

Specific Comments on Circulated Partition Draft

[Staff Note: Specific comments from Professor Meredith Smith at the UNC School of Government, the Administrative Office of the Courts, the Conference of Clerks of Superior Court, and Hank Van Hoy, former President of the NC Bar Association, are set out below the relevant sections. The redlining in the draft represents suggestions from Professor Smith.]

"Chapter 46A.

"Partition.

"Article 1.

"General Provisions.

"§ 46A-1. Partition is a special proceeding.

A partition of property under this Chapter is a special proceeding, and, except as modified in this Chapter, its procedure is provided in Subchapter XII of Chapter 1 of the General Statutes.

"§ 46A-2. Summons; notice included in petition.

(a) In partition proceedings initiated under this Chapter, the period of time for answering a summons is provided in G.S. 1-394.

(b) The petition shall include written **notice** 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. 46A-3, the court may order reasonable attorneys' fees to be paid as a part of the costs of the proceeding.

[Comment from Prof. Smith: A question that comes up is what is the effect of a petitioner's failure to include this notice in the petition? Is it just legal error and ground for challenging on appeal? What does the court do if there is a petition filed without this notice?]

"§ 46A-3. Attorneys' fees.

(a) In proceedings to partition property under this Chapter, the court shall allocate among all the cotenants of the property those reasonable attorneys' fees incurred for the common benefit of all the cotenants, unless a cotenant shows by clear and convincing evidence that doing so would be inequitable. The allocation shall be according to each cotenant's interest in the property.

(b) The attorneys' fees described in subsection (a) of this section do not include attorneys' fees incurred ~~in disputing which method of partition the court should order.~~ related to the issue of whether the court should order an actual partition or a sale in lieu of partition. Reasonable attorneys' fees incurred by a cotenant ~~in disputing the method of partition on the issue of whether to order an actual partition or a sale in lieu of partition~~ shall be allocated by the court among those cotenants determined by the court to be aligned with the cotenant on that issue. The allocation shall be according to each aligned cotenant's interest in the property relative to the total interest of all the aligned cotenants in the property.

[Comment from Prof. Smith: I am reading this provision in GS 46A-3 coupled with the notice given in 46A-2(b)(2) to create two categories of attorneys' fees that may be allocated by the court.

1. "Common benefit" attorneys' fees under 46A-2(a)

2. Fees incurred in disputing method of partition under 46A-2(b)

Is the intent to narrow the court's authority to assess and allocate attorneys' fees? Previously, the court had the authority to allocate any reasonable attorneys' fees among the parties as part of the costs in a partition under GS 6-21(7).

If notice is given that the court may order attorneys' fees as set forth in 46A-3, is the court restricted to only allocating attorneys' fees described in that subsection? Does the court still have the authority to allocate other attorneys' fees that do not fall into one of the two categories above as set out in GS 6-21(7) or does the notice given in 46A-2 limit the court's authority to allocate other attorneys' fees to only those incurred in those categories?]

[Comment from Prof. Smith: The way I read (b) is that attorneys' fees disputing the method of partition could not be allocated among the petitioners. Is "disputing the partition" limited to the respondents to the proceeding? Or, may the court allocate the attorneys' fees among respondents as a cotenant group and petitioners as a cotenant group on the issue of what type of partition to order? Is the intent to allow allocation among cotenants on both sides of the issue?

Could be revised to state:]

[Comment from Administrative Office of the Courts (AOC): The proposed statute on attorneys' fees poses a significant departure from the previous statute addressing the court's discretion over the allocation of attorneys' fees in a partition proceeding. The previous statute gave clerks discretion over how to tax or impose attorney's fees as costs for, against, or amongst parties to a partition proceeding.

The new proposed language restricts the court's authority under the new proposed language in subsection (a) of the statute. Subsection (b) attempts to clarify that the attorney's fees incurred in litigating the method of partition aren't subject to the constraints of subsection (a). However, without additional language added to this statute, clerks will be left with holes in the statute regarding how to deal with other types of attorneys' fees incurred by parties when the fees aren't incurred for the common benefit. Specifically, the attorneys' fees of a party in litigating the division of sale proceeds is not addressed in this proposed language. This is a serious issue for clerks because in partition sales this is a heavily litigated issue. Some more all-encompassing language in subsection (b) is recommended. And again, clerks may also have concerns with the proposed language in subsection (a) since it takes discretion away from the clerk.

We are unaware of whether Legal Aid of North Carolina provides advice or other free services related to partition proceedings.]

[Comment from Conference of Clerks of Superior Court (Clerks): The attorney's fees section got fleshed out and we think it gives Clerks slightly less discretion in raising the bar to "clear and convincing" evidence needed to show why the fees should not be evenly split amongst cotenants. So, clerks will need to require more hard evidence if accusations are made that one or more co-tenants held out and caused the action to be necessary and therefore, fees should be taxed against them. Clerks may need more than just testimony now.]

"Article 2.

"Partition of Real Property.

"Part 1.

"General Provisions.

"§ 46A-20. Venue in partition.

A proceeding to partition real property shall be commenced in the county where the property is located. If the property, whether consisting of one or more tracts, is located in more than one county, the proceeding may be commenced in any of the counties where any part of the property is located; in this case, the petitioner shall file a notice of lis pendens in each of the other counties.

[Comment from Prof. Smith about the phrase "the court of such county wherein the proceedings for partition are first brought shall have jurisdiction" in current law:

This is eliminated from the revised law. No longer clarity expressly in 46A re: which county has superior venue claim if multiple petitions filed in multiple counties.]

"§ 46A-21. Petition by cotenant or personal representative of cotenant; necessary and proper parties; no requirement to serve or join spouses of cotenants.

