



General Statutes Commission

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MEMORANDUM

To: Senate Judiciary
From: General Statutes Commission
Re: SB 729 (GSC Modernize Partition Laws)
Date: May 15, 2020

General Comments

Under current law, when property is concurrently owned by multiple cotenants, a cotenant has a right to partition the property in a special proceeding before a clerk of superior court. There are two partition procedures: (i) actual partition, where property is physically apportioned among the cotenants, and (ii) partition sale, where property is sold and the sale proceeds are divided among the cotenants.

This bill modernizes the partition of property statutes by reorganizing them into a new chapter, updating and clarifying language, and making substantive changes, including the following:

- Generally, the court shall allocate among all the cotenants those reasonable attorneys' fees incurred for the benefit of all the cotenants.
- The petitioner is not required to serve or join spouses of cotenants of real property, unless the spouse is also a cotenant.
- A cotenant of real property has a right to contribution from the other cotenants for the cotenant's payment of the property's carrying costs and improvements.
- A party to whom a share of real property has been apportioned in an actual partition may obtain an order for possession of the share.

This bill also makes conforming and technical amendments to statutes referencing the current partition chapter, which include: (i) updating references to the current partition chapter, (ii) replacing legalese with plain English, (iii) fixing punctuation, (iv) making stylistic updates, (v) fixing the format of citations and lists, (vi) making language gender-neutral, (vii) reorganizing language, (viii) deleting technically unnecessary language, and (ix) clarifying ambiguous references. This bill also makes technical, conforming, and modernizing amendments to the elective life estate statute, some of which are requested by the Real Property Section of the N.C. Bar Association.

The General Statutes Commission organized a Partition Task Force that studied the partition statutes and made recommendations to the Commission. In preparing this bill, the Commission examined these recommendations and received ongoing input from the Partition Task Force. The members of the Partition Task Force are Starkey Sharp, Judith Welch Wegner, Paul Stam, and C. Thomas Steele, Jr.

In addition to publishing its drafts online, the Commission circulated a draft of this bill to dozens of groups and individuals, including the N.C. Bar Association, Conference of Clerks of Superior Court, Administrative Office of the Courts, Land Loss Prevention Project, and Professor Meredith

Smith at the UNC School of Government. The Commission is unaware of any opposition to this bill.

Specific Comments

Part I of the bill recodifies and modernizes the partition of property statutes, as follows:

Section 1 creates and organizes a new chapter on partition law as Chapter 46A of the General Statutes, and **Section 2** recodifies existing partition law into the new chapter.

Section 3 amends the new chapter, as follows:

Article 1. General Provisions.

§ **46A-1** continues to provide that a partition is by special proceeding. This bill makes stylistic changes, replaces legalese with plain English, clarifies an ambiguous reference, and adds a reference to the subchapter on special proceedings.

§ **46A-2** continues to provide that the period of time for answering a summons is as provided in G.S. 1-394 and that a petition for partition must give notice about the possibility of free legal services and the allocation of attorneys' fees. This bill adds more information to the section catchline, makes a stylistic change to the introductory language of subsection (b), and makes a conforming change to a new section on attorneys' fees (§ 46A-3).

§ **46A-3** is a new section that provides that the court generally shall allocate among all the cotenants those reasonable attorneys' fees incurred for the benefit of all the cotenants. § 46A-3 also provides that attorneys' fees incurred by a cotenant in disputing the method of partition or the division of partition sale proceeds shall be allocated among those cotenants aligned with the cotenant on that issue. § 46A-3 also provides that the court has discretion to allocate among the parties other reasonable attorneys' fees.

Article 2. Partition of Real Property.

Part 1. General Provisions.

§ **46A-20** continues to provide that a partition proceeding may be brought in the county where the real property is located or, if the real property is located in more than one county, in any county where the property is located. This bill makes stylistic changes, replaces legalese with plain English, deletes technically unnecessary language, and adds that if the real property is located in more than one county, a petitioner shall file a notice of lis pendens in each of the counties other than the county where the proceeding is pending.

