

Issues Before the Hearing

Partition for Clerks of Superior Court

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Goals for this Session



Review common issues and questions that occur **before** the hearing on the partition petition.

- Proper Parties
- Filing and Summons
- Transferring to Superior Court
- Mediation
- Entry of Default & Default Judgments

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Proper Parties to the Partition



Quick Review: Types of Property Ownership

Cotenants – Generic term for two or more people who own property together.

Different Types of Co-Ownership

- **Joint tenant** – Someone who owns an undivided interest, typically with survivorship rights (i.e., JWROS). [G.S. 41-71](#)
- **Tenant in common** – Owners who owns an undivided interest that passes to their estate. [G.S. 41-81](#)
- **Tenancy by entirety** – Co-ownership by married persons. This type of property ownership is not available to anyone else. Offers some protection from creditors. [G.S. 41-56](#)

Who can be a Petitioner?

The following persons can file a petition for partition:

1. Any person claiming to be a **tenant in common** or **joint cotenant**.
2. Personal Representative (PR).
3. Judgment creditor.

[G.S. 46A-21](#), [G.S. 46A-23](#)

What kind of interest?

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[G.S. 46A-21](#), [G.S. 46A-23](#)

PR as Petitioner

PR may be petitioner:

- For any decedent who owned property as a tenant in common or a joint tenant.
- If required for payment of debts and claims.
- *Note:* For PR to seek partition, PR must first file for approval of sale under [G.S. 28A-15-1\(c\)](#) and may need to obtain possession, custody and control of the property under [G.S. 28A-13-3\(c\)](#) or (d).
 - These can all be done in one petition (3-in1).

[G.S. 46A-21](#)

Judgment Creditor as Petitioner

Judgment creditor can petition for:

- Actual partition only.
 - Separate debtor's individual parcel.
 - JC can then seek to have the parcel sold.

[G.S. 46A-23](#)

Necessary Parties: Who must be included in a partition?

Generally:

- **All cotenants** (co-owners) of the property.
 - Tenants in common.
 - Joint tenants.

Caution! Any cotenant not made a party and properly served with petition is not bound by the order.

Permissive Parties: Who may be included in a partition?

- Any other person with an interest in the property,
- Any lessee of the property, and
- Any holder of a lien, mortgage, or deed of trust on the property.

What about Spouses?

Spouses of cotenants are **not** required parties.

- Old guidance was that spouses should be made parties.
- This was due to the concern that not doing so would cause a problem with the spouse's ability to elect a life estate under [G.S. 29-30](#).
- 2021 update made clear that spouses are not required to be made parties and life estate statute was also updated to remove property that had been subject to partition by adding [G.S. 29-30\(a\)\(3b\)](#).

**CURRENT GUIDANCE:* Clerk has no obligation to join spouses as parties; spouses are not required for a partition.

[G.S. 46A-21](#)

Spousal Issues that Prevent Partition

Caution!

- There can be no partition when **equitable distribution** proceeding is pending.
- Cannot partition **tenancy by entirety** (TbyE) property.

What about unknown/unlocatable parties who have an interest in the property?

If petitioner **shows** by affidavit or otherwise that petitioner cannot after due diligence ascertain the name or location of a party...the clerk **MUST**

1. Authorize *service by publication* under G.S. 1A-1, Rule 4,
 - Notice by publication must include a description of the property that includes the street address, if any, or other common designation for the property, and may include the legal description of the property, *and*
2. Appoint a *guardian ad litem* under G.S. 1A-1, Rule 17, to represent the unknown or unlocatable person.

[G.S. 46A-22](#)

Filing & Summons



Filing Fee

The filing fee for a partition proceeding is:

- \$120 **and**
- If the fair market value of the land involved is over one hundred dollars (\$100.00), there shall be an additional sum of thirty cents (30¢) per one hundred dollars (\$100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of two hundred dollars (\$200.00).
 - Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation.

G.S. 7A-306(a)(2).

