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From: David Unwin, Staff Attorney
To: General Statutes Commission
Re: DN 16-4 – Streamline Partition Sales
Date: January 5, 2017

The Commission opened this docket to discuss possible methods of streamlining partition sales. This memorandum identifies four issues arising from this docket, examines current North Carolina law on each issue, and outlines possible discussion items for each issue. As a preliminary matter, however, this memorandum will address how these methods relate to the Uniform Partition of Heirs Property Act (UPHPA), in response to the Commission's decision at its December 2, 2016 meeting to combine this docket with the docket on the UPHPA.

I. Relation to Uniform Partition of Heirs Property Act

In seeking to protect heirs' interests, the UPHPA recognizes that heirs are often the respondents in a partition action and thus primarily safeguards the rights of the *respondents*. The UPHPA accomplishes three major reforms: (1) a cotenant buyout procedure, (2) consideration of noneconomic factors in determining whether to order a partition in kind or a partition by sale, and (3) a prioritized open-market sale procedure. This docket, however, seeks to streamline partition sales, which primarily benefits the *petitioner*. It is important to note that the petitioner may also be an heir and that unnecessary procedural obstacles and expenses may significantly harm an heir who is cash-poor and who may be the only person living on the land.

In order to not undermine UPHPA protections, the Commission should perhaps consider limiting some or all of the streamlined procedures to (1) petitioners who are also heirs; and/or (2) real property worth less than a certain dollar amount. An analog to (2) is the small estate by affidavit procedure provided in G.S. 28A-25-1:

> **§ 28A-25-1. Collection of property by affidavit when decedent dies intestate.**
>
> (a) When a decedent dies intestate leaving personal property, less liens and encumbrances thereon, not exceeding twenty thousand dollars ($20,000) in value, at any time after 30 days from the date of death, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action to a person claiming to be the public administrator appointed pursuant to G.S. 28A-12-1, or an heir or creditor of the decedent, not disqualified under G.S. 28A-4-2, upon being presented a certified copy of an affidavit filed in accordance with subsection (b) and made by or on behalf of the heir or creditor or the public administrator stating:
>
> (1) The name and address of the affiant and the fact that the affiant is the public administrator or an heir or creditor of the decedent;
>
> (2) The name of the decedent and the decedent's residence at time of death;
>
> (3) The date and place of death of the decedent;

(4) That 30 days have elapsed since the death of the decedent;

(5) That the value of all the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed twenty thousand dollars ($20,000);

(6) That no application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction;

(7) The names and addresses of those persons who are entitled, under the provisions of the Intestate Succession Act, to the personal property of the decedent and their relationship, if any, to the decedent; and

(8) A description sufficient to identify each tract of real property owned by the decedent at the time of the decedent's death.

In those cases in which the affiant is the surviving spouse and sole heir of the decedent, not disqualified under G.S. 28A-4-2, the property described in this subsection that may be collected pursuant to this section may exceed twenty thousand dollars ($20,000) in value but shall not exceed thirty thousand dollars ($30,000) in value, after reduction for any spousal allowance paid to the surviving spouse pursuant to G.S. 30-15. In such cases, the affidavit shall state: (i) the name and address of the affiant and the fact that the affiant is the surviving spouse and is entitled, under the provisions of the Intestate Succession Act, to all of the property of the decedent; (ii) that the value of all of the personal property owned by the estate of the decedent, less liens and encumbrances thereon, does not exceed thirty thousand dollars ($30,000); and (iii) the information required under subdivisions (2), (3), (4), (6), and (8) of this subsection.

(b) Prior to the recovery of any assets of the decedent, a copy of the affidavit described in subsection (a) shall be filed in the office of the clerk of superior court of the county where the decedent was domiciled at the time of death. The affidavit shall be filed by the clerk upon payment of the fee provided in G.S. 7A-307, shall be indexed in the index to estates, and a copy thereof shall be mailed by the clerk to the persons shown in the affidavit as entitled to the personal property.

(c) The presentation of an affidavit as provided in subsection (a) shall be sufficient to require the transfer to the affiant or the affiant's designee of the title and license to a motor vehicle registered in the name of the decedent owner; the ownership rights of a savings account or checking account in a bank in the name of the decedent owner; the ownership rights of a savings account or share certificate in a credit union, building and loan association, or savings and loan association in the name of the decedent owner; the ownership rights in any stock or security registered on the books of a corporation in the name of a decedent owner; or any other property or contract right owned by decedent at the time of the decedent's death.

A distinction based on the value of the property could fit in well with the UPHPA, because section 6 of the UPHPA requires that a court, before reaching the merits of the action, determine the value of the property.

As a related matter, requiring a court to consider the expenses of a partition action relative to the value of the property could also be beneficial. South Carolina enables a court to consider whether the expense of a partition in kind would be unnecessary:

> Nothing in Rule 71, South Carolina Rules of Civil Procedure, concerning partition actions, shall be construed to affect the power of a court hearing a partition action to dispense with the issuing of a writ of partition when, in the judgment of the court, it would involve unnecessary expense to issue such writ. And the court may in all proceedings in partition, without recourse to such writ, determine by means of testimony taken before the proper officer and reported to the court whether a partition in kind among the parties be practicable or expedient and, when such partition cannot be fairly and equally made, may order a sale of the property and a division of the proceeds according to the rights of the parties.

