

NORTH CAROLINA GENERAL ASSEMBLY  
1969 SESSION

CHAPTER 895  
SENATE BILL 651

1 AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE AND CERTAIN OTHER  
2 STATUTES RELATING TO CIVIL PROCEDURE.

3  
4 The General Assembly of North Carolina do enact:  
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6 **Section 1.** G.S. 1A-1, Rule 4(a) is hereby amended and rewritten to read as follows:

7 "(a) Summons — issuance; who may serve. Upon the filing of the complaint, summons  
8 shall be issued forthwith, and in any event within five days. The complaint and summons shall  
9 be delivered to some proper person for service. In this State, such proper person shall be the  
10 sheriff of the county where service is to be made or some other person duly authorized by law  
11 to serve summons. Outside this State, such proper person shall be anyone who is not a party  
12 and is not less than 21 years of age or anyone duly authorized to serve summons by the law of  
13 the place where service is to be made. Upon request of the plaintiff separate or additional  
14 summons shall be issued against any defendants. A summons is issued when, after being filled  
15 out and dated, it is signed by the officer having authority to do so. The date the summons bears  
16 shall be prima facie evidence of the date of issue."

17 **Sec. 2.** G.S. 1A-1, Rule 4(j)(1) and Rule 4(j)(2) are hereby amended and rewritten  
18 to read as follows:

19 "(1) Natural Person. Except as provided in subsection (2) below, upon a natural  
20 person:

21 a. By delivering a copy of the summons and of the complaint to him or  
22 by leaving copies thereof at the defendant's dwelling house or usual  
23 place of abode with some person of suitable age and discretion then  
24 residing therein; or b. By delivering a copy of the summons and of  
25 the complaint to an agent authorized by appointment or by law to be  
26 served or to accept service of process or by serving process upon  
27 such agent or the party in a manner specified by any statute.

28 (2) Natural Person Under Disability. Upon a natural person under disability by  
29 serving process in any manner prescribed in this Section (j) for service upon  
30 a natural person and, in addition, where required by paragraph a or b below,  
31 upon a person therein designated.

32 a. Where the person under disability is a minor, process shall be served  
33 separately in any manner prescribed for service upon a natural person  
34 upon a parent or guardian having custody of the child, or if there be  
35 none, upon any other person having the care and control of the child.  
36 If there is no parent, guardian, or other person having care and  
37 control of the child when service is made upon the child, then service  
38 of process must also be made upon a guardian ad litem who has been  
39 appointed pursuant to Rule 17.

40 b. If the plaintiff actually knows that a person under disability is under  
41 guardianship of any kind, process shall be served separately upon his  
42 guardian in any manner applicable and appropriate under this Section  
43 (j). If the plaintiff does not actually know that a guardian has been

appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17."

**Sec. 3.** G.S. 1A-1, Rule 4(j)(6), Rule 4(j)(7) and Rule 4(j)(8) are hereby amended and rewritten to read as follows:

"(6) Domestic or Foreign Corporation. Upon a domestic or foreign corporation:

- a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute.

(7) Partnerships. Upon a general or limited partnership:

- a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney in fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf or by leaving copies thereof in the office of such general partner, attorney in fact or agent with the person who is apparently in charge of the office.
- b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this Section (j).

(8) Other Unincorporated Associations and Their Officers. Upon any unincorporated association, organization, or society other than a partnership:

- a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute."

**Sec. 4.** G.S. 1A-1, Rule 4(j) is hereby amended by adding a new subdivision (9) at the end thereof to read as follows:

"(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or is not Inhabitant of or Found Within State. - Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this Section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:

- a. Personal Service Outside State. Personal service may be made on any party outside this State by anyone authorized by section (a) of this

rule and in the manner prescribed in this Section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G. S. 1-75.10(1).

b. Registered Mail. Any party subject to service of process under this subsection(9) may be served by mailing a copy of the summons and complaint, registered mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.

c. Service By Publication. A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph B. or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a county in the same judicial district, once a week for three successive weeks. If the party's post office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(b) and the circumstances warranting the use of service by publication.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action which

title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading, within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) be subscribed by the party seeking service or his attorney and give the postoffice address of such party or his attorney; and (vii) be substantially in the following form:

## NOTICE OF SERVICE OF PROCESS BY PUBLICATION

## STATE OF NORTH CAROLINA

..... COUNTY

In the ..... Court

[Title of action or special proceeding] To [Person to be served]: Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than ....., 19....) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.) You are required to make defense to such pleading not later than (....., 19....) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ..... day of ....., 19.....