(a) Any person claiming real property as a tenant in common or joint tenant may petition to partition the property in superior court. The personal representative of a deceased tenant in common or deceased joint tenant may also petition to partition the property as provided in G.S. 28A-17-3 as part of a petition to sell the deceased cotenant's interest for the payment of debts and other claims against the decedent's estate under Article 17 of Chapter 28A of the General Statutes.

(b) The petitioner shall serve and join all tenants in common and joint tenants of the property. The petitioner may serve and join any other person with an interest in the property and any holder of a lien, mortgage, or deed of trust on the property.

(c) The petitioner is not required to serve or join spouses of cotenants of the real property unless the spouse is also a cotenant. The surviving spouse of a ~~deceased cotenant~~ decedent is not entitled to a life estate in real property under G.S. 29-30 if the ~~cotenant's~~ decedent's interest in the real property was ~~transferred in a partition proceeding initiated under this Chapter to another person before the cotenant's death.~~ partitioned, either by actual partition or partition by sale, pursuant to this Chapter and transferred to a person other than the decedent before the decedent's death.

[Comment from Prof. Smith: But they are not legally still a cotenant, correct? They are a former cotenant because property must be conveyed during lifetime of former cotenant. Consider revising as follows:]

[Comment from AOC: When a spouse acquires property during the marriage, but not by inheritance, is this intended to cut off any marital interest of the spouse who is not joined as a party? Without more clear or complete statutory language that this statute is intended to cut off any interest of the spouse, there may be argument that a spouse retains inchoate rights in the property and therefore a cloud on title may be remain.]

"§ 46A-22. Effect of judgments partitioning real property subject to a contingent future interest.

When real property is subject to a contingent future interest, any judgment partitioning the property is valid and binding upon all persons having an interest in the property, whether or not in being, if all of the following requirements are met:

(1) The following persons are ~~parties~~: parties to the proceeding partitioning the real property:

- a. Persons with a present interest or a vested future interest.
- b. Persons in being **with** a contingent future interest and **that** would have a present interest if the contingency had occurred at the time the proceeding was commenced.
- c. Persons not in being with a contingent future interest.

(2) The following parties are represented by a guardian ad litem appointed under G.S. 1A-1, Rule 17:

- a. Unborn individuals.
- b. Parties not in being.
- c. Parties who are minors or incompetent adults and who do not have a guardian of the estate or general guardian.
- d. Unknown or unlocatable parties.

[Comment from Prof. Smith: A question received in practice is whether a partition by sale triggers a contingent interest. For example, property conveyed to A for life, then to B. If B dies before A, then to C.

If the partition by sale extinguishes the life estate, then is the contingency deemed to have occurred upon the sale of the property? If B is alive upon the sale, does B have a vested interest in proceeds? Or are the funds paid to the clerk as "unknown" and upon death of A, funds may be distributed to B or C depending on who is alive at A's death?]

"§ 46A-23. Petition by judgment creditor of cotenant.

(a) If a judgment debtor has a personal liability on a judgment docketed in the superior court of a county where the judgment debtor owns real property as a tenant in common or joint tenant, the judgment creditor may petition for an actual partition of the property. If the court

apportions a share of the property to the judgment debtor, the judgment creditor may seek to execute the judgment against the judgment debtor's share by (i) setting aside the judgment debtor's homestead in the share, as determined according to Article X of the North Carolina Constitution and Article 16 of Chapter 1C of the General Statutes, and (ii) selling the remaining part of the share.

(b) The remedy provided in this section does not deprive a judgment creditor of any other remedy in law or equity to enforce a judgment lien.

[Comment from Prof. Smith: To add support for this revision per NC Clerk of Superior Court Procedures Manual, pg. 163.8:

"Petition by judgment creditor of cotenant and assignment of homestead. G.S. § 46-5, which authorizes a judgment creditor of a cotenant to file a petition for partition in order to be able to lay off homestead and sell the remainder to satisfy a judgment, is no longer useful because homesteads are no longer physically laid off on the land. Now the sheriff may sell the undivided interest of the tenant in common/debtor under a writ of execution."]

[Comment from AOC: What is the purpose of stating "personal liability"?]

"§ 46A-24. Surface and oil, gas, or mineral interests in separate owners; partitions distinct.

When title to the oil, gas, or mineral interests in real property has been separated in ownership from the title to the surface of the property, a tenant in common or joint tenant of the oil, gas, or mineral interests may partition the oil, gas, or mineral interests, distinct from the surface, without joining the owner of the surface. Similarly, a tenant in common or joint tenant of the surface of the property may partition the surface, distinct from the oil, gas, or mineral interests, without joining the owner of the oil, gas, or mineral interests. An owner of the oil, gas, or mineral interests is not required to join a partition of the surface of the property, and an owner of the surface of the property is not required to join a partition of the oil, gas, or mineral interests. The rights of either owner shall not be prejudiced by a partition of the other interests.

"§ 46A-25. Unknown or unlocatable parties; summons, notice, and representation.

(a) If, ~~upon~~ at the time of or subsequent to the filing of the petition, the petitioner shows by affidavit ~~or otherwise~~ filed with the court that the petitioner cannot after due diligence

ascertain the name or location of a person that the petitioner is required to, or chooses to, serve under G.S. 46A-21(b), the court shall ~~authorize~~ enter an order authorizing service by publication under G.S. 1A-1, Rule 4. The notice by publication shall include a description of the property that 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 the notice by publication, the court shall appoint a guardian ad litem under G.S. 1A-1, ~~Rule 17,~~ Rule 17 to represent any unknown or unlocatable person that the petitioner is required to, or chooses to, serve under G.S. 46A-21(b).

[Comment from Prof. Smith: Suggest eliminate "otherwise" and limiting to affidavit or other specified document filed with the court - provides more clarity to the court as to process.]

[Comment from Prof. Smith: Authorize alone does not make it clear what the court does in practice – seems like if it were in an order it would be a clear action for the court to take and clear in the record that service by publication was in fact authorized. How does the court authorize if not in an order?]