§ **46A-21** continues to provide that the following may petition to partition real property: a tenant in common, a joint tenant, or, pursuant to G.S. 28A-17-3, the personal representative of a deceased tenant in common or deceased joint tenant. This bill makes stylistic changes, replaces legalese with plain English, and adds the following:

- All tenants in common and joint tenants are necessary parties, and any person with an interest in the property, lessee of the property, or holder of a lien, mortgage, or deed of trust is a proper party.
- The petitioner is not required to serve or join spouses of cotenants, unless the spouse is also a cotenant.

§ 46A-22 continues to provide that if a petitioner cannot ascertain the name of a party after due diligence, the court shall order service by publication. It also continues to provide that an unknown or unlocatable party shall be represented by a guardian ad litem. This bill makes stylistic changes, replaces legalese with plain English, replaces "which" with "that," clarifies that the court shall also order service by publication if the petitioner cannot ascertain the location of a party, and adds references to N.C. Rules of Civil Procedure 4 and 17.

§ 46A-23 continues to provide that a judgment creditor of a cotenant may seek an actual partition of real property and may execute the judgment against the share apportioned to the judgment debtor by setting aside the judgment debtor's homestead in the share and selling the remaining property. This bill shortens the section catchline, reorganizes this section into subsections, makes stylistic changes, replaces legalese with plain English, makes language gender-neutral, deletes technically unnecessary language, and adds references to Article X of the N.C. Constitution and Article 16 of Chapter 1C of the General Statutes.

§ 46A-24 continues to provide that when title to the mineral interests of real property has been separated from the title to the surface of the property, a cotenant of the mineral interests may partition the mineral interests without joining the owners of the surface and a cotenant of the surface may partition the surface without joining the owners of the mineral interests. This bill makes stylistic changes, replaces legalese with plain English, and clarifies that this provision also applies to oil and gas interests.

§ 46A-25 clarifies and elaborates that when the real property is subject to a contingent future interest, the following requirements must be satisfied for the judgment to be valid and effective upon all persons having an interest in the property:

- All persons with a present or vested future interest, persons in being with a contingent future interest and that would have a present interest if the contingency had occurred when the proceeding was commenced, and persons not in being with a contingent future interest are parties to the proceeding.
- All unborn individuals, parties not in being, parties who are minors or incompetent adults and who do not have a guardian of the estate or general guardian, and unknown or unlocatable parties are represented by a guardian ad litem.

This bill rephrases unclear language, replaces legalese with plain English, makes stylistic changes, reorganizes the section into lists, and adds a reference to N.C. Rule of Civil Procedure 17.

§ 46A-26 sets out the different methods of partition of real property in a list and continues to provide that in addition to an actual partition and a partition sale, (i) part of real property may be partitioned by actual partition and the remaining part sold in a partition sale and (ii) part of the real property may be partitioned and the remaining part held in cotenancy. This bill also makes stylistic changes, adds references to other parts of the article, and adds that the court shall not order a cotenant to continue to hold property in cotenancy over the cotenant's objection.

§ 46A-27 is a new section that provides that in a real property partition proceeding, a cotenant may on application seek contribution from the other cotenants for the cotenant's payment of carrying costs and improvements. Carrying costs include property taxes paid during the preceding 10 years, homeowner's insurance, repairs, and payments for a loan to acquire the real property. The value of improvements is calculated as the lesser of either the value added to the property by the improvements or the actual costs of the improvements.

§ 46A-28 continues to provide that a court may make interlocutory orders in the best interest of the parties. In addition to making stylistic changes, this bill adds that (i) the court may order access to real property for the purpose of inspecting, surveying, appraising, or selling the property, (ii) a party making a written application for an interlocutory order shall serve it on all other parties and any other person the court may require, and (iii) if a party opposes the motion or requests a hearing on it, the court shall hold a hearing.

§ 46A-29 continues to provide that parties may agree to a mediation of a partition. By placing this provision in Part 1 (General Provisions), this bill clarifies that this provision applies to both an actual partition and a partition sale. This bill also clarifies that parties may agree to a mediation at any time during the proceeding and that the court may, on its own motion, order a mediation before considering whether to order a partition sale. This bill also deletes technically unnecessary language, makes stylistic changes, and replaces legalese with plain English.