S.C. Code Ann. § 15-61-100 (effective Jan. 1, 2017). Somewhat similarly, section 9 of the UPHPA requires a court, in determining whether a partition in kind would result in "great prejudice" or "manifest prejudice", to consider, among other factors, "whether the heirs property practicably can be divided among the cotenants[.]" In addition, section 6 provides that a court shall determine the fair market value of the property after an evidentiary hearing "[i]f the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal[.]"

Perhaps a court, in making a procedural determination, should be required to consider the expense of the procedure relative to the value of the property.

II. Notice to and Representation of Unknown or Unlocatable Heirs

One issue arising from this docket is the petitioner's cost of providing notice to unknown or unlocatable heirs. This issue implicates constitutional due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance[.] But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. The criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) (citations and quotation marks omitted).

A. Current North Carolina Law

G.S. 46-6 provides that upon filing a petition in a partition proceeding involving unknown or unlocatable heirs, the petitioner must show that the petitioner could not ascertain the heirs' identity or location after due diligence. The clerk of superior court shall order notice of the partition proceeding to unknown or unlocatable heirs by publication in "one or more newspapers" and shall also appoint "some disinterested person" to represent the unknown or unlocatable heirs:

> **§ 46-6. Unknown or unlocatable parties; summons, notice, and representation.**
>
> (a) If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. The notice by publication shall include a description of the property which includes the street address, if any, or other common designation for the property, if any, and may include the legal description of the property.
>
> (b) Before or after such general notice by publication if any person interested in the premises and entitled to notice fails to appear, the court shall appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown or unlocatable and unrepresented. (1887, c. 284; Rev., s. 2490; C.S., s. 3218; 2009-512, s. 1.)

North Carolina Rule of Civil Procedure 4(k), which governs service of process in *in rem* and *quasi in rem* actions, requires that the petitioner publish the notice once a week for three successive weeks in a newspaper qualified for legal advertising and circulated in the county where the action is pending.

Regarding representation, S.L. 2009-512 removed the clerk's discretion in deciding whether or not to appoint "some disinterested person"; the clerk *shall* appoint "some disinterested person[.]" This "disinterested person" would be a guardian *ad litem*, appointed pursuant to North Carolina Rule of Civil Procedure 17. *Cf.* G.S. 28A-22-3 (providing that the clerk of superior court shall appoint a guardian *ad litem* for unknown heirs in a special proceeding against the unknown heirs before the distribution of a decedent's estate). The North Carolina Supreme Court discussed a predecessor statute of G.S. 46-6, Rev., s. 2490:

> A court dealing with the matter should always be properly careful of the rights and interests of the parties who are only so by reason of constructive service. If such rights are questioned or assailed, the statute provides that some disinterested person may be appointed to represent them and look after their interests, and this should in most instances be done. If these interests are known to exist, or there is good reason to believe that they do, a sufficient amount of the fund should be retained to satisfy such claims and be invested or settled so that it may be forthcoming when called for. This the statute expressly requires (Revisal 1905, sec. 2516), and, if there is promise of success, further effort can and should be made to ascertain and notify the rightful owner[.]

Lawrence v. Hardy, 151 N.C. 123, 128, 65 S.E. 766, 769 (1909).

In 2009, the General Assembly also enacted G.S. 46-2.1, which provides:

> **§ 46-2.1. Summons.**
> (a) In partition proceedings initiated under this Chapter, the period of time for answering a summons is provided in G.S. 1-394.
> (b) Written notice shall be included in the petition in a manner reasonably calculated to make the respondent aware of the following:
> (1) That the respondent has the right to seek the advice of an attorney and that free legal services may be available to the respondent by contacting Legal Aid of North Carolina or other legal services organizations.
> (2) That pursuant to G.S. 6-21 the court has the authority, in its discretion, to order reasonable attorneys' fees to be paid as a part of the costs of the proceeding.

B. Possible Discussion Items

1. Due Diligence (Direct Notice)

Because over a hundred heirs may have an interest in a single piece of real property, it is often extremely costly and time-consuming to identify and locate all the heirs. G.S. 46-6(a) uses the term "due diligence" to describe the efforts the petitioner must make. *See also Mullane*, 339 U.S. at 317 ("Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. Those beneficiaries . . . whose interests or whereabouts could not with *due diligence* be ascertained come clearly within this category." (emphasis added and citations omitted)).

The ambiguity of the term "due diligence" likely contributes to the problem of notice to unknown or unlocatable heirs. Perhaps a concrete, inexpensive statutory procedure of direct notice would mitigate this problem. Below is a possible procedure:

(1) The petitioner shall fill out a form listing all known names and all last known contact information of potential heirs (mailing address, phone number, email address, etc.).

(2) The petitioner shall serve each known and locatable potential heir in a manner reasonably calculated to reach the heir (i.e., service by mail is not required). Included with the summons, the petitioner shall include the form. The form shall ask the heir to supply any information updating or adding the contact information of other potential heirs or adding the names of new potential heirs. The form shall have a box to indicate that the heir does not know of any additional information. The heir shall sign the form. The petitioner shall send a new summons and form according to the feedback the petitioner receives. The petitioner shall repeat this process until the petitioner receives no new information for thirty days.