**"§ 46A-26. Court's authority to make orders before final determination of proceeding;
notice and hearing.**

(a) Before final determination of a proceeding to partition real property, on written application of any of the ~~parties,~~ parties filed with the court, the court may make any orders that it finds to be in the best interest of the parties, including, but not limited to, orders relating to possession, payment of secured debt or other liens on the property, occupancy and payment of rents, the appointment of receivers pursuant to G.S. 1-502(6), and access to the property for the purpose of inspecting, surveying, appraising, or selling the property.

(b) A party making an application under subsection (a) of this section shall serve a copy of the application on all other ~~parties,~~ parties pursuant to [G.S. 1A-1, Rule 5?]. The court shall schedule a hearing on the application, if, within 10 days ~~of being served,~~ after service on the other parties, a party files a response in opposition to the application or ~~requests~~ files a request

for a hearing. If no response or request for a hearing is filed within the time period prescribed,
the court may decide the matter summarily.

[Comment from AOC: Under G.S. 46A-26(b), the following addition is recommended: "any other interested persons the clerk may require"]

"§ 46A-27. Carrying costs, including property taxes; improvements; right to contribution.

(a) Right to Contribution. – At any time during a real property partition proceeding, a cotenant may on written application filed with the court assert the cotenant's right to contribution provided in this section. A cotenant has a right to contribution from the other cotenants for the cotenant's payment of the real property's carrying costs and for the lesser of the following:

(1) The value added to the real property by the cotenant's improvements as of the date of the commencement of the proceeding.

(2) The actual costs of the cotenant's improvements.

(b) Property Taxes. – A cotenant's right to contribution for property taxes under this section is limited to the amount of property taxes 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.

(c) Scope. – Nothing in this section affects the rights of cotenants outside a real property partition proceeding initiated under this Chapter.

(d) Carrying Costs Defined. – For purposes of this section, "carrying costs" means the actual costs of preserving the value of and the cotenants' interests in the real property, including property taxes, homeowner's insurance, repairs, and payments for a loan to acquire the real property.

[Comment from Prof. Smith: Is this right of contribution limited if the cotenant had exclusive possession of the property? Consider whether to incorporate or otherwise address holding of Harris v. Gilchrist (COA15-437; March 1, 2016).

In Harris, the court noted under GS 105-363(b) and an earlier decision of the court a cotenant who pays a greater share of taxes, mortgage interest, and costs may enforce a lien in his favor upon the shares of other joint owners for such payments, except when the cotenant paying the taxes and costs is in exclusive possession of the property. The court noted that exclusive possession is not the same as sole possession. For possession to be exclusive, the court stated there must be a finding that the occupying cotenant withheld the property from the other

cotenants and the other cotenants made a demand to possess the property. In this case, neither had occurred therefore the court affirmed the trial court's award of an allowance for taxes and insurance to the occupying cotenant during the time he was a tenant in common with the non-occupying cotenants.]

[Comment from Prof. Smith: Service of application? Does this have to be filed before the hearing on partition by sale? Could it be presented at the hearing? Is any notice required?]

[Comment from AOC: There should be a distinction in the procedure for contribution when there will be a sale and when the property will be apportioned. Since this is an in rem proceeding, outside of owelty, there cannot be a money judgment for contribution. The commissioners would need to account for the contribution claim in deciding how to apportion the property. However, if the property is sold, the court can consider contribution in the division of proceeds.

Subsection (a): For technical consideration, we recommend adding paid in excess of paying cotenant's share after the term "carrying costs".]

[Comment from Clerks: The clerks liked what was done with "carrying costs" and clearly defining what those are, and then allowing the actual cost of an improvement to be considered, not just the difference in value of the property before and after the improvements.]

"§ 46A-28. Sale in lieu of partition.

(a) Subject to G.S. 46A-77(b), the court shall order a sale of the real property described in the petition, or of any part of the property, under Part 3 of this Article only if it finds by a preponderance of the evidence that an actual partition of the property pursuant to Part 2 of this Article cannot be made without substantial injury to any of the parties, after having considered evidence in favor of actual partition and evidence in favor of a sale presented by any of the parties. The party seeking a sale of the property has the burden of proving substantial injury under this section.

(b) In determining whether an actual partition would cause substantial injury to any of the parties, the court shall consider all of the following:

(1) Whether the fair market value of each cotenant's share in an actual partition of the property would be materially less than the amount each cotenant would receive from the sale of the whole.

(2) Whether an actual partition would result in material impairment of any cotenant's rights.

(3) Whether charging owelty under G.S. 46A-51 would eliminate or mitigate any substantial injury to any of the parties caused by an actual partition.

(c) If the court orders a partition sale, the court shall make specific findings of fact and conclusions of law supporting the order.

[Comment from Prof. Smith: An issue that comes up in practice is whether the clerk must hold a hearing in response to every petition for partition filed and, if the clerk holds a hearing, to what extent may the clerk consider arguments raised by a respondent at the hearing that were not previously raised in a pleading filed with the court.]

Current guidance in the CSC Manual is that if the petition seeks partition by sale the clerk must hold a hearing to determine whether actual partition cannot be made. It is also clear that if petitioner files for actual partition and respondent files an answer contesting the actual partition, the clerk must hold a hearing. The open question in both of these situations is to what extent a respondent may contest the petition at the hearing if the respondent does not file an answer. Frequently, attorneys for petitioners argue that the respondent may not be heard if they have not filed a responsive pleading.