Part 2. Actual Partition.

§ 46A-50 continues to provide that in an actual partition, the court shall appoint three disinterested commissioners to apportion the property and these commissioners shall be compensated, shall take an oath, and may be removed by the court for unreasonable delay or neglect. This bill adds a new section catchline and subsection catchlines, makes stylistic changes, replaces legalese with plain English, deletes technically unnecessary language, adds a reference to Chapter 11 of the General Statutes, and deletes language about a commissioner being held in contempt and fined for unreasonable delay or neglect.

§ 46A-51 continues to provide that the commissioners shall inspect the real property and apportion it into (i) shares proportionate in value to the cotenant's interests or (ii) to the extent necessary to make an equitable partition, shares disproportionate in value where the shares of disproportionately greater value are charged with owelty, to be paid to the shares of disproportionately lesser value. § 46A-51 also continues to provide that owelty bears interest until paid and that owelty apportioned to a minor is payable when the minor becomes 18 years old, except that if the minor has a general guardian, the owelty is payable when the general guardian receives assets that may be used to pay it. This bill adds a new section and subsection catchlines, makes stylistic changes, replaces legalese with plain English, makes language gender-neutral, deletes a requirement for the sheriff to summon the commissioners to the property, adds that in apportioning shares, the commissioners may consider a court order for contribution, adds a reference to G.S. 24-1, and adds the term "guardian of the estate" to the provision about when owelty is payable by a minor with a general guardian.

§ 46A-52 continues to provide that if there are unknown cotenants or cotenants whose title is in dispute, their shares shall be apportioned together as one parcel. § 46A-52 also continues to provide that if two or more cotenants contest the same undivided interest, the court is not required to decide the issue before ordering a partition. This bill makes stylistic changes, replaces legalese with plain English, and reorganizes the current provision into § 46A-52, as subsections, and § 46A-53.

§ 46A-53 continues to provide that if requested by two or more cotenants, the commissioners may, by order of the court, apportion their shares in common, as one parcel, so long as doing so does not injure a cotenant. This bill adds a section catchline, makes stylistic changes, and replaces legalese with plain English.

§ 46A-54 continues to provide that the clerk may authorize the commissioners to propose in their report the dedication of part of the real property for a street and that for the dedication to affect the interest of a minor or a person under a legal disability, it must be approved by a superior court judge. This bill makes stylistic changes, replaces legalese with plain English, and clarifies that a dedication affecting an incompetent adult also must be approved by a superior court judge.

§ 46A-55 continues to provide that the commissioners shall file a report that describes the real property, the shares apportioned, and any owelty charged. § 46A-55 also continues to provide that the commissioners may employ a disinterested surveyor to prepare a map, to be included in their report. This bill adds a new section catchline and subsection catchlines, makes stylistic changes, replaces legalese with plain English, deletes technically unnecessary language, makes language gender-neutral, and adds that the commissioners shall serve the report on all the parties at the time of filing.

§ 46A-56 continues to provide that (i) absent an exception from a party, the clerk shall confirm the commissioners' report and (ii) if a party excepts, the clerk shall either confirm the report, recommit the report for correction or further consideration, vacate the report and direct the same commissioners to reapportion the property, or vacate the report and appoint new commissioners. § 46A-56 also continues to provide the procedures for appealing and seeking relief from an order of confirmation for mistake, fraud, or collusion. This bill adds more information to the section catchline, replaces the term "impeachment" with "motion for relief," provides that an exception must be filed within 10 days of service of the commissioner's report on all the parties, makes stylistic updates, replaces legalese with plain English, reorganizes language, fixes the format of a list, and replaces "may not" with "shall not" to conform to this State's drafting conventions.

§ 46A-57 continues to provide that the commissioners' report and the order of confirmation shall be enrolled and certified to the register of deeds and that the report is binding among the parties and the parties' heirs and assigns. This bill makes stylistic changes, replaces legalese with plain English, and deletes an obsolete sentence.