(3) The petitioner shall file an affidavit with the court averring that the petitioner followed this procedure and shall include a copy of the final version of the form. In the affidavit, the petitioner shall also describe what methods, means, and attempts the petitioner made to locate and to serve unknown or unlocatable heirs, including the efforts made to utilize readily available sources of information.[1]

2. Service by publication (Constructive notice)

Service by publication in a newspaper can be very expensive. Below is a table describing the cost of publishing a notice in a newspaper for 3 successive weeks under North Carolina Rule of Civil Procedure 4:

News & Observer	$800 -$1,200
N&O community newspapers (e.g. The Cary News, The Chapel Hill News) (each covers 3-4 zipcodes)	$190-$250
Charlotte Observer[2]	$70
Winston-Salem Journal	$450-$550
New Bern Sun Journal	$350-$450
Wilson Times	$250-$400

In addition, publication by newspaper is not particularly effective. The Advisory Committee to the Federal Rules of Civil Procedure in their notes to Supplemental Admiralty and Maritime Claims Rule G stated: "Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives." Even back in 1950, the U.S. Supreme Court in *Mullane* recognized that "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." *See Mullane*, 339 U.S. at 315.

Possible alternative methods of service by publication include (1) posting on an official government website and (2) requiring a newspaper to send its legal notices to an online repository maintained by a statewide association of newspapers. A supplemental protection to unknown or unlocatable heirs would be to post a sign on the real property. This memorandum discusses each of these methods.

i. Posting on an Official Government Website

[1] Step (3) is partially based on section 1-103(b) of the March 14-15, 2008 Draft of the UPHPA, which provided: "In order for a court to order that a defendant be served by publication, the plaintiff must specifically allege in an affidavit the facts showing what due diligence the plaintiff exercised in attempting to locate unknown or unlocatable owners. The affidavit required by this paragraph shall set forth facts based upon the personal knowledge of the affiant concerning the methods, means, and attempts made to locate and to effect personal service on the unknown or unlocatable defendants, including the efforts made to utilize, review, or otherwise draw upon sources of information readily available to the plaintiff."

[2] This figure is not a typographical error.

Supplemental Admiralty and Maritime Claims Rule G of the Federal Rules of Civil Procedure, adopted in 2006, provides an alternative method of service by publication for federal civil forfeiture actions. The U.S. government may post a notice "on an official internet government forfeiture site for at least 30 consecutive days." This website is www.forfeiture.gov. Federal Rule of Criminal Procedure 32.2, which governs federal criminal forfeiture actions, also includes this method of service by publication by expressly referencing Supplemental Rule G.

Beginning in 2012, the U.S. Department of Justice (USDOJ) has also used www.forfeiture.gov for administrative forfeiture actions. *See* 28 C.F.R. § 8.9. In publishing this rule, the USDOJ responded to public comments from newspaper organizations. *See* 77 F.R. 56093. The USDOJ argued that posting on a government website was more effective and less costly:

> The Department believes that in the Internet era, continued adherence to newspaper noticing alone places a burden on persons desirous of receiving notice, including, but certainly not limited to: members of our Armed Forces serving in foreign lands; other persons residing in foreign countries; incarcerated persons or those confined long-term to health care facilities wherever located; or anyone with Internet access but far removed from outlets carrying up-to-date American newspapers of general circulation. By contrast, Internet publication will allow for continuous access to administrative forfeiture notices for at least 30 days on a Web site that may easily be found by, for example, using the term "United States forfeiture" on a search engine. Given the current state of technology, the Department believes that this practice is far more "reasonably calculated" to provide public notice of forfeiture proceedings to all interested persons, whatever their circumstances and wherever they might be located.
>
> . . . .
>
> Supplemental Rule G was also drafted against the backdrop of a dramatic rise in Internet usage coinciding with a precipitous decline in newspaper circulation. Since 2003, these trends have only accelerated. The most recent and comprehensive analysis of Internet penetration is *Digital Nation—Expanding Internet Usage*, published by the U.S. Department of Commerce, National Telecommunications & Information Administration, in February 2011. Statistics from this report show that "an estimated 209 million Americans—about 72% of all adults and children aged three years and older—use the internet somewhere, whether at home, the workplace, schools, libraries, or a neighbor's house." *Digital Nation* at 28 (emphasis omitted). This represents an increase from 68.4% (197.9 million) in 2009. *Id.* at 17. Internet use through libraries is particularly important, as it provides the most widespread availability of free and regular Internet access to the general public. The American Library Association's Public Library Funds & Technology Access Study (2010-2011) reports that 99.3% of public libraries offer public access to computers and the Internet. According to a study by the University of Washington, a third of Americans 14 and older, or about 77 million people, use public library computers.
>
> As Internet use has expanded, the circulation of printed newspapers has continued to decline. According to *The State of the News Media 2011*, a report issued by the Pew Research Center's Project for Excellence in Journalism, daily

> circulation of U.S. newspapers has declined 30% in the last 10 years, from 62.3 million in 1990 to 43.4 million in 2010. This negative trend is reflected by national papers such as *USA Today*, which in just the past two years has seen its circulation decline by 460,000, and by big-city metro newspapers such as the *Newark Star Ledger* and the *San Francisco Chronicle*, each of which lost about a third of its daily circulation over the same period. *Id.* at 9.
>
> In addition to enhanced accessibility and reach, another factor in favor of publishing forfeiture notices through the Internet is cost. The Advisory Committee that drafted Supplemental Rule G advised in the note pertaining to subpart (4)(a) that, in choosing between newspapers and the Internet as the means for providing public notice, the Government "should choose . . . a method that is reasonably likely to reach potential claimants at a cost reasonable in the circumstances." Fed. R. Civ. P. Supp. R. G Advisory Committee's Note (2006) (emphasis added). Currently, according to the Department's Justice Management Division, the Department pays between $10,000 and $12,000 per day in noticing costs to newspapers. Alternatively, publishing those same notices on www.forfeiture.gov, a fully operational Web site, would be of little to no additional cost to the Government.

