

## Partition Case Summaries

NC Court of Appeals and NC Supreme Court  
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January 1, 2015 – September 19, 2017

### ***Waiver of Right to Partition; Equitable Authority of the Court***

#### **Ward v. Ward (COA16-832; March 7, 2017)**

Husband and wife owned real property as tenants by entirety; parties subsequently divorced resulting in ownership of the property as tenants in common. Husband filed for partition by sale. Wife filed a response raising two defenses: (i) husband waived right to partition by implied in fact contract, and (ii) equitable principles precluded distribution of the property by partition. Clerk and superior court judge on *de novo* appeal from the clerk both authorized the partition by sale. Wife appealed the superior court's order to the NC Court of Appeals. The court affirmed the trial court's order authorizing partition by sale. The court found competent evidence to support the trial court's findings that there was no written agreement, action, or conduct that gave rise to an implied in fact contract and no implied in fact contract existed to waive the husband's right to partition. Second, the court noted that a partition proceeding is equitable in nature and the court has the authority to adjust all equities with respect to the property, including authorize reimbursement of an owner for improvements to the property. However, the husband's extra-marital affair did not have any bearing on such equity when partitioning a marital home.

### ***Division of Proceeds from Partition Sale***

#### **Harris v. Gilchrist (COA15-437; March 1, 2016)**

Dispute over the division of sale proceeds arising out of an action for partition by sale of real property owned by tenants in common, including awards made for (i) betterments, (ii) fair rental value, and (iii) contributions for property expenses.

1. **Betterments.** The NC Court of Appeals applied G.S. 1-340 to affirm the trial court's award of an allowance for improvements made by a co-tenant occupying the property because he made improvements to the property while in possession of the land under a color of title believed to be good. The court remanded the issue for findings on the value of the improvements because the sole finding by the trial court that there was an increase in tax value was alone insufficient to show how much improvements made by the occupying co-tenant added to the value of the property.
2. **Fair Rental Value.** The court noted the Betterments statutes under Article 30 of G.S. Chapter 1 allow a claim for rent to offset a betterments claim, provided one would be entitled to rents in the first instance. A non-occupying co-tenant is entitled to rents when there has been an actual ouster by the occupying co-tenant of the non-occupying co-tenant. Here the court did not find actual ouster because there was no evidence tending to show that the occupying co-tenant prevented the other co-tenants from accessing the property. The court affirmed the trial court's order denying the claim for rents and profits during the co-tenancy.
3. **Contributions.** The court noted that under GS 105-363(b) and an earlier decision of the court a co-tenant 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 co-tenant 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 co-tenant withheld the property from the other co-tenants and the other co-tenants 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 co-tenant during the time he was a tenant in common with the non-occupying co-tenants.

### ***Judicial Immunity of Commissioner***

#### **[Price v. Calder \(COA14-832; April 7, 2015\)](#)**

Defendant served as a commissioner appointed by the Clerk of Superior Court in a partition proceeding. Plaintiff, a co-owner of the land subject to the partition, filed a complaint against the defendant after the partition by sale was completed alleging, among other things, that the defendant breached his fiduciary duty in carrying out his role as commissioner. The trial court dismissed the plaintiff's complaint. On appeal, the NC Court of Appeals held that a commissioner in a partition proceeding acting within the scope of his or her duties is a quasi-judicial official and is covered by the rule of judicial immunity. The court found no merit to the plaintiff's argument that the defendant acted outside the scope of his duties and therefore concluded that the defendant was immune from suit and affirmed the trial court's dismissal of the case.

### ***Actual Partition vs. Partition by Sale***

#### **[Solesbee v. Brown \(COA16-1214; Sept. 19, 2017\)](#)**

Four sisters own three parcels of land as tenants in common. One sister filed a petition for partition by sale and two other sisters acknowledged in their response that a sale of all parcels was necessary. The fourth sister agreed that partition by sale was necessary for parcel one but contested a partition by sale for parcels two and three. The clerk of superior court and the superior court on appeal entered orders authorizing the partition by sale of all three parcels. The NC Court of Appeals (COA) reversed the superior court and remanded for additional findings of fact pursuant to GS 46-22 and re-examination of the trial court's conclusions of law. The COA noted that the law favors actual partition and before ordering a partition by sale, the court must find by preponderance of the evidence that an actual partition would cause substantial injury to the interested parties. Specifically, the COA found the trial court erred in ordering a partition by sale because:

1. **The trial court failed to make specific findings of fact.**
  - a. The trial court failed to make specific findings of fact as to the value of each share of each parcel if the parcels were to be physically divided. The court's findings were limited to the value of one-fourth of the total value of all three parcels. The court's findings were thus insufficient to support the conclusion of law that each cotenant's share from an actual partition of each parcel would be materially less than from a sale of the whole parcel.

- b. The trial court failed to make specific findings as to the value of each of the three parcels. The trial court determined the value of each parcel was a range spanning from the current residential value to a re-zoned commercial value. The sweeping nature of the ranges, including a range in value of \$110,000 for parcel one, failed to yield *specific* findings of fact by the court as to the value of each parcel.
2. **The trial court erred by considering certain factors when determining a substantial injury would result to the parties from an actual partition.**
- a. *Personal value.* The COA noted that prior case law establishes that economic factors alone control whether substantial injury will result to the parties from an actual partition. The trial court’s consideration of the personal value of the property to the cotenants who lived adjacent to parcels two and three was inappropriate.
  - b. *Difficult to physically partition.* A determination that the property is difficult to physically partition does not replace the obligation of the court to make findings as to the fair market value of each cotenant’s share resulting from an actual partition. The court erred in relying on the difficulty in physically partitioning the property without making findings as to the actual value of each share of the physically partitioned property.
  - c. *Highest and best use.* The trial court erred by relying on the “highest and best use” of the land in determining whether substantial injury would result to the parties from an actual partition of the land. The COA stated that substantial injury to a party does not occur simply because an actual partition would not result in the highest and best use of the land.