Venue

- The proper venue for a partition proceeding is in the county where all or part of the land is located. G.S. 46A-20. See also G.S. 1-76(2).
 - If the land to be partitioned is located in more than one county, the proceeding may be instituted in any county in which part of the land is located. G.S. 46A-20; G.S. 1-76(2).
 - The petitioner must file a notice of lis pendens in each of the other counties. G.S. 46A-20.
- **Remember:** Venue is not jurisdictional and it may always be waived. *Clark v. Carolina Homes, Inc.*, 189 N.C. 703 (1925).

Filing & Service: The Basics

- Partitions are always _____ proceedings.
- Partition is initiated by filing and service of a **summons** and a **petition**.
- The petition and summons must be served per [G.S. 1A-1, Rule 4](#).

A Special Summons, AOC-SP-101

Summons are issued per [G.S. 1-394](#).

- Requires a **30-day answer period**—NOT the usual 10-day answer period for other special proceedings.
- Must use Partition Summons, Form [AOC-SP-101](#).
- Clerk can extend time for good cause shown
 - For 30 more days, *and*
 - And only once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party to file. [G.S. 1-398](#).

What if?...

In her will, Meredith leaves her farm to Lisa and Catherine in equal shares as tenants in common. Lisa and Catherine can't agree on whether to keep the farm or sell it, so Catherine files a petition for partition asking the court to order a sale of the property. She file a summons Form [AOC-SP-100](#) and Lisa is served with that summons and promptly files her proof of service on Lisa.

- Is anything wrong?
- If so, what do you do?

AOC-SP-100

STATE OF NORTH CAROLINA		File No.
County		In The General Court Of Justice Superior Court Division Before The Clerk
Name Of Petitioner(s)	SPECIAL PROCEEDINGS SUMMONS ☐ ALIAS AND PLURIES SUMMONS	
VERSUS		G.S. 1-394
Name Of Respondent(s)	Date Original Summons Issued	
	Date(s) Subsequent Summons(es) Issued	
To Each Of The Respondent(s) Named Below:		
Name And Address Of Respondent 1	Name And Address Of Respondent 2	
A Special Proceeding Has Been Commenced Against You! You are notified to appear and answer the attached petition as follows: 1. File a written answer in the office of the Clerk of Superior Court for the county named above within ten (10) days of the date you were served, unless you are a local government, an agency of a local government, an agency of the State, or an agency of the federal government, in which case the time to file a written answer is within thirty (30) days after being served. 2. Serve a copy of your written answer on the petitioner or the petitioner's attorney by personal delivery or mail at the address listed below. If you fail to answer the petition, the petitioner may apply to the Court for the relief demanded in the petition.		

AOC-SP-101

STATE OF NORTH CAROLINA

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County

In The General Court Of Justice
Superior Court Division
Before The Clerk

Name Of Petitioner(s)

PARTITION PROCEEDINGS SUMMONS

☐ ALIAS AND PLURIES SUMMONS

G.S. 1-394

VERSUS

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1. File a written answer in the office of the Clerk of Superior Court for the county named above within 30 days of the date you were served.
2. Serve a copy of your written answer on the petitioner or the petitioner's attorney by personal delivery or mail at the address listed below.

If you fail to answer the petition, the petitioner may apply to the Court for the relief demanded in the petition.

Name And Address Of Petitioner's Attorney (if none, Address Of Petitioner)

Date Issued

Time Issued

☐ AM ☐ PM

Remember....

- Check the summons before signing and issuing
- Make sure it is Form AOC-SP-101
 - It will have "PARTITION" in the title.

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Name And Address Of Petitioner's Attorney (if none, Address Of Petitioner)	Date Issued	Time Issued ☐ AM ☐ PM

Transferring to Superior Court



Transfer of Special Proceedings – General Rule

If an ***issue of fact***, an ***equitable defense***, or a ***request for equitable relief*** is raised in a pleading or written motion, the clerk must transfer the proceeding to superior court.