77 F.R. at 56097-98 (footnotes omitted).

In 2013, U.S. Customs and Border Protection (CBP) followed the same course. See 19 C.F.R. § 162.45. In publishing the rule, CBP made the same arguments in response to public comments from newspaper organizations. *See* 78 F.R. 6027.

At the state level, in 2009, a bill was introduced in the Pennsylvania General Assembly that would allow a municipality to post a notice on an official government website instead of publishing the notice in a newspaper. *See* House Bill 795 of the 2009-2010 Regular Session of the Pennsylvania General Assembly. However, the Pennsylvania General Assembly did not enact the bill. In 2010, a bill was introduced in the Connecticut General Assembly that would allow a municipality to post a notice on its website instead of publishing the notice in a newspaper. *See* Senate Bill 365 of the 2010 Session of the Connecticut General Assembly. However, the Connecticut General Assembly did not enact the bill.

One advantage of an online posting system, whether it is an official government website or an online repository maintained by a statewide association of newspapers, is the availability of "push technology." In *Old Principles, New Technology, and the Future of Notice in Newspapers*, Lauren A. Rieders describes "push technology":

> Push technology refers to a specific method for accessing Internet content; instead of causing users to search for content, particular content is automatically delivered directly to their e-mail accounts. . . . [T]his feature may enhance the likelihood that citizens will see legal notices affecting their interests, as they can register to have pertinent notices delivered straight to their e-mail accounts automatically.

Old Principles, New Technology, and the Future of Notice in Newspapers, Lauren A. Rieders, 38 Hofstra L. Rev. 1009, 1011 n. 18 (Spring 2010) (citation omitted); *see also* 1 Maine Revised Statutes Annotated § 603 (requiring an online repository maintained by a statewide association of newspapers to provide "push technology").

Within the context of partition sales, service by posting on an official government website could significantly reduce the petitioner's cost of service by publication. It could also benefit unknown or unlocatable heirs, because it would likely be more effective than publication by newspaper. However, it would be an added cost to the state government. Possible websites include www.nccourts.org, which is operated by the Administrative Office of the Courts, and www.nctreasurer.com, which is operated by the Department of the State Treasurer.

ii. Online Repository Maintained by a Statewide Association of Newspapers

Another method of service by publication would be requiring the newspaper to publish the legal notice on its website and requiring a statewide association of newspapers to create an online repository of all legal notices from all newspapers in the state. Florida, Illinois, Maine, Massachusetts, and Utah have one or both of these requirements. *See* Florida Statutes Annotated § 50.0211; 715 Illinois Compiled Statutes Annotated 5/2.1; 1 Maine Revised Statutes Annotated § 603; Massachusetts General Laws Annotated Chapter 4, § 13; Utah Code Annotated § 45-1-101. An example of an online repository of legal notices is www.utahlegals.com.

This method would most likely be more effective than publishing a notice in a print newspaper alone and thus would most likely benefit unknown or unlocatable heirs. However, it would do little to reduce the petitioner's cost of service by publication.

iii. Posting a Sign on the Real Property

A supplemental protection to unknown or unlocatable heirs would be posting a sign on the real property. Section 4 of the Uniform Partition of Heirs Property Act provides:

> **SECTION 4. SERVICE; NOTICE BY POSTING.**
>
> (a) This [act] does not limit or affect the method by which service of a [complaint] in a partition action may be made.
>
> (b) If the plaintiff in a partition action seeks [an order of] notice by publication and the court determines that the property may be heirs property, the plaintiff, not later than 10 days after the court's determination, shall post [and maintain while the action is pending] a conspicuous sign on the property that is the subject of the action. The sign must state that the action has commenced and identify the name and address of the court and the common designation by which the property is known. The court may require the plaintiff to publish on the sign the name of the plaintiff and the known defendants.

This requirement would most likely benefit the unknown or unlocatable heirs and would not be expensive. However, it is uncertain that posting a sign alone would satisfy constitutional due process. Thus, this requirement would be an added cost to the petitioner.

3. Virtual Representation

An alternative to appointing a guardian *ad litem* for the unknown or unlocatable heirs would be to allow known heirs with a substantially identical interest to virtually represent the unknown or unlocatable heirs provided there is no conflict of interest. The Uniform Trust Code has this type of provision:

> **§ 36C-3-304. Representation by person having substantially identical interest.**
>
> Unless otherwise represented under this Article, a minor, an incompetent or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute.