§ 46A-58 continues to provide that the clerk shall enter any owelty on the judgment docket and that when the owelty is paid, this entry shall be marked satisfied. This bill shortens the section catchline, makes stylistic changes, replaces legalese with plain English, deletes obsolete language, and makes language gender-neutral.

§ 46A-59 is a new section that provides that a party to whom a share of property has been apportioned may obtain an order for possession of the share. § 46A-59 lists the procedural requisites for when an order for possession may be issued and provides that the sheriff shall be authorized to enforce the order.

Part 3. Partition Sale.

§ 46A-75 continues the statutory preference for an actual partition by providing that a court must find that an actual partition would cause substantial injury to a party before it may order a partition sale. This bill reorganizes this provision, makes stylistic changes, replaces legalese with plain English, and adds references to other provisions of the new partition chapter.

§ 46A-76 continues to (i) incorporate the article on judicial sales into the partition sale procedure, (ii) prohibit a clerk from conducting a partition sale, and (iii) and provides that if the

court orders a public sale, the commissioner shall certify that a copy of the notice of sale was mailed to the parties. This bill reorganizes these provisions (including transferring the substance of a sentence to § 46A-83(b)), adds subsection catchlines, clarifies an ambiguous reference, makes stylistic changes, replaces legalese with plain English, makes language gender-neutral, clarifies that the court is not required to appoint more than one commissioner in a partition sale, clarifies that the notice of sale procedure applies to public sales only, adds a reference to N.C. Rule of Civil Procedure 4(j), and eliminates the distinction in the procedure between a notice of sale and notice of resale.

§ 46A-77 continues to provide that a cotenant who enters the high bid at a partition sale shall receive a credit for the undivided interest already owned by the cotenant. This bill adds a section catchline, makes stylistic changes, replaces legalese with plain English, and adds a reference to § 46A-27 on carrying costs.

§ 46A-78 continues to provide that if the real property is subject to a life estate, a life tenant shall receive the value of the life tenant's out of the sale proceeds. This bill makes stylistic changes, replaces legalese with plain English, clarifies that the life tenant's share shall be calculated according to mortality tables, deletes the option for a life tenant to receive an annual payment, and clarifies that the owners of the remainder or reversionary interest have no interest in the payment to the life tenant.

§ 46A-79 continues to provide that a remainder or reversionary interest in property may be partitioned so long as it does not interfere with the life estate. This bill makes stylistic changes, replaces legalese with plain English, and makes language gender-neutral.

§ 46A-80 continues to provide that standing timber may be partitioned by sale separate from the real property and that if the property is subject to a life estate, the life tenant shall be made a party and is entitled to receive the life tenant's share of the proceeds. This bill makes stylistic changes, replaces legalese with plain English, and reorganizes this provision into subsections.

§ 46A-81 continues to provide the court shall order a partition sale of mineral interests if it finds that it is in the cotenant's best interest and that actual partition of the mineral interests would injure some or all of the cotenants. This bill expands the provision to include oil and gas interests, reorganizes this provision as a list, makes stylistic changes, and replaces legalese with plain English.

§ 46A-82 continues to provide that if real property is required for public purposes and the cotenants' interests would be promoted by a partition sale, the court shall order a partition sale of the property. This bill replaces "public use" with "public purposes" in the section catchline to conform with the statutory text, makes stylistic changes, replaces legalese with plain English, and adds references to § 46A-3 on attorneys' fees and G.S. 6-21 on court costs.

§ 46A-83 continues to provide that within 15 days of an order confirming a partition sale, the purchaser or a party may petition the court to revoke the order upon the following grounds:

- In the case of a purchaser, a lien remains unsatisfied on the property.
- In the case of a party:
 - Notice of the partition was not served on the party.
 - Notice of the sale was not mailed to the party.
 - The price is inadequate and inequitable and will result in irreparable damage to the owners of the property.

§ 46A-83 also carries forward the procedural provisions for a petition of revocation, including service of the petition, notice of a hearing on the petition, the petitioner's evidentiary burden, and the court's actions following a successful petition. This bill adds subsection catchlines, fixes a typographic error in subsection (a), makes stylistic changes, replaces legalese with plain English, fixes the format of lists, and adds references to § 46A-76 on sale procedure.

