



## GENERAL STATUTES COMMISSION

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### MEMORANDUM

**To:** General Statutes Commission  
**From:** David Unwin, Staff Attorney  
**Re:** Bill Draft 2017-MUZ-43 (Real Prop. Partition/Carrying Costs)  
**Date:** February 1, 2018

#### General Comments

Bill Draft 2017-MUZ-43 (Real Prop. Partition/Carrying Costs) provides that in a real property partition proceeding, a cotenant has a right to contribution for the cotenant's payment of carrying costs. The draft provides that this right is subject to an offset in the amount of the fair market rental value of the cotenant's occupation of the real property.

#### Background

##### A. Carrying Costs

Under caselaw, in a real property partition proceeding, a cotenant generally has a right to contribution for the cotenant's payment of carrying costs. *Harris v. Gilchrist*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 785 S.E.2d 119, 125 (holding that cotenants had a right to contribution for payment of property taxes and homeowner's insurance), *disc. review denied*, 369 N.C. 68, 793 S.E.2d 223 (2016); *Knotts v. Hall*, 85 N.C. App. 463, 465-66, 355 S.E.2d 237, 239 (holding that a cotenant had a right to contribution for payment of property taxes), *aff'd per curiam*, 321 N.C. 119, 361 S.E.2d 591 (1987). G.S. 105-363(b) similarly provides that generally if a cotenant pays the entire amount of a tax lien on the real property, the cotenant shall receive a lien against the other cotenants' interests in the real property.

A cotenant, however, who has exercised exclusive possession of the real property does not have a right to contribution. *Harris*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 125; *Knotts*, 85 N.C. App. at 466, 355 S.E.2d at 239; *see also Craver v. Craver*, 41 N.C. App. 606, 607, 255 S.E.2d 253, 254 (1979) (holding that a cotenant who had exclusive possession did not have a right to contribution for repairs). In *Harris* and *Knotts*, the North Carolina Court of Appeals held that "there was 'no basis for a finding of exclusive possession' where the occupying co-tenant made no attempt to withhold the property from the other co-tenants and where the other co-tenants made no demand to possess the property." *Harris*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 125 (quoting *Knotts*, 85 N.C. App. at 467, 355 S.E.2d at 240).

##### B. Rent

Although a cotenant must share with the other cotenants rental payments received from third parties, a cotenant is liable for the cotenant's occupation of the real property only if the cotenant has committed an actual ouster. *Harris*, \_\_\_ N.C. App. at \_\_\_, 785 S.E.2d at 124. An actual ouster is "a cotenant's clear positive denial of another cotenant's rights in the common property." *Id.* at \_\_\_, 785 S.E.2d at 124 (citation, quotation marks, and brackets omitted).

##### C. Other Issues

Under caselaw, it is highly likely that outside a real property partition proceeding, (i) a cotenant has a right to contribution for the payment of carrying costs; and (ii) a cotenant has a right to contribution for property taxes paid during the past 10 years. In *Martin Marietta Materials, Inc. v. Bondhu, LLC*, a plaintiff-cotenant sought contribution from a defendant-cotenant for the plaintiff-cotenant's payment of property taxes. *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 82, 772 S.E.2d 143, 144-45 (2015). The defendant-cotenant raised the statute of limitations defense. *Id.*, 772 S.E.2d at 145. The Court held that it was unclear whether the plaintiff-cotenant's claim arose from an implied contract or was a claim for an accounting in equity.<sup>1</sup> *Id.* at 86-87, 772 S.E.2d at 147. The Court followed the North Carolina Supreme Court's holding that "where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected." *Id.* at 87, 772 S.E.2d at 147 (quotation marks omitted) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 350, 435 S.E.2d 530, 533 (1993)). The Court thus chose the 10-year statute of limitations under G.S. 1-56 that corresponded to the equitable accounting claim because that statute provides a longer period. *Id.*, 772 S.E.2d at 148.

### Specific Comments

**Section 1** of the bill draft adds a new § 46-3.2 to Article 1 of Chapter 46 of the General Statutes:

**Subsection (a)** of § 46-3.2 provides that in a real property partition proceeding, a cotenant has a right to contribution for the cotenant's payment of carrying costs. This right is subject to an offset in the amount of the fair market rental value of the cotenant's occupation of the real property. Subsection (a) alters the rights of cotenants under caselaw and simplifies the cotenants' rights by removing the concepts of exclusive possession and actual ouster.

**Subsection (b)** of § 46-3.2 provides that at any time during a real property partition proceeding, on application, a cotenant may assert the right to contribution provided in subsection (a) of § 46-3.2. Another cotenant may respond to the cotenant's application by asserting the offset provided in subsection (a) of § 46-3.2.

**Subdivision (c)(1)** of § 46-3.2 provides that carrying costs include payments for loans to acquire or improve the real property, homeowner's insurance, reasonable repairs, and property taxes.

**Subdivision (c)(2)** of § 46-3.2 provides that the amount of property taxes is the amount paid by the cotenant during the 10 years preceding the filing of the partition petition, plus interest at the legal rate under G.S. 24-1 (which is currently 8% per year).

**Subsection (d)** of § 46-3.2 provides that § 46-3.2 does not affect cotenants' rights outside a real property partition proceeding. Subsection (d) also incorporates cotenants' rights under caselaw to the extent that caselaw does not conflict with § 46-3.2.

**Section 2** provides that this bill draft is effective October 1, 2018, and applies to real property partition proceedings commenced on or after that date.

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<sup>1</sup> Although the plaintiff-cotenant's substantive claims arose under Virginia law since the real property was located in Virginia, this case is still instructive because North Carolina law also includes the concepts of implied contract and equitable accounting. *Id.* at 83, 86, 772 S.E.2d at 145, 147.