The North Carolina Court of Appeals examined the requirements of this statute in *First Charter Bank v. American Children's Home,* 203 N.C. App. 574, 582-85, 692 S.E.2d 457, 464-65 (2010). Chapter 28A, which governs the administration of decedents' estates, imports this concept of virtual representation:

> **§ 28A-2-7. Representation of parties.**
>
> (a) Notwithstanding any other applicable rule of the Rules of Civil Procedure or provision of Chapter 1 of the General Statutes, in any contested or uncontested estate proceeding or special proceeding, whether brought before the clerk of superior court or in the Superior Court Division of the General Court of Justice, *the parties shall be represented as provided in Article 3 of Chapter 36C of the General Statutes.*
>
> (b) In the case of any party represented by another as provided in subsection (a) of this section, service of process shall be made by serving such representative.

(Emphasis added.)

Allowing a known heir to virtually represent the interest of the unknown or unlocatable heirs would be less expensive than the current practice of appointing a guardian *ad litem.*

III. Attorneys' Fees and Costs

In providing notice to all the heirs, one of the petitioner's largest expenses is attorneys' fees.

A. Current North Carolina Law

G.S. 6-21 provides that the court has the discretion to award reasonable attorneys' fees in partition actions:

§ 6-21. Costs allowed either party or apportioned in discretion of court.

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

…

(7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.

…

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4.

B. Possible Discussion Item

One method of reducing the petitioner's cost of providing notice is to require the court to apportion among the parties on a *pro rata* basis all reasonable expenses, including reasonable attorneys' fees, that the petitioner incurs while providing notice to all potential heirs. Arkansas has a similar statute that provides that the court in a partition action shall apportion the petitioner's attorneys' fees incurred while performing services "which are of common benefit to all parties":

§ 18-60-419. Payment of attorney's fees

(a)(1) In all suits in any of the courts of this state for partition of lands when a judgment is rendered for partition in kind, or a sale and a partition of the proceeds, the court rendering the judgment or decree shall allow a reasonable fee to the attorney bringing the suit.

(2) The attorney's fee shall be taxed as part of the costs in the cause and shall be paid pro rata as the other costs are paid according to the respective interests of the parties to the suit in the lands so partitioned.

(b)(1) When judgment is rendered by a court of this state for partition of realty in kind, or for the sale of realty and partition of the proceeds of the sale, the court in assessing a reasonable fee to be allowed the attorney bringing the action shall consider only those services performed by the attorney requesting a fee which are of common benefit to all parties.

(2) The court shall assess no fee for services which benefit only one (1) party, such as services necessary for the preparation and trial of contested issues of title or services for which payment has been made by the agreement of the parties.

(c) In no event shall a fee so assessed and taxed as costs exceed forty thousand dollars ($40,000) in total compensation and costs.

(d) In no event shall a fee be awarded when the trial court shall determine that the attorney seeking the allowance of a fee has an interest in the subject matter property.

(e) Subsections (b)-(d) of this section shall not be construed as limiting the amount of any fee charged by an attorney to the attorney's client.

Arkansas Code Annotated § 18-60-419. Arkansas has a similar provision for costs of court:

§ 18-60-418. Payment of costs

The costs of the division shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong.

Arkansas Code Annotated § 18-60-418.

In a February 2009 report, the Partition Sales Study Committee, however, proposed the following legislation, which was not enacted, to prohibit the assessment of attorneys' fees against "a nonpetitioning cotenant who contests the partition or sale of the property by appearing in person before the court":

NO ATTORNEYS' FEES CHARGED TO OPPONENTS OF SALE

SECTION *x*.(a) Article 2 of Chapter 46 of the General Statutes is amended by adding a new section to read:

"**§ 46-22.2. Attorneys' fees prohibited.**

In a partition proceeding under Articles 1 or 2 of this Chapter, the court shall not assess attorneys' fees against a nonpetitioning cotenant who contests the partition or sale of the property by appearing in person before the court."

SECTION *x*.(b) G.S. 6-21(7) reads as rewritten:

"**§ 6-21. Costs allowed either party or apportioned in discretion of court.**

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

…

(7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled ~~Partition.~~Partition, except as otherwise provided therein.

…

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4."

The Partition Sales Study Committee based this proposed legislation on the following finding:

There is also a fairness issue in that parties who are opposed to the partition sale are often forced to pay a share of the attorneys' fees of the petitioner who forces the sale. The attorneys' fees are usually awarded by the clerk, in their discretion, from the sale proceeds before the co-tenants are paid their proportional shares from proceeds that are often the result of below market value sales.

Similarly, in a November 2007 memorandum to the UPHPA drafting committee, Thomas W. Mitchell, the UPHPA's Reporter, explained why the "common benefit" doctrine was inapposite to parties who oppose a partition sale:

> Based largely upon the notion that a party who successfully petitions a court for a partition sale has conferred a benefit upon the group of tenants in common as a whole, a number of states provide that the petitioner's attorney's fees should be allocated amongst all of the co-tenants -- irrespective of whether these non-petitioning co-tenants contested the partition sale request -- and paid out from the proceeds of the sale before the sale proceeds are distributed to the co-owners. In such a contested action, application of the common benefit rule rests upon the notion that the only benefits that are relevant are the supposed economic benefits of a partition sale and that it is irrelevant whether the co-tenant(s) who [r]esisted the petition for a partition sale wanted such an economic benefit even if such a benefit proved to be available.

Thomas W. Mitchell, Memorandum Re: *Overview of Project; Issues for First Meeting*, To: Drafting Committee on Uniform Tenancy in Common Partition Act, Nov. 6, 2007 (available at: www.uniformlaws.org/Committee.aspx?title=Partition of Heirs Property Act (last accessed December 20, 2016)).