§ 46A-84 continues to provide that in the case of a petition for revocation based on an inadequate price, the court may order an independent appraisal of the property. § 46A-84 also carries forward the procedural provisions regarding the appraisal and the court's actions following a successful petition. This bill adds a section catchline, provides that the court shall determine the allocation of the cost of the appraisal among the parties requesting the appraisal, and replaces legalese with plain English.

§ 46A-85 continues to provide that (i) an order confirming a partition sale becomes final 15 days after entry and may be appealed within 10 days of becoming final, (ii) the successful bidder may purchase the property when the order of confirmation becomes final, (iii) the deed shall convey such title and estate as the parties had in the property, and (iv) upon receipt of the sale proceeds, the court shall secure to each cotenant the cotenant's share of the sale proceeds. This bill adds a section catchline and subsection catchlines, deletes technically unnecessary language, makes stylistic changes, replaces legalese with plain English, makes language gender-neutral, and adds that if upon receipt of the sale proceeds, the court has not yet determined each cotenant's share of the sale proceeds, the court shall set the matter for a hearing.

§ 46A-86 elaborates and clarifies how a court shall handle sale proceeds belonging to certain parties: (i) for minors and incompetent adults, the court shall either administer the proceeds pursuant to G.S. 7A-111 or order the proceeds disbursed to a person acting on behalf of the party, such as a trust or guardian of the estate; and (ii) for imprisoned, unknown, or unlocatable parties, invest or deposit the proceeds under G.S. 7A-112 and G.S. 7A-112.1. This bill makes stylistic changes, replaces legalese with plain English, deletes obsolete language, adds several references to other statutes, and adds that an imprisoned, unknown, or unlocatable party may obtain the party's proceeds by filing a motion in the proceeding.

Article 3. Partition of Personal Property.

§ 46A-100 continues to provide that a cotenant may petition to partition personal property. This bill makes stylistic changes, replaces legalese with plain English, and transfers the substance of the latter part of this provision to § 46A-101.

§ 46A-101 continues to provide that in the case of an actual partition of personal property, the court shall appoint three disinterested commissioners who shall apportion the property and file a written report. § 46A-101 also provides that absent an exception, the court shall confirm the commissioner's report and that a party may seek relief from the order of confirmation for mistake, fraud, or collusion. This bill adds a section catchline and subsection catchlines, makes stylistic changes, replaces legalese with plain English, reorganizes language, adds that the commissioners shall serve their report on all the parties at the time of filing, and replaces "impeachment" with "motion for relief."

§ 46A-102 continues to provide that if the court determines that an actual partition of personal property would injure some of the parties and that a partition sale is necessary, the court shall order a partition sale of the property. This bill makes stylistic changes, clarifies that the court

is not required to appoint more than one commissioner in a partition sale, and adds a reference to § 46A-86.

Part II of the bill consists of conforming changes directly related to partition procedure:

Section 4 amends G.S. 1-301.2(e) by updating a reference to a provision in the current partition chapter and elaborating on how it relates to this section.

Section 5 amends G.S. 1-394 by updating a reference to the current partition chapter.

Section 6 amends G.S. 1-502(6) by updating a reference to a provision in the current partition chapter.

Section 7 amends G.S. 6-21(7) to conform to the addition of a new section on attorneys' fees (§ 46A-3) to the new partition chapter.

Part III of the bill consists of additional conforming amendments and technical amendments:

Section 8 amends G.S. 1-394 by fixing punctuation, making stylistic changes, fixing the format of citations, and replacing legalese with plain English.

Section 9 amends G.S. 1-502 by fixing the format of a list, making language gender-neutral, replacing "which" with "that," fixing punctuation, replacing legalese with plain English, making stylistic changes, fixing the format of a citation, and clarifying an ambiguous reference.