Also in the case of an actual partition where not all the parties are joined as a petitioner and the respondent does not file an answer, may the clerk enter an order for actual partition without holding a hearing? If the clerk holds a hearing, to what extent may the clerk consider issues raised by the respondent at the hearing that were not raised in an answer filed with the court? Procedures applicable to special proceedings under Chapter 1, Article 33 apply to the partition. Specifically, GS 1-400 and GS 1-401 set out when the clerk may act summarily, including if all persons affected by the decree or their attorney have signed the petition and are of full age. If a party does not join in the petition and does not file an answer, does GS 1-394 allow the clerk to enter an order without a hearing? It simply says the “plaintiff will apply to the court for the relief demanded....” If the clerk holds a hearing on an actual partition and the respondent, who did not file an answer, appears and requests partition by sale at the hearing, does the clerk allow the respondent to be heard on the issue? May the clerk order partition by sale under those facts?

This is an issue that comes up in all special proceedings before the clerk (especially private condemnation actions) but perhaps one that could be clarified at least for partitions in the revised GS Chapter 46A.]

[Comment from AOC: For technical consideration in subsection (a), consider deleting “after having considered evidence in favor of actual partition and evidence in favor of a sale presented by the any of the parties.” A sale can’t be ordered without a finding of substantial injury to the parties by a preponderance of the evidence and the party seeking sale has the burden of proof. How the court comes to that conclusion should be left to the parties and to the court. This language in some ways restricts clerk’s authority and the procedures clerks use.]

"§ 46A-29. Partition of part of the real property.

In a partition proceeding under this Chapter, the court may order the actual partition of part of the real property and order that the remaining part of the property be sold in a partition sale or held in cotenancy.

"Part 2.

"Actual Partition.

"§ 46A-50. Commissioners appointed; compensation; oath; delay or neglect.

(a) Appointment. – The superior court shall appoint three disinterested commissioners to apportion the real property to be partitioned among the cotenants. If the property to be partitioned is located in more than one county, the court may appoint additional commissioners if necessary from counties where the property is located other than the county where the proceeding is commenced.

(b) Compensation. – The clerk of the superior court shall fix the compensation of commissioners for the partition of real property according to G.S. 1-408.

(c) Oath. – The commissioners shall be sworn according to Chapter 11 of the General Statutes.

(d) Delay or Neglect. – If, after accepting the commission, any of the commissioners unreasonably delays or neglects to perform his or her duties as a commissioner, the court may do any of the following:

(1) ~~Find the commissioner in civil contempt.~~ Enter an order directing the commissioner to perform his or her duties and, if after due service of the order, the commissioner does not within the time specified in the order, comply or obtain further time to comply, hold him or her in civil contempt as provided in Article 2 of Chapter 5A.

(2) Remove the commissioner.

(3) Assess a civil penalty of fifty dollars (\$50.00), to be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

[Comment from Prof. Smith: To initiate civil contempt proceedings, there must first be an order that the commissioner fails to comply with and serves as the basis for civil contempt – no order, no civil contempt.]

**"§ 46A-51. Commissioners to inspect and partition real property; apportioning shares;
charging owelty on shares of disproportionately greater value.**

(a) Apportioning Shares; Charging Owelty on Shares. – The commissioners together shall inspect the real property and partition it among the cotenants by apportioning it into shares proportionate in value as nearly as possible to the cotenants' interests in the property. To the extent the commissioners find it necessary to make an equitable partition, they may (i) apportion the property into shares disproportionate in value to the cotenants' interests in the property and (ii) charge owelty on the shares of disproportionately greater value in the amounts of money necessary to redress the disproportion, to be paid to the shares of disproportionately lesser value.

(b) Interest on Owelty. – Owelty shall bear interest at the legal rate under G.S. 24-1 until paid.

(c) Minor's Share. – If a share charged with owelty is apportioned to a minor, the money shall not be payable until the minor reaches the age of 18 years. If the minor has a guardian of the estate or general guardian, however, the guardian shall pay the money when the guardian receives assets belonging to the minor, other than the share, that may be used for that purpose. If the guardian fails to comply with this subsection, the guardian shall be personally liable for any interest that accrued due to the failure.

*[Comment from Prof. Smith: Is this the guardian's personal liability? Could that be made clear? Not minor's estate that is liable. E.g. 35A-1244 – "guardian may be held **personally** liable for the costs..."]*

[Comment from AOC: In the second sentence of subsection (c) we recommend the following addition to clarify that the property apportioned to the minor may not be used: If the minor has a guardian of the estate or general guardian, however, the guardian shall pay the money when the guardian receives assets belonging to the minor, other than the share apportioned to the minor, that may be used for that purpose.

In the last sentence of subsection (c) we recommend the following addition to clarify that the guardian is liable and not the minor's estate: If the guardian fails to comply with this subsection, the guardian shall be personally liable for any interest that accrued due to the failure.]

"§ 46A-52. Partition where cotenants unknown or title disputed.

(a) If there are any cotenants whose names are not known or whose title is in dispute, the shares of those cotenants shall be apportioned together as one parcel.

(b) In any partition proceeding, if two or more cotenants appear as respondents claiming the same particular undivided interest in the real property to be partitioned, or if any part of the undivided interest claimed by the petitioner is disputed by any respondent, it shall not be necessary to decide on their respective claims before the court orders an actual partition or partition sale of the property. The controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding.

"§ 46A-53. Apportionment of shares in common.

If two or more cotenants by petition or answer request it, the commissioners may, by order of the court, apportion their several shares to them in common, as one parcel, so long as the apportionment is not injurious or detrimental to any cotenant.

[Comment from AOC: We recommend the following or similar language to clarify that the request to apportion shares in common must occur in the initiating petition or answer and not in a subsequent petition: If requested in the petition or answer by two or more cotenants, the commissioners may, by order of the court, apportion their several shares to them in common, as one parcel, so long as the apportionment is not injurious or detrimental to any cotenant.]

"§ 46A-54. Report of commissioners; contents; filing; extension; map.

(a) Report. – The commissioners shall file a report of their proceedings in the office of the clerk of superior court within 90 days after the last commissioner receives a notice of appointment. The report shall be signed by at least two commissioners and shall describe particularly the real property or parcels of real property apportioned, the share apportioned to each cotenant in severalty, and any owelty charged. The clerk of the superior court may, for good cause shown, extend the time for filing the report for an additional period not exceeding 60 days.