One way to resolve this issue might be to apportion all reasonable attorneys' fees and costs incurred for the common benefit *only* among parties who did not oppose the partition, whether in kind or by sale.

Section 5-501 of the March 14-15, 2008 Draft of the UPHPA provided this solution:

> **SECTION 5-501. COURT COSTS AND FEES.**
>
> (a) In the event partition by division of the cotenancy is made, the costs of partition shall be apportioned by the court among all the cotenants. The proportion of the costs assessed against each cotenant shall be a lien upon the share of the cotenancy assigned by the court to the cotenant. If partition by division of the whole or a part of the property cannot be made without great prejudice to the cotenants and a sale of entire estate or any part thereof is ordered, the court shall apportion the costs of sale among all the cotenants. The court shall deduct and withhold from the distributive share of the proceeds of the sale assigned to each cotenant the proportion of the costs assessed against each cotenant.
>
> (b) As used in this section "costs" includes expenses incurred by commissioners, costs of survey, costs of appraisers, expenses incurred by agents or masters appointed by the court to conduct a sale, and other costs incurred in partition by division or in sale which to the court seem just and proper.
>
> (c) The reasonable attorney fees of any party to an action for partition of real property owned under a tenancy in common may be awarded in the court's equitable discretion if these fees were incurred for the common benefit of all of the tenants in common. The reasonableness of an attorney fee award cannot be based in any way on an arbitrary percentage of the value, and the court shall require evidence to be presented of the reasonableness of the fees sought prior to awarding any such fees and the manner in which these fees were incurred for the common benefit of all of the parties. No portion of any attorney's fees may be assessed against any party

who contests the partition proceeding whether by appearing by court-appointed or privately retained counsel or by appearing pro se.

IV. Sale of Timber

Another possible method of alleviating the burden on the petitioner would be to expedite the procedure for the sale of timber on the real property. The petitioner could then use the proceeds to finance the rest of the partition action.

A. Current North Carolina Law

G.S. 46-25 provides that a petitioner may seek the sale of timber "under like proceedings" of a partition action:

> **§ 46-25. Sale of standing timber on partition; valuation of life estate.**
>
> When two or more persons own, as tenants in common, joint tenants or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and *under like proceedings as are now prescribed by law for the sale of land for partition*: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his or her portion of the net proceeds of sales, to be ascertained under the mortality tables established by law: Provided further, that prior to a judgment allowing a life tenant to sell the timber there must be a finding that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest.

(Emphasis added.)

G.S. 46-28 provides the procedure for a partition sale:

> **§ 46-28. Sale procedure.**
>
> (a) *The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes, except as provided herein.*
>
> (b) *The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail.* The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written

request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b.

….

(Emphasis added.)

The commissioners (appointed under G.S. 46-7) must certify that a notice of sale was sent to all parties that had been served in person or by mail. Article 29A of Chapter 1 contains many provisions relating to the sale of timber. Below are two such provisions:

§ 1-339.3A. Judge or clerk may order public or private sale.

The judge or clerk of court having jurisdiction has authority *in his discretion* to determine whether a sale of either real or personal property shall be a public or private sale and *whether a public sale of timber shall be by auction or by sealed bid.* Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of court having jurisdiction is hereby validated as to the order that the sale be a private sale.

….

§ 1-339.13A. Public sale of timber by sealed bid; appraisal; bid procedure.

(a) When a sale of timber by sealed bid is ordered, the person holding the sale, before giving notice of the sale, shall:

(1) Obtain one or more appraisals of the timber to be sold;

(2) Determine the place at which and the manner and form in which sealed bids should be submitted;

(3) Determine the first date on which sealed bids will be accepted, which shall not be less than five days after the date on which the notice of sale is first published pursuant to G.S. 1-339.17; and

(4) Determine the date, time, and place at which sealed bids will be opened.

(b) Each appraisal obtained pursuant to subsection (a) of this section shall be made by a registered professional forester or other person qualified by training and experience to appraise the timber to be sold. Copies of all appraisals obtained pursuant to this section shall be included in the report required under G.S. 1-339.24. A person conducting an appraisal pursuant to this section, including a partnership, corporation, company, or other business of the appraiser, may not submit a bid on the timber which is the subject of the appraisal. An appraisal conducted pursuant to this section shall remain confidential until the appraisal is filed with the report of sale pursuant to G.S. 1-339.24. The contents of the appraisal shall not be divulged by the appraiser to

> any person other than the person holding the sale nor may the appraiser conduct an appraisal of the timber for any other person until after the sale is confirmed.
>
> (c) All sealed bids received on or after the first date set for submitting bids and, at or before the time set for opening the bids, shall be opened publicly at that time at the place set for doing so. If the minimum number of bids is received and there is only one highest bid, that bid shall be announced at that time; the highest bidder is the purchaser, and all bidders shall immediately be notified of that fact. If the minimum number of bids is not received, or if two or more bids in the same amount are the highest bids, that fact shall be announced at that time, and all bidders shall immediately be notified of that fact; the person holding the sale shall then obtain a new order of sale.