Section 10 amends G.S. 6-21 by replacing "which" with "that," replacing legalese with plain English, making stylistic changes, fixing punctuation, fixing the format of a citation, repealing a reference to an obsolete provision, and clarifying an ambiguous reference.

Section 11 amends G.S. 11-11 by replacing legalese with plain English and changing "Dividing and Allotting" to "Apportioning" to conform to the new partition chapter.

Section 12 amends G.S. 31A-6 by adding Oxford commas, replacing legalese with plain English, and updating a reference to the current partition chapter.

Section 13 amends G.S. 39-13.5 by clarifying that this section applies to actual partitions of real property, replacing legalese with plain English, fixing punctuation, making stylistic changes, fixing the format of a list, and replacing "assigned" with "apportioned" to conform to the new partition chapter.

Section 14 adds a new section § 41-11.2 in Chapter 41 of the General Statutes (Estates) to provide a reference to § 46A-80 on partition sale of standing timber.

Section 15 amends G.S. 93A-43 by fixing punctuation, adding a reference to the new partition chapter, replacing "no . . . may" with "no . . . shall" to conform to this State's drafting conventions, conforming terminology to the partition statutes, and replacing legalese with plain English.

Section 16 amends G.S. 136-96, as follows:

- Reorganizes the section into subsections.

- In subsection (a), replaces "which" with "that," replaces legalese with plain English, fixes punctuation, and deletes technically unnecessary language.
- In subsection (b), replaces legalese with plain English, makes language gender-neutral, and adds an Oxford comma.
- In subsection (c), makes stylistic changes, replaces legalese with plain English, fixes punctuation, makes language gender-neutral, updates a reference to the current partition chapter, and fixes the format of citations.
- In subsection (d), makes stylistic changes, fixes punctuation, clarifies ambiguous references, and replaces legalese with plain English.
- In subsection (e), reorganizes this provision into a list of subdivisions, replaces legalese with plain English, makes a stylistic change, replaces legalese with plain English, deletes technically unnecessary language.

Part IV, which consists of **Section 17**, amends G.S. 29-30, which generally allows a surviving spouse to elect to take a life estate in one-third of the real property seized and possessed by the deceased spouse during the marriage, instead of taking an intestate share or elective share. These amendments include the following amendments requested by the Real Property Section of the N.C. Bar Association:

- In subsection (a), adds the internal reference "Except as provided in this subsection," adds subdivisions (a)(1a) and (a)(3a) that specifically recognize two additional forms used for one spouse to waive interests in the other spouse's real property, and updates terminology by replacing "released or quitclaimed" with "waived, released, or conveyed" in subdivision (a)(2).
- In subsection (c), makes stylistic changes, fixes punctuation, and requires that if there is no estate administration pending, a notice of the surviving spouse's election be recorded with the register of deeds in every county where affected real property is located.
- In subsection (g), fixes the format of a list and clarifies that the protection of the elective life estate under this section against the deceased spouse's creditors does not extend to real property that is subject to a purchase-money mortgage given by a lender, regardless of whether the lender is the seller or a third-party lender, and also that this protection against creditors does not apply to real property not included in the elective life estate.

The remaining amendments to G.S. 29-30 are as follows:

- In subsection (a), adds subdivision (a)(3b) to clarify that the surviving spouse may not take real property that was apportioned to or sold to someone other than the deceased spouse in a partition proceeding, replaces legalese with plain English, and fixes the format of a list.
- In subsection (b), replaces legalese with plain English.
- In subsection (c), fixes the format of an internal citation, rephrases unclear language, reorganizes language, and replaces legalese with plain English.
- In subsection (c1), fixes the format of a list, replaces legalese with plain English, and fixes the format of internal citations.
- In subsection (d), fixes a reference to a provision of the elective share statutes, fixes the format of an internal citation, and replaces legalese with plain English.
- In subsection (f), deletes an unnecessary reference and replaces legalese with plain English.
- In subsection (g), replaces legalese with plain English.
- In subsection (h), fixes the format of an internal citation.

Part V, which consists of **Section 18**, provides that this bill becomes effective October 1, 2020 and that Parts I and II of this bill apply to partition proceedings commenced on or after that date.