(b) Map. – The commissioners may employ a disinterested surveyor to prepare a map of the real property showing the quantity, courses, and distances of each share. If a map is prepared, the map shall accompany and form a part of the report of the commissioners.

"§ 46A-55. Dedication of streets.

Upon motion of any party or the commissioners, the clerk may authorize the commissioners to propose in their report the dedication of portions of the real property that are necessary as a means of access to any share or that are otherwise advisable for public or private highways, streets, or alleys. The court shall consider the proposal as a part of the report and, if approved by the court, it shall constitute a dedication. Only a dedication approved by a judge of the superior court affects the interest of a minor or other person under disability.

[Comment from Prof. Smith: Change to "an incompetent adult" to conform to 46A-86 and 46A-22?]

"§ 46A-56. Confirmation and impeachment of report; appeal.

(a) If no exception to the report of the commissioners is filed within 10 ~~days~~, days from the filing of the report with the court, the report shall be confirmed.

(b) If an exception to the report of commissioners is filed, the clerk shall do one of the following:

(1) Confirm the report.

(2) Recommit the report for correction or further consideration.

(3) Vacate the report and direct a reappraisal by the same commissioners.

(4) Vacate the report, discharge the commissioners, and appoint new commissioners to view the real property and partition it.

(c) Appeal from the clerk to superior court of an order of confirmation of the report of commissioners is governed by G.S. 1-301.2 except that the judge may take only the actions specified in subsection (b) of this section and shall not adjudge a partition of the property different from that made by the commissioners.

(d) After confirmation of the report, any party may impeach the proceeding for mistake, fraud, or collusion by a motion in the proceeding. Impeachment, however, does not affect an innocent purchaser for value and without notice.

[Comment from Prof. Smith: My suggested changes would incorporate case law and add clarity. See *Brown v. Miller*, 63 N.C.App. 694, 306 S.E.2d 502 (1983) (party has 10 days from **filing** of the commissioner's report to file an exception to the proposed partition) and *Hewett v. Hewett*, 38 N.C.App. 37, 247 S.E.2d 23 (1978) ("G.S. 46-19 provides that unless exceptions to the report of the commissioners in a partition proceeding are filed within 10 days of **filing** of such report, the report is confirmed...").

Also consider adding clarity whether clerk may extend time to file an exception for good cause. In a very old case, *McDevitt v. McDevitt*, 150 N.C. 644, 64 S.E. 761 (1909), the court, in dicta, held that it was not prepared to hold that the clerk upon good cause shown may not extend the time for filing exceptions. However, current NC Rule of Civil Procedure 6(b) does not authorize the extension of time except for times periods prescribed by the Rules of Civil Procedure.

Also consider whether written exception is required. A party's oral notification of the clerk before the expiration of the period of his desire to file exceptions has been considered to be a valid and timely exception. See *McDevitt v. McDevitt*, 150 N.C. 644, 64 S.E. 761 (1909).]

[Comment from Prof. Smith: Consider making clear whether the clerk could at this point could order partition by sale. At least one case has suggested that the clerk can order a sale. See *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962) (decided before the statutory change to G.S. § 46-22, which raised the burden of proof for partition by sale).

Also – Consider stating expressly that the clerk is without authority to alter the report filed, either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners. *Allen v. Allen*, 258 N.C. 305, 128 S.E.2d 385 (1962) (judge may not adjudge a partition of land different from that made by the commissioners).]

[Comment from AOC: We recommend the following addition to subsection (a) to provide discretion to the clerk in instances where commissioners have not fully complied with the clerk's order of partition: If no exception to the report of the commissioners is filed within 10 days, the ~~same~~ report shall be confirmed so long as the report of commissioners complies with the law and the court's previous order. If not confirmed by the court, the court shall issue an order consistent with subsections (b)(2), (3), or (4). Reports of commissioners are sometimes inconsistent with the law or with previous orders of the clerk. Currently, clerks and parties are without a procedural remedy if a report is in conflict with the law or prior court orders.]

"§ 46A-57. Report and confirmation enrolled and registered; effect.

The report of the commissioners, when confirmed, and the order of confirmation shall be enrolled and certified to the register of deeds and registered in the office of each county where the real property is located. The confirmed report shall be binding among and between the parties and the parties' heirs and assigns.

"§ 46A-58. Clerk to docket owelty.

If the court orders owelty, the clerk shall enter the owelty on the judgment docket in the same manner as judgments are entered on the docket. The clerk shall mark as plaintiffs on the judgment

docket persons whose shares are to be paid owelty, and the clerk shall mark as defendants on the judgment docket persons whose shares are charged with owelty. The entry on the docket shall contain the title of the special proceeding in which the property was partitioned and shall refer to the book and page in which the special proceeding is recorded. When owelty is paid, the entry upon the judgment docket shall be marked satisfied in the same manner as judgments are cancelled and marked satisfied, and the clerk shall be entitled to the same fees for entering this judgment as the clerk is entitled to for docketing other judgments. The docketing of owelty under this section does not release the property from the owelty. Any judgment docketed under this section is not a lien on any property other than the property charged with owelty.

[Comment from AOC: We recommend the following change to omit outdated language related to the docketing of judgments to the third sentence as follows: The entry of the docket shall contain the title of the special proceeding in which the property was partitioned. ~~and shall refer to the book and page in which the special proceeding is recorded.~~]

"§ 46A-59. Order for possession.

(a) An order for possession of real property apportioned pursuant to this Part, in favor of the party to which an apportionment 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, or if an appeal has been made, the judge confirmed the report pursuant to G.S. 46A-56(c).
- (2) The report and confirmation have been duly recorded in the office of the register of deeds pursuant to G.S. 46A-57.
- (3) Ten days' notice has been given by the party applying for the order for possession to the party or parties who remain in possession at the time application is made. The notice shall not be given until the clerk has confirmed the report of the commissioners pursuant to G.S. 46A-56.