The court has the discretion to determine whether the public sale of timber should be by auction or by sealed bid. The General Statutes Commission recommended S.L. 1997-83, which established the procedure for the sale of timber by sealed bid. In a May 5, 1997 explanatory memorandum to the Senate Judiciary Committee, the Commission explained the impetus behind the bill:

> Experience in at least one area of North Carolina has shown that timber companies will not bid at public auction but will bid at sealed bid sales. Moreover, prices obtained through sealed bid sales of timber are generally somewhat higher than prices obtained through private sales. It would therefore benefit the sellers if timber sold in a judicial sale could be sold through a sealed bid process as a method of public sale.

Accordingly, it appears that a public sale by sealed bid often is more advantageous to the seller.

B. Possible Discussion Items

1. To be constitutional, a statutory procedure for the sale of timber need only comply with due process. (See Issue I above.) Perhaps G.S. 46-28 could be amended to require the petitioner to give the notice of sale, instead of the commissioners, since the commissioners are unnecessary for a sale. Perhaps the petitioner's attorneys' fees incurred during the sale procedure could be apportioned on a *pro rata* basis among the parties. (See Issue II above.)

2. Open-Market Sale

Perhaps the court could order a sale of timber by open-market sale, to mirror Section 10 of the UPHPA, which provides:

> **SECTION 10. OPEN-MARKET SALE, SEALED BIDS, OR AUCTION.**
>
> (a) If the court orders a sale of heirs property, the sale must be an open-market sale unless the court finds that a sale by sealed bids or an auction would be more economically advantageous and in the best interest of the cotenants as a group.
>
> (b) If the court orders an open-market sale and the parties, not later than

10 days after the entry of the order, agree on a real estate broker licensed in this state to offer the property for sale, the court shall appoint the broker and establish a reasonable commission. If the parties do not agree on a broker, the court shall appoint a disinterested real estate broker licensed in this state to offer the property for sale and shall establish a reasonable commission. The broker shall offer the property for sale in a commercially reasonable manner at a price no lower than the determination of value and on the terms and conditions established by the court.

(c) If the broker appointed under subsection (b) obtains within a reasonable time an offer to purchase the property for at least the determination of value:

(1) the broker shall comply with the reporting requirements in Section 11; and

(2) the sale may be completed in accordance with state law other than this [act].

(d) If the broker appointed under subsection (b) does not obtain within a reasonable time an offer to purchase the property for at least the determination of value, the court, after hearing, may:

(1) approve the highest outstanding offer, if any;

(2) redetermine the value of the property and order that the property continue to be offered for an additional time; or

(3) order that the property be sold by sealed bids or at an auction.

(e) If the court orders a sale by sealed bids or an auction, the court shall set terms and conditions of the sale. If the court orders an auction, the auction must be conducted under [insert reference to general partition statute or, if there is none, insert reference to foreclosure sale].

(f) If a purchaser is entitled to a share of the proceeds of the sale, the purchaser is entitled to a credit against the price in an amount equal to the purchaser's share of the proceeds.

Open-market sales generally lead to higher prices. Should the Commission adopt the UPHPA, it may be beneficial to extend Section 10 to timber sales.

3. Sale of Minerals

Perhaps the same expedited procedure for the sale of timber could be applied to the sale of mineral interests. Currently, G.S. 46-26 provides:

§ 46-26. Sale of mineral interests on partition.

In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual

> partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear.

V. Proceeds Belonging to Unknown or Unlocatable Heirs

Another issue arising from this docket is how to manage the proceeds belonging to unknown or unlocatable heirs.

A. Current North Carolina Law

G.S. 46-34 provides that after the real property has been sold in the partition sale, the court shall order the unknown or unlocatable heirs' share of the proceeds to be "invested or settled[,]" so that the unknown or unlocatable heirs may later recover their share:

> **§ 46-34. Shares to persons unknown or not sui juris secured.**
> When a sale is made under this Chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the State, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

In other words, the unknown or unlocatable parties' share of the proceeds does not escheat, provided that there is at least one known heir. And, as a practical matter, a partition action would not even occur if there was not at least one known heir.

> Real property escheats only when the owner dies intestate or dies testate without disposing of the same by will and without leaving surviving any heir, kindred or spouse to inherit under the laws of this State. . . . The existence of *only one known heir* capable of succeeding to title to his property would have prevented an escheat.

In re Estate of Nixon, 2 N.C. App. 422, 427-28, 163 S.E.2d 274, 278 (1968) (emphasis added).

The clerk of superior court may invest the unknown heirs' proceeds under G.S. 7A-112 or deposit them in an interest-bearing account under G.S. 7A-112.1. The clerk shall assess fees under G.S. 7A-308.1. The unknown heirs may recover any interest and investment earnings that remain after the clerk assesses fees. *See* G.S. 7A-308.1.

In *Nixon*, in 1958, the clerk of superior court received proceeds of a partition sale to be held for the benefit of unlocatable heirs pursuant to G.S. 46-34. *Id.* at 427, 163 S.E.2d at 277-78. Eight years later, in 1966, the clerk transferred the proceeds, with interest, to the Escheats Officer of the University of North Carolina. *Id.* at 428, 163 S.E.2d at 278. The following year, the petitioners sued to recover the money from the University, claiming to be the descendants and successors-in-interest to the unlocatable heirs. *Id.*, 163 S.E.2d at 278-79. The University argued that the petitioners' claim was barred by a three-year statute of

limitations since the clerk held the proceeds more than three years before transferring the proceeds to the University. *Id.*, 163 S.E.2d at 279. The North Carolina Court of Appeals rejected this argument:

> The clerk remained liable to account for these funds to the persons entitled thereto so long as the funds remained in his possession, and no statute of limitations would apply to bar an action by the beneficiaries for whose account he held the funds until they had made demand upon him and he had refused to honor the same.

