chief Justice

The General Assembly, in G.S. § 42-36.2, has set the deadline by which the sheriff shall execute on a valid Writ for Possession of Property as five (5) days. While the Chief Justice has no direct authority to overrule the General Assembly as to a matter of statutory law, it is also possible to interpret that the General Assembly has delegated, in times of emergency, authority to the Chief Justice under G.S. § 7A-39(b)(1) to issue orders, such as the Order issued on March 19, to suspend compliance with deadlines imposed by the statutes as to processes which fall under the authority of the Courts.

Effect of the Order

The Order only has to do with timing. It does not otherwise relieve a sheriff from any of his/her duties and responsibilities, nor does it abrogate the sheriff's responsibilities upon expiration of the Order's covered time. The Chief Justice's Order very-nearly mirrors the language as to what is allowed under Her Honor's statutory authority in G.S. § 7A-39(b)(1). Her Honor's Order indicates that it intends to cover all "*acts that were or are due to be done.*" In essence, one interpretation is that the Order is setting a new due date for legal acts required under law.

Does the Order apply to the execution of a Writ for Possession of Property?

Breaking down the language, it certainly may. Here's why:

- A. The summary ejectment process contained in G.S. § 42 is very clearly a "*civil action.*"
- B. The next question is whether the execution by the sheriff of a Writ for Possession of Property is incorporated within the "*other acts*" referenced in the Chief Justice's Order. The phrase "other acts" does not appear to be a term of art, as it is not defined in Chapter 7A (which outlines the role of the Judicial Branch), it appears nowhere in the NC Rules of Civil Procedure, nor is it defined in the Criminal Procedure Act. Based on this, we must give those words the best interpretation possible based on their plain meaning. Based on the plain meaning of the term "*other acts,*" in the context of the judicial function, it is reasonable to interpret that one such "act" would be the sheriff's execution of a Writ for Possession of Property as required under G.S. § 42-36.2.

Sheriff as an Officer of the Courts

How does this apply to sheriffs? Under G.S. § 162-14, the sheriff has a duty to execute civil processes and "*make due return*" of those processes. When the sheriff serves a Writ for Possession of Property, he/she is acting as an officer of the court in advancing the interests of a civil plaintiff in possession of real property. This duty is one which the sheriff alone can perform and the Chief Justice's Order in no way alleviates the sheriff from his/her obligation to perform that duty. Instead, the Order can be interpreted to allow the sheriff additional time in which to have performed that duty in a timely fashion. So, rather than five (5) days, the sheriff would have until April 17 to execute on the writ of possession and still be within the time allowed by G.S. § 42-36.2 to have validly executed the writ of possession.

The Chief Justice's Order is not a mandate

The Chief Justice's Order can be interpreted as to allow the sheriff discretion as to when "due to be done" may occur... which, in this case, is no later than April 17. This interpretation does not mean that Writs for Possession of Property received between now and April 17 are invalid in any

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way. Nothing in the Chief Justice's Order would seem to prevent a sheriff from doing "business as usual." If a writ is received that otherwise appears to be valid for service, it can certainly be served, as normal, within the guidelines of the statutes. What the Order may apparently give to sheriffs is the ability to use some discretion in deciding, on a case-by-case basis, whether or not the writs should be served on the normal schedule, or perhaps delayed for service until closer to April 17 based on the health crisis we are facing statewide. At this point, without any further Orders from the Chief Justice, it appears that April 17 is a hard deadline. This may mean that if a sheriff were to delay service based on this Order, Writs for Possession of Property may need to begin being served in advance of the April 17 deadline to avoid having to serve a great number on one day.

As always, if you have any questions or need any additional information, please call me at 919-459-1052.

Thanks....Eddie C.



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