(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 real property and to put the party to which an apportionment has been made in possession. The order 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 apportionment has been made has 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 State law, including Chapters 42 and 44A of the General Statutes.

[Comment from Prof. Smith: If the intention is to limit orders for possession to cases of actual partition, could this just be said explicitly in lieu of referencing "this Part" or in addition to referencing "this Part"?

*For example, "An order for possession of real property apportioned **by actual partition** pursuant to this Part...."]*

[Comment from Prof. Smith: What about if there is an appeal from the superior court's order to the court of appeals? I know clerks will ask this.... It may be helpful to state this expressly in the statute.]

[Comment from AOC: We recommend that something be added to the statute to clarify the rights of a tenant occupying the property and whether this language is intended to circumvent G.S. Chapter 42.]

[Comment from Clerks: The possible issue raised with even more notice under a writ of possession should not be applicable. The Federal statute affording additional notice and protections expired and now is only codified in Chapter 45, so those protections are only given to tenants affected by foreclosure (this was SL in 2019 – the Federal Protecting Tenants Foreclosure Act (Rep. Hanig bill that eliminated conflicting state/federal statutes).]

"Part 3.

"Partition Sale.

"§ 46A-75. Sale procedure.

(a) General. – The procedure for a partition sale is the same as is provided in Article 29A of Chapter 1 of the General Statutes, except as provided in this Part.

(b) One Commissioner Sufficient. – In a partition sale, the court ~~is not required to appoint more than~~ shall appoint at least one commissioner.

(c) Persons Not To Be Appointed. – The clerk of the superior court shall not appoint the clerk, the assistant clerk, or the deputy clerk to make a sale of the real property.

(d) Additional Requirement; Notice of Public Sale. – If the court orders a public sale, the commissioner 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 parties who previously were served pursuant to G.S. 1A-1, Rule 4(j). An affidavit from the commissioner that copies of the notice of sale were mailed to all parties entitled to notice in accordance with this section satisfies the certification requirement and shall also be deemed prima facie true.

[Comment from Prof. Smith: A question I receive – is the clerk required to appoint any commissioners for a sale in lieu? For example, there is a private sale handled by a real estate agent authorized by the clerk to conduct the sale. Consider revising to make answer to this explicit. I think there is concern about mounting costs (commissioner fees and real estate agent fees) in these situations.]

[Comment from Prof. Smith: There is no notice of sale required by the judicial sales statutes when there is a private sale. However, in a partition one of the grounds for revoking confirmation of a sale is that notice of sale was not mailed to one of the parties. See e.g. 46A-83(a)(2) below. Consider adding subsection (e) to 46A-75 that sets out the requirements for notice of sale in private sale.

“Presumably, the statute would be met by serving a copy of the clerk’s order authorizing a private sale and a copy of the report of sale on the parties. Another possibility is to serve a pre-sale notice on the parties that gives the date after which the property will be offered for private sale.” NC Clerk of Superior Court Procedures Manual, pg. 163.28]

[Comment from AOC: We make the following recommendation to subsection (c) since there may be more than one assistant or more than one deputy clerk in many counties: Persons Not To Be Appointed. – The clerk of the superior court shall not appoint the clerk, ~~the~~ an assistant clerk, or ~~the~~ a deputy clerk to make a sale of the real property.

The purpose of providing notice of a public sale to a cotenant party is to allow them to bid on the property at the sale. To accomplish this purpose in a private sale, we recommend that the commissioner be required to provide notice of a private sale to cotenant parties to provide the opportunity to place upset bids after a private sale. We recommend the following or similar language added to the end of Subsection (d): The commissioner shall also serve a copy of any report of a private sale on all parties prior to or at the time of filing the report private sale with the court.]

[Comment from Clerks: The draft states only one commissioner is required for a partition by sale and they fix the 20-day notice requirement by only making it necessary in a public sale scenario- Both are great things.]

"§ 46A-76. Cotenant credit.

Any cotenant who enters the high bid or offer at any sale of one hundred percent (100%) of the undivided interests in any parcel of real property shall receive a credit for the undivided interest the cotenant already owns in the real property and shall receive a corresponding reduction in the amount of the total purchase price owed after deducting the costs and fees associated with the sale and allocating the costs and fees associated with the sale in accordance with the orders of the court. The high bid or offer shall be for one hundred percent (100%) of the undivided interests in the parcel of real property sold, and the credit and reduction shall be applied at the time of the closing of the cotenant's purchase of the real property. When two or more cotenants jointly make the high bid or offer at the sale, they may receive at the closing an aggregate credit and reduction in the amount of the total purchase price representing the total of their undivided interests in the real property. Any credits and reductions allowed by this subsection shall be further adjusted to reflect any court-ordered adjustments to the share of the net sale proceeds of each of the cotenants entering the high bid or offer, including, but not limited to, equitable adjustments to the share of the net sales proceeds due to a court finding of the lack of contribution of one or more cotenants to the payment of carrying costs or improvements of the real property under G.S. 46A-27.

"§ 46A-77. Mediation.

(a) Parties interested in the real property may agree at any time to mediation of a partition. A list of mediators certified by the Dispute Resolution Commission may be obtained from the clerk or from the Commission through the Administrative Office of the Courts.

(b) When a partition sale is requested, the court or the clerk may order mediation before considering whether to order a sale. G.S. 7A-38.1 and G.S. 7A-38.3B apply to a mediation under this section.

"§ 46A-78. Partition sale of real property subject to a life estate.

If the real property to be partitioned is subject to a life estate, the life tenant may join in the proceeding, and in the case of a partition sale, the interest on the value of the share of the life tenant shall be paid to the life tenant annually. In lieu of annual interest, the value of the life tenant's share shall be calculated according to mortality tables accepted by the court and paid out of the proceeds to the life tenant absolutely.

