

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 578
Committee Substitute Favorable 5/7/09
Committee Substitute #2 Favorable 5/12/09
PROPOSED SENATE COMMITTEE SUBSTITUTE H578-PCS70473-RC-43

Short Title: Partition Sales/Commrs., Sellers, Buyers.

(Public)

Sponsors:

Referred to:

March 16, 2009

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY NOTICE REQUIRED TO PARTIES WHO MAY BE UNKNOWN
3 OR UNLOCATABLE IN A PARTITION PROCEEDING; TO CODIFY THE CURRENT
4 PRACTICE OF GRANTING OWNERS CREDIT FOR THEIR EXISTING INTEREST IN
5 LAND WHEN BIDDING ON A PARTITION SALE; TO PERMIT A COURT TO
6 ORDER AN INDEPENDENT APPRAISAL IF REQUESTED AND PAID FOR BY A
7 PARTY TO THE PARTITION WHO CHALLENGES THE AMOUNT BID IN A
8 PARTITION SALE; TO REVISE THE STANDARD FOR DETERMINING WHAT
9 CONSTITUTES "SUBSTANTIAL INJURY" WITH REGARDS TO A PETITION FOR A
10 SALE OF THE PROPERTY; AND TO PROVIDE FOR MEDIATION OF PARTITION
11 DISPUTES.

12 The General Assembly of North Carolina enacts:

13 SECTION 1. G.S. 46-6 reads as rewritten:

14 "§ 46-6. Unknown or unlocatable parties; summons and summons, notice, and
15 representation.

16 (a) If, upon the filing of a petition for partition, it be made to appear to the court by
17 affidavit or otherwise that there are any persons interested in the premises whose names are
18 unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order
19 notices to be given to all such persons by a publication of the petition, or of the substance
20 thereof, with the order of the court thereon, in one or more newspapers to be designated in the
21 order. The notice by publication shall include a description of the property which includes the
22 street address, if any, or other common designation for the property, if any, and may include the
23 legal description of the property.

24 (b) ~~If~~ Before or after such general notice by publication if any person interested in the
25 premises and entitled to notice fails to appear, the court shall ~~in its discretion~~ appoint some
26 disinterested person to represent the owner of any shares in the property to be divided, the
27 ownership of which is unknown or unlocatable and unrepresented."

28 SECTION 2. G.S. 46-22 reads as rewritten:

29 "§ 46-22. Sale in lieu of partition.

30 (a) Subject to G.S. 46-22.1(b), the ~~The~~ court shall order a sale of the property described
31 in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual



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1 partition of the lands cannot be made without substantial injury to ~~any of the interested~~
2 ~~parties.~~ parties taking into account the totality of the circumstances.

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

7 (b1) In determining whether a partition in-kind of all the property or some of the
8 property cannot be made without substantial injury, the court shall consider the following
9 factors:

10 (1) Whether the property is able to be fairly and equitably divided, in whole or
11 in part, between the party or parties seeking a partition by sale and those
12 seeking to remain tenants in common;

13 (2) Whether a partition in-kind would apportion the property in such a way that
14 the fair market value of the parcels resulting from the division would be
15 materially less than the share of each cotenant in the money equivalent that
16 would be obtained from the sale of the whole, based upon a valuation that
17 takes into account the type of sale conditions under which the court-ordered
18 sale would occur;

19 (3) Evidence of long-standing ownership by any individual owner as
20 supplemented by the length of time of ownership within the chain of title of
21 any person or persons to whom such a cotenant is or was related to by blood,
22 marriage, or adoption;

23 (4) The use being made of the property by any of the owners and the degree to
24 which this owner or owners would be harmed if they could not continue to
25 use the property for these purposes;

26 (5) The degree to which the owners have contributed their pro rata share of the
27 property taxes, insurance, and other carrying charges associated with
28 maintaining ownership of the real property, as well as the degree to which
29 the owners have contributed to the physical improvement or the upkeep of
30 the property, including any upkeep related to protecting the interests of the
31 owners against any person who has no legal claim to the property but who
32 attempts to use the property without the consent of the owners;

33 (6) Whether the substantial injury from an actual division to the parties
34 requesting a sale outweighs the substantial injury to the parties opposing the
35 sale; and

36 (7) Any other economic or noneconomic factors that the court finds appropriate
37 to consider.

38 (b2) The court shall use the remedy of owelty where such remedy can aid in making a
39 partition in-kind occur without substantial injury to the parties.

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

41 (d) The party seeking a sale of the property shall have the burden of proving substantial
42 injury under the provisions of this section."

43 **SECTION 3.** Article 2 of Chapter 46 of the General Statutes is amended by adding
44 a new section to read:

45 **"§ 46-22.1 Mediation.**

46 (a) Persons interested in the premises may agree at anytime to mediation of a partition.
47 A list of mediators certified by the Dispute Resolution Commission may be obtained from the
48 clerk or from the Commission through the Administrative Office of the Courts.

49 (b) When a partition sale is requested, the court or the clerk may order mediation before
50 considering whether to order a sale. The provisions of G.S. 7A-38.1 and G.S. 7A-38.3B shall
51 apply."