Id. at 429, 163 S.E.2d at 279. The Court affirmed the trial court's order awarding the petitioners the proceeds, including the interest that had accrued while in the clerk's possession. *Id.*, 163 S.E.2d at 279.

Currently, under the North Carolina Unclaimed Property Act, the clerk of superior court shall transfer the proceeds to the State Treasurer after one year. G.S. 116B-53(c)(12) presumes that "[p]roperty held by a court, government, governmental subdivision, agency, or instrumentality" is abandoned if it remains unclaimed by the apparent owner after one year. Therefore, after one year, the clerk of superior court shall mail notice to the last known address of the unknown heir under G.S. 116B-59 and shall file a report to the State Treasurer under G.S. 116B-60. Upon filing the report, the clerk shall transfer the unknown heirs' proceeds, along with any interest or investment earnings less the fees assessed by the clerk, to the State Treasurer's custody. G.S. 116B-61(a). With written permission from the State Treasurer, the clerk may transfer the unknown heirs' proceeds before one year. *See* G.S. 116B-69(b); 20 NCAC 08 .0110.

G.S. 116B-6(b) provides that the State Treasurer shall then transfer the proceeds to the Escheat Account:

> [T]he Treasurer shall transfer, at least annually, to the Escheat Account all moneys then in the Treasurer's custody received as, or derived from the disposition of, escheated and abandoned property and shall disburse to the State Education Assistance Authority, as provided in G.S. 116B-7, the income derived from the investment of the Escheat Account and the Escheat Fund.

The State Treasurer shall also prepare a list of the apparent owners of the unclaimed property and shall distribute it to the Administrative Office of the Courts and shall cause it to be published in at least two newspapers. G.S. 116B-62(a), (b). Under G.S. 116B-67, an unknown heir can claim the proceeds anytime. The unknown heir, however, cannot recover any interest or investment earnings that accrued while in the State Treasurer's custody. G.S. 116B-64; *see also Rowlette v. State*, 188 N.C. App. 712, 722, 656 S.E.2d 619, 625-26 (holding that the State Treasurer's retention of interest earned on unclaimed property did not amount to an unconstitutional taking because the owners had abandoned the property), *appeal dismissed and disc. review denied*, 362 N.C. 474, 666 S.E.2d 487 (2008).

B. Possible Discussion Items

1. Proceeds Transferred Immediately to the State Treasurer

One alternative method of managing the unknown or unlocatable heirs' proceeds is to transfer the proceeds to the State Treasurer immediately after the partition sale. This method may prove more helpful to

the unknown or unlocatable heirs since the State Treasurer's Unclaimed Property and Escheats Division is a more intuitive place to look than a clerk of superior court's investment account. In addition, this Division actively seeks to locate the rightful owners. On its website's frequently asked questions page, the Division provides the following question and answer:

> [Question:] What attempts are made to find the rightful owners?
>
> [Answer:] Under the law, the holders (the entity which has possession of the property, i.e. banks, insurance companies, credit unions, etc.) must make a good faith effort to locate the true owner. If they are unsuccessful, they are to report the names and last known address of the owners to the State Treasurer. By statute, a list is sent to all the Clerks of Court in North Carolina. Also, the Department of State Treasurer is required to post a notice in at least two newspapers stating the nature of the lists and that the lists are available for inspection at the offices of the respective clerks of superior court. Additionally, the Department of State Treasurer has developed and implemented a statewide outreach and public awareness effort that includes setting up booths at various fairs, street festivals and conventions, asking for assistance from members of the General Assembly as well as local governmental offices in locating rightful owners, and working with the media to encourage people to check for unclaimed property on our website, www.NCCash.com.

Available at: www.nctreasurer.com/Claim-Your-Cash/Claim-Your-NC_Cash/Pages/FAQ.aspx (last accessed December 20, 2016).

One sub-issue to consider is interest and the Fifth Amendment's takings clause. In *Rowlette*, the N.C. Court of Appeals held that the State Treasurer's retention of interest was not an unconstitutional taking because the owners had abandoned the property. *See Rowlette*, 188 N.C. App. at 722, 656 S.E.2d at 625-26. Because the State Treasurer retains all interest on unclaimed property, it is probably necessary that the unknown or unlocatable heirs' proceeds be presumed to be abandoned before they can be transferred to the State Treasurer. *See* G.S. 116B-64; *cf. Morton Grove Park Dist. v. American Nat. Bank and Trust Co.*, 78 Ill.2d 353, 361-62 (1980) (holding that the takings clause prevented a county treasurer from retaining interest on private property).

2. Proceeds Transferred to Known Heirs

Another method would be to transfer the proceeds on a *pro rata* basis to the known heirs. In some cases, the known heirs may be the heirs of a deceased unlocatable heir. However, it is important to recognize the potential moral hazard problem of rewarding known heirs for the absence of other heirs in the proceeding, especially because the known heirs can be essential in identifying and locating other heirs. Perhaps the proceeds could be subject to a claim by the unknown or unlocatable heirs for three years, or some other period of time.