

Summary of Partition Task Force's Discussion at the August 25, 2017 Meeting

Attendance: Judith Welch Wegner, Co-Chair (by telephone); Starkey Sharp, Co-Chair; Faith Rivers James; Paul Stam; C. Thomas Steele, Jr.; Floyd M. Lewis; Bly Hall (by telephone); David C. Unwin; Joshua Lanier, North Carolina Bar Association.

Location: Stam Law Firm, PLLC, 510 W. Williams Street, Apex, North Carolina.

I. Partition Task Force's Report

The Partition Task Force (PTF) decided to adopt a report to send to the General Statutes Commission. The report describes that (i) the PTF did not reach a consensus to recommend enactment of the Uniform Partition of Heirs Property Act ("the Uniform Act"); and (ii) the PTF reached a consensus on fourteen non-Uniform Act issues on partition-related law.

A. Uniform Partition of Heirs Property Act

The PTF did not reach a consensus to recommend enactment of the Uniform Act.

The following opinions *in favor* of the Uniform Act were expressed:

- There are many problems with current partition law, and the Uniform Act represents a national consensus on how to resolve problems relating to the partition of heirs property.
- The PTF may not be aware of how many individuals have been disadvantaged by the current law.
- The Uniform Act was recently enacted in South Carolina, and thus it is likely that the Uniform Act could be enacted in North Carolina.
- The PTF can glean certain features of the Uniform Act and reject those aspects which it disfavors.
- Under the current law, it may be difficult for a party opposing a partition to hire a lawyer. Although a court can award attorneys' fees to any party in a partition proceeding, many people are unaware of this possibility. *See* G.S. 6-21(7).

The following opinions *against* the Uniform Act were expressed:

- The Uniform Act harms the individuals it is designed to help and empowers individuals seeking to disrupt a partition proceeding.
- There are no problems with the current law, and the current law is only used as a last resort. Real estate practitioners do not appear to think the Uniform Act is necessary.

- It is immaterial whether the Uniform Act can be enacted in North Carolina, if it harms the individuals it is designed to help.
- In 2009, there was controversy surrounding issues relating to the partition of heirs property; it does not appear there is consensus today. The General Statutes Commission typically recommends consensus-based legislation.
- Poverty typically does not prevent an individual from obtaining legal representation, and a court can award attorneys' fees to any party in a partition proceeding. *See* G.S. 6-21(7).
- The appraisal procedure of the Uniform Act could lead to a lower valuation of the property and could set an unreasonable expectation for the sale price.
- The appraisal procedure of the Uniform Act would unnecessarily lengthen the partition procedure. Mr. Stam shared that in his experience, an appraisal usually takes 6 weeks, rather than 5 days.
- Section 9 of the Uniform Act, which allows a court to consider noneconomic factors in deciding between a partition in kind and a partition by sale, is unnecessary if a court is already able to consider these factors under *Brown v. Boger*, 263 N.C. 248, 256-60, 139 S.E.2d 577, 583-85 (1965) ("It is well known that many considerations, other than monetary, attach to the ownership of land, and courts should be, and always have been, slow to take away from owners of real estate their common law right to have the same set aside to them in kind.").
- Most real estate practitioners believe that courts should not and do not consider noneconomic factors in deciding between a partition in kind and a partition by sale.

The following opinions *related to* the Uniform Act were expressed:

- The PTF discussed the possibility of recommending enactment of only the cotenant buyout procedure in Section 7. Staff noted that the buyout procedure required an initial valuation of the property.
- The presumption for a partition in kind should not apply in situations where a partition in kind would clearly be impractical, such as in the case of a single beach house.

B. Fourteen Non-Uniform Act Issues

The PTF decided to recommend that the General Statutes Commission refer the following two issues to the Revenue Laws Study Committee:

- Provide that a partition by sale may be treated as a nontaxable exchange similar to an exchange under Section 1031 of the Internal Revenue Code. Dan Etefagh, an attorney in the North Carolina General Assembly's Bill Drafting Division who drafts finance bills, prepared a bill draft to accomplish this treatment under State income tax law. The PTF

approved Mr. Ettefagh's bill draft. Staff reported that State law cannot be amended to achieve similar treatment under federal income tax law.

- Provide that any cotenant may request that the property tax bill be sent to the cotenant either by mail or email, provided that the cotenant provides a mailing address or an email address to the revenue collector.

The PTF decided to recommend that the General Statutes Commission examine the following twelve issues:

(1) Authorize the clerk of court to issue a writ of possession at the conclusion of a partition in kind. Current law allows the clerk of court to issue a writ of possession at the conclusion of a partition by sale as part of the partition proceeding. *See* G.S. 1-339.29(c), (d); G.S. 46-28(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."). There is not, however, a similar provision for partitions in kind. The PTF appeared to favor the following language from a draft presented by Mr. Stam:

SECTION 1. Article 1 of Chapter 46 of the General Statutes is amended by adding a new section to read:

"§ 46-19.1. Orders for possession.