..... (Attorney) (Party)

..... (Address)

- d. Alternative Provisions for Service in a Foreign Country. Where service under this subsection (9) is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (iii) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer or a managing or general agent; or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (v) as directed by order of the court. Service under (iii) or (v) may be made by any person authorized by section (a) of this rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, the order of the court or paragraph b hereof, in which case there shall be included an affidavit or certificate of addressing and mailing by the clerk of the court, or by the law of the foreign country.
- e. Attack on Judgment by Default. No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence,

under some other subsection of this section (j) or under a different paragraph of this subsection (9)."

**Sec. 5.** G.S. 1A-1, Rule 17(a) is hereby amended and rewritten to read as follows:

"(a) Real Party in Interest. Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

**Sec. 6.** (a) G.S. 1A-1, Rule 17(b) is amended by renumbering subsection (6) thereof as subsection "(7)" and inserting the following new subsection "(6)":

"(6) When guardian ad litem not required in domestic relations actions. Notwithstanding any other provisions of this Rule, an infant who is competent to marry, and who is 18 years of age or older, is competent to prosecute or defend an action or proceeding for his or her absolute divorce, divorce from bed and board, alimony pendente lite, permanent alimony with or without divorce, or an action or proceeding for the custody and support of his or her child, without the appointment of a guardian ad litem."

**Sec. 7.** G.S. 1A-1, Rule 18(a) is amended and rewritten as follows:

"(a) Joinder of Claims. A party asserting a claim for relief as an original claim, counterclaim, crossclaim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party."

**Sec. 8.** G.S. 1A-1, Rule 34 is hereby amended by deleting that paragraph of the Rule numbered "(b)" and entitled "Discovery Without Court Order." and by deleting the letter and symbols "(a)" from the first line of Rule 34.

**Sec. 9.** G.S. 1A-1, Rule 40 is hereby amended by rewriting the catchline to read "Assignment of Cases for Trial; Continuances.", making Rule 40 as presently written subsection (a) and adding a subsection (b) to read as follows:

"(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require."

**Sec. 10.** G.S. 1A-1, Rule 41 is hereby amended and rewritten to read as follows:

"Rule 41

"DISMISSAL OF ACTIONS.

"(a) Voluntary Dismissal; Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23 (c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without

prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

- (2) By Order of Judge. Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiffs instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

"(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

"(c) Dismissal of Counterclaim; crossclaim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

"(d) Costs. A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall dismiss the action."

**Sec. 11.** G.S. 1A-1, Rule 50(b) is hereby amended and rewritten to read as follows:

"(b) Motion for Judgment Notwithstanding the Verdict.

- (1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the

judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or deny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

- (2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redid the motion for a directed verdict in accordance with Rule 50(b)(1)."

**Sec. 12.** G.S. 1A-1, Rule 52(a) is hereby amended and rewritten to read as follows:

"Rule 52

"FINDINGS BY THE COURT

"(a) Findings. (1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

**Sec. 13.** G.S. 1A-1, Rule 53(a)(1) is hereby amended and rewritten to read as follows:

- "(1) By consent. Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without divorce or actions in which a ground of annulment or divorce is in issue."

**Sec. 14.** G.S. 1-75.10(1)b is hereby amended to read as follows:

- "b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j)(9)(d) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made."

**Sec. 15.** G.S. 1-271 is hereby amended by adding at the end thereof a new sentence to read as follows:

"A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved."

**Sec. 16.** G.S. 50-13.3(b) is hereby amended by striking out the period at the end thereof and adding thereto the words and figures, "and G. S. 1A-1, Rule 65".

**Sec. 17.** G.S. 50-13.4(f) is hereby amended by:

- (1) Striking out of subdivision "(2)" the letters and figures, "G.S. 1-227" and inserting in lieu thereof "G.S. 1A-1, Rule 70".
- (2) Inserting in subdivision "(5)", immediately after the words "General Statutes" and before the comma, the words and figures, "and G.S. 1A-1, Rule 65".

**Sec. 18.** G.S. 50-16.7 is hereby amended by:

- (1) Striking out of subsection "(c)" the letters and figures, "G.S. 1-227" and inserting in lieu thereof "G.S. 1A-1, Rule 70".
- (2) Inserting in subsection "if", immediately after the words "General Statutes" and before the comma, the words and figures, "and G.S. 1A-1, Rule 65".

**Sec. 19.** G.S. 1-65.5 and Article 3 of Chapter 1B of the General Statutes are hereby repealed.

**Sec. 20.** All laws and clauses of laws in conflict with this Act are hereby repealed.

**Sec. 21.** This Act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This Act takes effect on the same date as Chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws relating to Civil Procedure. In the construction of that Act and this Act, no significance shall be attached to the fact that this Act was enacted at a later date.

In the General Assembly read three times and ratified, this the 19th day of June, 1969.