1 **SECTION 4.** G.S. 46-28 reads as rewritten:

2 "**§ 46-28. Sale procedure.**

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

5 (b) The commissioners shall certify to the court that at least 20 days prior to sale a copy
6 of the notice of sale was sent by first class mail to the last known address of all petitioners and
7 respondents who previously were served by personal delivery or by registered or certified mail.
8 The commissioners shall also certify to the court that at least ten days prior to any resale
9 pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last
10 known address of all parties to the partition proceeding who have filed a written request with
11 the court that they be given notice of any resale. An affidavit from the commissioners that
12 copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance
13 with this section shall satisfy the certification requirement and shall also be deemed prima facie
14 true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a
15 sale or subsequent resale was mailed notice as required by this section prior to the date of the
16 sale or subsequent resale, then that party shall not prevail under the provisions of
17 G.S. 46-28.1(a)(2)a. and b.

18 (c) Any cotenant who enters the high bid or offer at any sale of one hundred percent
19 (100%) of the undivided interests in any parcel of real property shall receive a credit for the
20 undivided interest the cotenant already owns therein and shall receive a corresponding
21 reduction in the amount of the total purchase price owed after deducting the costs and fees
22 associated with the sale and apportioning the costs and fees associated with the sale in
23 accordance with the orders of the court. The high bid or offer shall be for one hundred percent
24 (100%) of the undivided interests in the parcel of real property sold, and the credit and
25 reduction shall be applied at the time of the closing of the cotenant's purchase of the real
26 property. When jointly making the high bid or offer at the sale, two or more cotenants may
27 receive at the closing an aggregate credit and reduction in the amount of the total purchase
28 price representing the total of such cotenants' undivided interests in the real property. Any
29 credits and reductions allowed by this subsection shall be further adjusted to reflect any
30 court-ordered adjustments to the share(s) of the net sale proceeds of each of the cotenants
31 entering the high bid or offer, including, but not limited to, equitable adjustments to the share(s)
32 of the net sales proceeds due to a court finding of the lack of contribution of one or more
33 cotenants to the payment of expenses of the real property."

34 **SECTION 5.** G.S. 46-28.1 reads as rewritten:

35 "**§ 46-28.1. Petition for revocation of confirmation order.**

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

- 42 (1) In the case of a purchaser, a lien remains unsatisfied on the property to be
43 conveyed.
- 44 (2) In the case of any party to the partition proceeding:
- 45 a. Notice of the partition was not served on the petitioner for revocation
46 as required by Rule 4 of the Rules of Civil Procedure; or
- 47 b. Notice of the sale was not mailed to the petitioner for revocation as
48 required by G.S. 46-28(b); or
- 49 c. The amount bid or price offered is inadequate and inequitable and
50 will result in irreparable damage to the owners of the real property.

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

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

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

- 13 (1) A lien remains unsatisfied on the property to be conveyed; and
- 14 (2) The purchaser has not agreed in writing to assume the lien; and
- 15 (3) The lien will not be satisfied out of the proceeds of the sale; and
- 16 (4) The existence of the lien was not disclosed in the notice of sale of the
17 property, the court may revoke the order confirming the sale, order the
18 withdrawal of the purchaser's offer, and order the return of any money or
19 security to the purchaser tendered pursuant to the offer.

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

22 (d) In the case of a petition brought pursuant to this section by a party to the partition
23 proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a
24 case pursuant to sub-subdivision (a)(2)a., b., or c. of subsection (a)(2), this section, the court
25 may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and
26 order the return of any money or security to the purchaser tendered pursuant to the offer.

27 (d1) In the case of a petition brought pursuant to sub-subdivision (a)(2)c. of this section,
28 and when an independent appraisal of the property being sold has not been previously entered
29 into evidence in the action, and upon the request of any party, the court may order an
30 independent appraisal prepared by a real estate appraiser currently licensed by the North
31 Carolina Appraisal Board and prepared in accordance with the Uniform Standards of
32 Professional Appraisal Practice. The cost of an independent appraisal shall be borne by one or
33 more of the parties requesting the appraisal in such proportions as they may agree. Before
34 ruling on the petition brought pursuant to sub-subdivision (a)(2)c. of this section, the court may
35 in its discretion require written evidence from the appraiser that the appraiser has been paid in
36 full for the appraisal. If based on the appraisal and all of the evidence presented, the court finds
37 the amount bid or price offered to be inadequate, inequitable, and resulting in irreparable
38 damage to the owners, the court may revoke the order confirming the sale, order the withdrawal
39 of the purchaser's high bid or offer, and order the return to such purchaser of any money or
40 security tendered by the purchaser pursuant to the high bid or offer.

41 (e) If the court revokes its order of confirmation under this section, the court shall order
42 a resale. The procedure for a resale is the same as is provided for an original public sale under
43 Article 29A of Chapter 1 of the General Statutes."

44 **SECTION 6.** This act becomes effective October 1, 2009, and applies to partition
45 actions filed on or after that date.