(a) Orders for possession of real property apportioned pursuant to this Article, in favor of the party to which an allotment has been made and against any party in possession at the time of application therefor, may be issued by the clerk of the superior court if all of the following apply:

- (1) No appeal from the order of confirmation of the report of commissioners has been made within the time prescribed under G.S. 1-301.2.**
- (2) The report and confirmation have been duly recorded in the office of the register of deeds pursuant to G.S. 46-20.**
- (3) Ten days' notice has been given to the party or parties who remain in possession at the time application is made; provided that notice has not been given until the clerk has confirmed the report of the commissioners pursuant to G.S. 46-19.**

(b) An order for possession issued pursuant to this section shall be directed to the sheriff and shall authorize the sheriff to remove all occupants and their personal property from the premises and to put the party to which an allotment has been made in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The party to which an allotment has been made shall have the same rights and remedies in connection with the execution of an order for possession and the

disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes."

(2) In a partition by sale of residential property, authorize the clerk of court to order the occupants of the property to allow a commissioner, real estate agent, surveyor, appraiser, or inspector to have a reasonable opportunity, on notice, to inspect and show the property to prospective buyers, to evaluate the property, and to prepare the property for sale.

(3) In both a partition in kind and a partition by sale, provide that a petitioner is not required to join or notice spouses of cotenants. The PTF discussed the possibility of amending G.S. 29-30, which provides for a surviving spouse's elective life estate, and Article 1A of Chapter 30 of the General Statutes, which provides for a surviving spouse's elective share, to provide that a surviving spouse does not have an interest in property of the decedent that has been transferred to another person in a prior partition proceeding.

(4) Provide a statutory presumption that the clerk of court should award attorneys' fees incurred for the common benefit of the cotenants, with the amount in the clerk's discretion. The PTF contrasted the advantages and disadvantages of the clerk assessing among only aligned parties the portion of attorneys' fees that are incurred specifically to oppose other cotenants on the issue of whether the property should be partitioned in kind or partitioned by sale.

(5) Clarify that a cotenant should be reimbursed for property taxes paid by the cotenant during the 10 years preceding the filing of the petition at the legal rate of interest provided under G.S. 24-1.

(6) Codify, but do not change, the current case law on ouster of a cotenant.

(7) Clarify the right of contribution and provide a simplified method for a cotenant to assert this right. A cotenant who has occupied the property is not required to pay rent but the rental value would be an offset against reimbursable carrying costs such as property taxes, homeowner's insurance, reasonable repairs, and mortgage payments for loans to acquire or improve the property. The rental value may be established by testimony. The PTF also raised the issue of how a court would calculate rental value in the case where an occupying cotenant had built the house. In addition, the PTF requested that the General Statutes Commission consider at some point in the future the idea of clarifying the right of contribution in the context of life estates.

(8) Explore whether this State's partition statutes should allow partition by allotment, as applied in *Zimmerman v. Marsh*, 365 S.C. 383, 388, 618 S.E.2d 898, 901 (S.C. 2005).¹

¹ See South Carolina Code 1976 § 15-61-320(7) (defining "partition by allotment" as "a court-ordered partition of the heirs' property where ownership to all or a portion of the heirs' property is granted to one or more cotenants proportionate in value to their interests in the entire heirs' property parcel, with adjustments being made for payment to compensate other cotenants for the value of their respective interests in the heirs' property").

(9) Refer issue of notice and service of process on unknown and unlocatable heirs to another docket of the General Statutes Commission. This docket should also include the issues of (i) whether alternative means of notice, such as first-class mail instead of certified mail, return receipt requested, should be explored for low-value property, (ii) whether electronic notice on a statewide searchable database should be allowed rather than newspaper publication, and (iii) whether the sale proceeds of unknown or unlocatable heirs should be sent directly to the Escheat Fund rather than held by the clerk of court for one year. The PTF concluded that issues of notice extend beyond partition proceedings.

(10) Ask the Real Property Section of the North Carolina Bar Association to prepare optional suggested short forms of tenancy in common agreements that clerks of court and legal aid clinics could provide to an individual who acquires a tenancy in common interest, whether by will or intestacy.

(11) Ask the Commissioner of Agriculture, the North Carolina Association of Assessing Officers, and other entities to explore the idea of establishing an outreach program to notify property owners who probably qualify for deferred property taxes due to the property's use as forestland under G.S. 105-277.2 through G.S. 105-277.7.

(12) Clarify that in a partition sale, the clerk of court is not required to appoint more than one commissioner. *See* G.S. 46-28 (using the term "commissioners" in connection to a partition sale).

II. Additional Consensus Item

The PTF also agreed that all statutes (e.g. judicial sales, rules of civil procedure, quiet title actions) relating to partition law should be coordinated and consistent.

III. Other Issues

The PTF examined the following four issues discussed in David Unwin's July 13, 2017 memorandum to the General Statutes Commission for the docket DN 16-4 – Streamline Partition Sales:

(1) Due Diligence (Direct Notice). The PTF did not favor a statutory procedure for direct notice and agreed that most attorneys understand what "due diligence" requires.

(2) First-Class Mail. The PTF decided to add to a new docket of the General Statutes Commission, which is discussed above under item (9), the concept of allowing a petitioner to use first-class mail, instead of certified mail, return receipt requested, to notice and serve respondents.

(3) Content of Notice. The PTF did not favor the idea of requiring that the notice contain the names of the petitioners and the names of all persons named in the petition, like a notice in a Torrens proceeding under G.S. 43-10.

(4) Proceeds Transferred to Known Heirs. The PTF did not favor the idea of transferring the unknown or unlocatable heirs' sale proceeds to the known heirs.

IV. Conclusion

The PTF decided not to schedule another meeting, although many of the members expressed a willingness to continue to meet.