[Comment from Hank Van Hoy: Under 46A-78 partition of property subject to life estate, who decides if the Life Tenant is paid annually or the present value sum?]

"§ 46A-79. Partition sale of remainder or reversionary interest of real property.

The existence of a life estate in real property does not bar a partition sale of the remainder or reversionary interest of the property, and for the purposes of partition, the tenants in common or joint tenants of the remainder or reversionary interest shall be deemed to possess the property as if no life estate existed. The partition shall not, however, interfere with the possession of the life tenant during the existence of the life tenant's estate.

"§ 46A-80. Sale of standing timber; valuation of life estate.

(a) When two or more persons own real property with standing timber, as tenants in common, joint tenants, or partners, one or more of the persons may seek a partition sale of the timber, separate from the real property.

(b) If real property with standing timber is subject to a life estate, the life tenant or an owner of the remainder or reversionary interest, whether as a tenant in common, joint tenant, partner, or sole owner, may seek a partition sale of the timber, separate from the real property. The life tenant shall be made a party to the proceeding and is entitled to receive the life tenant's share of the proceeds, to be calculated according to mortality tables accepted by the court.

(c) An order allowing a life tenant to sell standing timber requires a finding that the cutting of the timber is in keeping with good husbandry and that no substantial injury will be done to the remainder or reversionary interest.

[Comment from AOC: Under subsection (a) it is unclear why “or partner” is included in this statute. If the intent is to continue with existing law and permit a partner to initiate a partition proceeding for the sale of timber, a corresponding provision should be added to G.S. Chapter 59.]

"§ 46A-81. Sale of oil, gas, or mineral interests.

In a partition of oil, gas, or mineral interests of real property, when the court determines any of the following, the court shall order a sale of the oil, gas, or mineral interests and allocate the proceeds according to the interests of the tenants in common or joint tenants:

(1) It is in the best interest of the cotenants of the oil, gas, or mineral interests to sell the interests.

(2) Actual partition of the oil, gas, or mineral interests would cause injury to some or all of the cotenants of the oil, gas, or mineral interests.

"§ 46A-82. Sale of real property required for public purposes on cotenant's petition.

When the real property of tenants in common or joint tenants is required for public purposes, one or more cotenants, or the cotenant's guardian of the estate or general guardian, may file a petition verified by oath in the superior court of the county where the property or any part of the property is located, setting forth in the petition that the property is required for public purposes and that the cotenants' interests would be promoted by a sale of the property. If all necessary parties are before the court and the court finds the facts alleged in the petition to be true, the court shall order a sale of the property, or as much of it as may be necessary. Attorneys' fees shall be assessed in accordance with G.S. 46A-3. Mediator fees and costs of mediation shall be assessed in accordance with G.S. 7A-38.3B. Other costs and expenses shall be assessed in accordance with G.S. 6-21.

[Comment from AOC: Should something be added to address any concerns about the rights of any parties subject to a condemnation action? It's unclear how this statute is impacted by a public or private condemnation action or proceeding.]

"§ 46A-83. Petition for revocation of confirmation order.

(a) Grounds for Revocation. – Notwithstanding G.S. 46A-75 or any other provision of law, within 15 days of entry of the order confirming the partition sale of real property, the purchaser or any party to the partition proceeding may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding, any of the following:

a. Notice of the partition was not served on the petitioner for revocation as required by G.S. 1A-1, Rule 4.

b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46A-75(d).

c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

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

(b) Effect of Notice. – A petitioner for revocation shall not prevail under sub-subdivisions (a)(2)a. or b. of this section, if the petitioner was mailed notice of the sale in accordance with G.S. 46A-75(d).

(c) Service; Notice of Hearing. – The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under G.S. 1A-1, Rule 5, and shall serve the officer or person designated to make the sale under G.S. 1A-1, Rule 4(j). The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make the sale, and all parties required to be served under G.S. 1A-1, Rule 5.

(d) Petition by Purchaser. – In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence all of the following, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer:

(1) A lien remains unsatisfied on the property to be conveyed.

(2) The purchaser has not agreed in writing to assume the lien.

(3) The lien will not be satisfied out of the proceeds of the sale.

(4) The existence of the lien was not disclosed in the notice of sale of the property.

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

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

(f) Resale. – If the court revokes its order of confirmation under this section, the court shall order a resale. The procedure for a resale is as provided under G.S. 46A-75.

[Comment from AOC: Under subsection (c) it is not clear why the commissioner must be served pursuant to Rule 4 when the parties may be served pursuant to Rule 5? It would seem to make sense that all are served under Rule 5.]

[Comment from Prof. Smith: GS 46A-75(d) only applies to public sales. See comment above regarding notice in private sales.]

"§ 46A-84. Petition for revocation based on inadequate price.

In the case of a petition brought pursuant to G.S. 46A-83(a)(2)c., and when an independent appraisal of the property being sold has not been previously entered into evidence in the action,

and upon the request of any party, the court may order an independent appraisal prepared by a real estate appraiser currently licensed by the North Carolina Appraisal Board and prepared in accordance with the Uniform Standards of Professional Appraisal Practice. The cost of an independent appraisal shall be borne by one or more of the parties requesting the appraisal in such proportions as determined by the court. Before ruling on the petition brought pursuant to G.S. 46A-83(a)(2)c., the court may in its discretion require written evidence from the appraiser that the appraiser has been paid in full for the appraisal. If based on the appraisal and all of the evidence presented, the court finds the amount bid or price offered to be inadequate, inequitable, and resulting in irreparable damage to the owners, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's high bid or offer, and order the return to the purchaser of any money or security tendered by the purchaser pursuant to the high bid or offer.

"§ 46A-85. Order becoming final; appeal; purchase of property.