[G.S. 1-301.2 \(b\).](#)

Transfer - Examples

- **Issue of fact.**
 - A respondent (and purported owner of the property) files an answer asserting that (1) the petitioner does not own the property and (2) the petitioner is therefore not entitled to bring a partition proceeding. Whether the petitioner is an owner of the property is an issue of fact.
- **Equitable defense.**
 - A respondent files an answer asserting that (1) the petitioner fraudulently obtained title to the property and (2) the petitioner is therefore not entitled to bring a partition proceeding. The allegation of fraud is an equitable defense.
- **Request for equitable relief.**
 - A respondent files an answer requesting that the court impose a constructive trust on a portion of the proceeds from the partition sale of the property for the benefit of the respondent because the petitioner obtained title to the property using assets of the respondent. A request to impose a constructive trust is a request for equitable relief.

Transfer of Special Proceedings – Partition Exception

What **cannot** be transferred:

- The issue whether to order the actual partition or the sale in lieu of partition of real property
- This issue must be determined by the clerk.
 - The clerk's order determining this issue, though not a final order, may be appealed pursuant to subsection [G.S. 1-301.2\(e\)](#).

[G.S. 1-301.2\(h\)](#).

Mediation



When is Mediation Allowed in a Partition?

When can the parties agree to mediate?

- **Parties** can agree to mediation at any time. [G.S. 46A-29\(a\)](#).
- G.S. 7A-38.1 and G.S. 7A-38.3B apply to a mediation under this section.

When can one party request the clerk to order mediation?

- *When a partition sale is requested*, upon motion of a party, the court may order mediation *before considering whether to order a sale*. [G.S. 46A-29\(b\)](#).

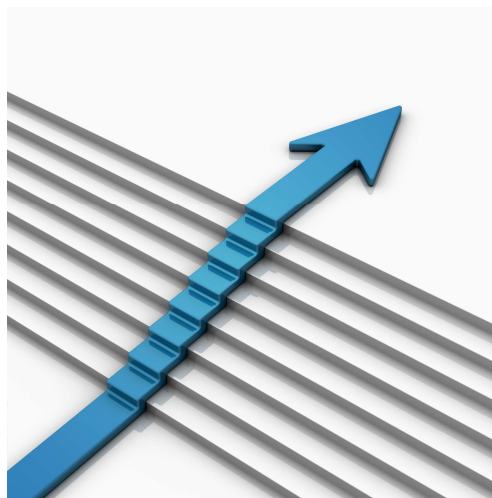
When can the clerk order mediation?

- *When a partition sale is requested*, the court may on its own motion order mediation *before considering whether to order a sale*. [G.S. 46A-29\(b\)](#).

What settlements can the clerk approve?

- If the parties reach an agreement, the clerk should only approve a settlement the terms of which the clerk would otherwise have jurisdiction to approve.
- More on this later....

Orders Before Final Determination



Orders Before Final Determination

Before **final determination** of a proceeding to partition real property, on application of any of the parties, ***the court may make any orders*** that it finds to be ***in the best interest of the parties***....

[G.S. 46A-28](#)

What is a final determination?

- The term “final determination” is not defined in the statute.
- However, there is guidance on final judgments in a partition:
 - For actual partition, “all orders of the clerk or judge are interlocutory except a final judgment or decree ***confirming the report*** of the commissioners” *Allen v. Allen*, 258 N.C. 305, 307 (1961).
 - For a partition sale, a judgment of ***confirmation of a judicial sale*** is a final judgment. *Brown v. Miller*, 63 N.C. App. 694, 697 (1983) (*citing Menzel v. Menzel*, 254 N.C. 353, 367 (1961)).

What can the Clerk Order?

Any order that the court 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 a receiver pursuant to G.S. 1-502(6) or a limited receiver for the real property pursuant to Article 38A of Chapter 1 of the General Statutes, and
- ✓ access to the property for the purpose of inspecting, surveying, appraising, or selling the property.