(a) Order Becoming Final; Appeal. – An order confirming the partition sale of real property becomes final 15 days after entry of the order of confirmation or when the clerk denies a petition for revocation, whichever occurs later. A party may appeal an order confirming the partition sale of real property within 10 days of the order becoming final.

(b) Purchase of Property. – After the order of confirmation becomes final, the successful bidder may immediately purchase the property.

(c) Effect of Deed. – The deed of the officer or person designated to make the sale shall convey to the purchaser such title and estate in the property as the cotenants and all other parties to the proceeding had in the property.

(d) Sale Proceeds. – At the time that the order of confirmation becomes final, the court shall secure to each cotenant the cotenant's ratable share in severalty of the proceeds of sale.

[Comment from Prof. Smith: Consider incorporating recent NC Court of Appeals decision in Tarr v. Zalaznik (COA18-649; March 19, 2019) here or above in section on contribution - Petitioner filed a petition requesting the clerk order the net proceeds from the sale to be disbursed in an unequal amount pro rata based on the owner's initial contribution to the purchase price,

roughly 59% for the petitioner and 41% for the respondent. COA held, although G.S. Chapter 46 on partitions did not specifically state the court could order an unequal division of the net proceeds, the clerk and the superior court had the authority to do so as the statutes do not constitute a strict limitation on the court's authority to make orders in the best interests of the parties in a partition proceeding.]

[Comment from AOC: Subsection (d): Neither the commissioner nor the court will likely have received sale proceeds when the confirmation is final. We recommend adding the following language or something similar: Upon receipt of the sale proceeds by either the court or the person conducting the sale, the court shall secure to each cotenant the cotenant's ratable share in the severalty of the proceeds of sale. If the ratable shares due to each cotenant has not yet been determined by the court, the court shall set the matter for hearing on the court's own motion or upon motion of a party or commissioner. Clerks often hold a hearing after the sale is complete to determine each cotenant's ratable share.]

"§ 46A-86. Sale proceeds belonging to certain parties.

(a) Minor; Incompetent Adult. – When real property is sold under this Chapter and a party to the proceeding is a minor or an incompetent adult and has a guardian of the estate or general guardian, the court shall order that the party's share of the proceeds be disbursed to the guardian.

If the party is a minor or an incompetent adult and does not have a guardian of the estate or general guardian, the court shall do one or more of the following:

(1) For proceeds up to the allowable amounts in G.S. 7A-111, order the court to receive, administer~~administer~~, and disburse the proceeds pursuant to that section.

(2) Appoint a guardian of the estate or general guardian under Chapter 35A of the General Statutes and order that the proceeds be disbursed to the guardian.

(3) ~~Disburse the proceeds~~ Order the proceeds disbursed to a trust created by the court in a separate proceeding under G.S. 36C-4-401.2.

(b) Certain Other Parties. – When a sale is made under this Chapter, the court shall ~~invest~~ order the receipt and investment or deposit under G.S. 7A-112 and G.S. 7A-112.1 proceeds belonging to the following parties:

(1) A party who is imprisoned, if the proceeds cannot be disbursed to, or at the direction of, the party.

(2) An unknown or unlocatable cotenant.

A party may seek disbursement of these proceeds by filing a motion in the proceeding. If the party shows that the proceeds belong to the party, the court shall order that the proceeds be disbursed to the party.

[Comment from Prof. Smith: Consider adding standard of proof for court to apply and making clear clerks may order disbursement here (does not have to go to superior court) – “If the party shows by a preponderance of the evidence that the proceeds belong to the party, the clerk shall order that the proceeds be disbursed to the party.”

Clerks may be hesitant, given limitations on their authority and risk of liability when handling money, to order disbursement unless statute specifies “clerk may order” disbursement.]

[Comment from AOC: Subsection (a)(2): There is no authority for the clerk to initiate a guardianship proceeding. If there is a guardianship proceeding in existence in another county, the clerk would not have jurisdiction to modify the guardianship to add a guardian of the estate.

Subsection (a)(3): Why does this language limit this to a court created trust?]

[Comment from Clerks: 46A-86 dealing with minor’s interests- QUESTION- this just gives clerks discretion to appoint a GOE or award the money to a trust, correct? Clerks wouldn’t actually create a trust themselves, right? (Just verifying)]

"Article 3.

"Partition of Personal Property.

"§ 46A-100. Personal property may be partitioned.

A tenant in common or joint tenant of personal property may file a petition in superior court to partition the property.

"§ 46A-101. Commissioners appointed; report; confirmation; impeachment.

(a) Appointment. – If the court determines that the petitioner is entitled to relief, the court shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within 20 days after notice of their appointment to partition the personal property in shares that are as nearly proportionate in value as possible to the interests of the cotenants.

(b) Report. – The commissioners shall file a written report of their proceedings in the court, signed by any two of them, within five days after the actual partition.

(c) Confirmation. – If no party files an exception to the commissioners' report within 10 days of its filing, the court shall confirm the report.

(d) Impeachment. – After confirmation of the report, a party may impeach the proceeding for mistake, fraud, or collusion by a motion in the proceeding. Impeachment, however, does not affect an innocent purchaser for value and without notice.

"§ 46A-102. Partition sale of personal property.

(a) If the court determines that an actual partition of personal property would injure some of the parties and that a partition sale is necessary, the court shall order a sale to be made as provided in Article 29A of Chapter 1 of the General Statutes. **In a partition sale, the court is not required to appoint more than one commissioner.**

(b) G.S. 46A-86 applies to sale proceeds under this section."

[Comment from Prof. Smith: Same comment as above to 46A-75(b) – if make change there, consider conforming language here to clarify whether one is the minimum.]

[Comment from AOC: Corresponding changes will be needed to:

G.S. 1-394

G.S. 1-502(6)

G.S. 29-30(f)

G.S. 31A-6(d)

G.S. 136-96]