[G.S. 46A-28](#)

How Does It Work?

1. On application of any of party,
2. In writing,
3. Served on the other parties and any other person the court may require.
(Rule 5 service.)

[G.S. 46A-28](#)

Is a Hearing Required?

YES, if

- Within 10 days of being served, a person files a response in opposition to the application *or* requests a hearing.

NO, if

- No response is filed or no one requests a hearing within 10 days of being served,
- The court *may* decide the application without a hearing.

[G.S. 46A-28](#)

Entry of Default & Default Judgments



What is a Default Judgment?

A default judgment is **a judgment entered** by a clerk or judge **without a trial** when the defendant is served with the complaint and summons but does not respond.

- The standards for signing a default judgment differ between those entered by a judge and those by a clerk.
- The **clerk's authority** to enter a default judgment is **much more limited** than the judge's authority.

Obtaining a Default Judgment

There are two steps to obtaining a judgment by default:

1. **Entry of default.** The clerk is authorized to make all entries of default. [G.S. 1A-1, Rule 55\(a\)](#)
2. **Judgment by default.** The clerk is authorized to enter default judgments only under *limited* circumstances. A judge may enter default judgments in all cases. [G.S. 1A-1, Rule 55\(b\)](#)

When Is clerk authorized to make an entry of default?

Prerequisites for proper entry of default:

1. Pleading party is seeking a judgment for affirmative relief.
 - Affirmative relief means that the pleading party is seeking some positive relief from the defaulting party.
2. Failure to plead.
3. No motions pending that would extend time for pleading.
4. Proof that entry of default is appropriate.
 - Proof may be shown by affidavit.

When is clerk authorized to enter a default judgment?

The clerk is authorized to enter a judgment by default only when the claim is for a sum certain or a sum ascertainable by computation. [G.S. 1A-1, Rule 55\(b\)](#)

Sum certain?

What is a claim for a sum certain?

- Claims must be for a liquidated sum that can be ascertained or computed from the commercial document to which the parties agreed. *Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E.2d 858 (1980); *Adrian v. Jackson*, 75 N.C. 536 (1876).
- A “liquidated” claim is one where the amount has been agreed on by the parties or fixed by operation of law or one that can be determined with exactness from the parties’ agreement or by arithmetical process or application of definite rules of law **without reliance on opinion or discretion**. BLACK’S LAW DICTIONARY 930 (6th ed. 1990)

Important(!)

- A partition is **not** relief for a sum certain a sum ascertainable by computation as contemplated by Rule 55(b), therefore, a clerk will **not** be authorized to enter a default judgment in a partition proceeding.

Effect of an Entry of Default on a Partition

- If default is entered against a respondent, all allegations in petition are deemed to be admitted and respondent may not contest them. *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 751 (2009).
- Entry of default does **not** prevent the respondent from challenging whether petitioner’s allegations are sufficient to state a claim for relief. *Hunter v. Spaulding*, 97 N.C. App. 372, 377 (1990).

Does Entry of Default mean you can skip the hearing?

No.

Important(!)

- An entry of default ***does not alleviate the clerk's responsibility to determine at a hearing if the petition is sufficient to entitle the petitioner to the requested relief.*** In the case of a partition sale, the clerk must also clerk find, by a preponderance of the evidence, that actual partition cannot be made without “substantial injury” to any interested party. [G.S. 46A-75](#).

For more on default....

- clerks.sog.unc.edu/civil/default-judgments

Manual: Civil

[Chapter 1: Confessions of Judgment](#) (January 1,

[Chapter 2: Default Judgments](#) (April 30, 2010)

[Chapter 3: Docketing, Crediting, and Cancelli](#)

[Chapter 4: Entry of Judgment: Rule 58](#) (January

[Chapter 5: Attachments](#) (September 30, 2009)

[Chapter 6: Claim and Delivery](#) (September 30, 2005

Next....

- What happens at the hearing...

Questions?



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