



Hearing on the Partition Petition

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Goals for this Session



PROCEDURE AND THE
PETITION



THE HEARING PROCESS
AND WHAT TO CONSIDER



DRAFTING THE ORDER



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Procedure and the Petition



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Applicable Procedure

- A partition is a special proceeding and, except as otherwise provided, its procedure is governed by Subchapter XII of Chapter 1 of the General Statutes.

G.S. 46A-1.

- The North Carolina Rules of Civil Procedure are applicable to partition proceedings, except as otherwise provided.

G.S. 1-393.



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Contents of the Petition

Statutory requirements ([G.S. 46A-2](#)):

- Respondent has right to seek advice from an attorney,
- Free legal services may be available by contacting Legal Aid of North Carolina or other legal services organizations,
- Notice that court may award reasonable attorneys' fees.

Additional requirements:

- Petitioner and defendants are tenants in common or joint tenants;
- All parties in interest have been joined as petitioners or defendants;
- A description of the land and the requested division;
- A description of the nature and extent of the interest of each cotenant; and
- Petitioners' desire partition so that they may hold their interests in severalty (separately).
- ***Bonus:** If seeking partition by sale, the petition also should allege that actual partition cannot be made without substantial injury to any of the interested parties.* [G.S. 46A-75](#)



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What's Not Required

- Petitioners do not have to include the reason why they are seeking partition. *Richardson v. Barnes*, 238 N.C. 398, 399-401 (1953) (holding that a tenant in common is entitled to partition as a matter of right and the reason for exercising that right is immaterial).
- Petitioners do not have to allege that they are in possession of the property to be partitioned. *Moore v. Baker*, 222 N.C. 736, 738 (1943) (even though actual possession is in the life tenant, petitioners with a remainder fee interest entitled to bring partition action).



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The Hearing



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Step 1: Check Parties and Service

Ask:

1. Have all interested persons been made a party to the proceeding?
This includes:
 - a. All co-owners
 - b. Any other interested persons named in petition
2. Have all parties been served?
 - a. Need proof of Rule 4 service for all parties.
 - b. If unknown/unlocated parties, service by publication must be complete.

Caution!—If a party is not served, they are not bound by the result.



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Hansley v. Hansley, 297 N.C. App. 764, 771 (2025)

Petitioner's failure to submit proof of Rule 4 service prior to the court's order on the petition for partition will result in the clerk's order being void for lack of personal jurisdiction.

Remember: *Always check that Rule 4 service has been completed on all respondents before holding the hearing.*



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Check service on Unknown/Unlocatable parties, too

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](#)

Ask: Has time for answer period run for service by publication?



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G.S. 1A-1, Rule 4(j1) – Service by Publication

NOTICE OF SERVICE OF PROCESS BY PUBLICATION

STATE OF NORTH CAROLINA _____ COUNTY

In the _____ Court

[Title of action or special proceeding] [To Person to be served]:

Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than _____, __) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows:

(State nature.)

You are required to make defense to such pleading **not later than (_____, __)** and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _____ day of _____, __

_____ (Attorney) (Party)

_____ (Address)



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Step 2: Confirm That a Hearing is Required

The clerk **must** hold a hearing if:

1. Petition requests partition by sale.
2. Petition seeks actual partition and an answer is filed requesting sale in lieu of actual partition.
3. Parties do not agree on the relief.



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When is a hearing not required?

If **all parties join** in the relief requesting **actual partition**, the clerk can approve summarily without a hearing. G.S. 1-400 and -401.

However:

- Commissioners must still determine what share of the property each party takes.
- Even though a hearing may not be required, the clerk may wish to have a hearing to address other matters.



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Step 3: Has Partition Sale Been Requested?

Ask:

- Have all parties asked for an actual partition?
- Or... has petitioner asked and no one has responded/objected?

If no party has requested a sale, no sale analysis is needed.

Then ask:

- Has any party requested part actual partition and part cotenancy?
- If YES, do all cotenants agree to hold that portion as cotenants?

*If YES, clerk can enter hybrid order for actual partition/cotenancy.
If NO, clerk must enter order for actual partition as to entire property.*



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Step 4: If Sale Requested, Apply Substantial Injury Test

Legal Standard:

If a partition sale is requested, the clerk must find, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to any interested party to order a sale.

G.S. 46A-75.

In other words...

Can actual partition occur without substantial injury to any party?



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Substantial Injury Test – Burden of Proof

- Burden of proof is *on the person asking for sale*.

G.S. 46A-75



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Substantial Injury Test – Evidentiary Standard

- *Evidentiary Standard*: Preponderance of the evidence.
- This means
 - More likely than not.
 - More than 50%.

[G.S. 46A-75](#)



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Substantial Injury Test – Statutory Factors, G.S. 46A-75(b)

The clerk must consider the following statutory factors:

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; and
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.

Let's break it down...



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Substantial Injury Test – Factor #1

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.*

Things to Consider:

- What's the evidence?
 - May hear from appraisers, surveyors, realtors, other experts.
- Compare: value of partitioned lot vs. share of sales proceeds
- What's "material"?
- Consider costs of actual partition (*i.e., surveys*)?



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Substantial Injury Test – Factor #2

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

Things to Consider:

- What's the evidence?
 - Are there rights at issue? Special features of the land that can't be divided? (Mountain, pond, waterfall, etc.)
 - Access issues? (Right of way, water, etc.)
- Compare: partitioned lot vs. loss of/impaired rights
- What's "material"?



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Substantial Injury Test – Factor #3

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.*

Things to Consider:

- What's owelty?

Owelty - Defined

Owelty – “Equality as achieved by a compensatory sum of money given after an exchange of parcels of land having different values or after an unequal partition of real property.”

Owelty, BLACK’S LAW DICTIONARY 1329 (12th ed. 2024).

Owerty – Characteristics

- Owerty follows the land and is a legal charge upon the land; it is not a personal debt against the tenant owning that tract. *Dobbin v. Rex*, 106 N.C. 444, 444 (1890).
- An owerty charge bears interest until satisfied. G.S. 46A-51(b).
 - Legal rate is 8% annually. [G.S. 24-1](#)
- An owerty charge may be enforced by execution. *Newsome v. Harrell*, 168 N.C. 295, 295 (1915).
 - Therefore, if an execution is issued to enforce the judgment, it should order the sale of the specific real property.



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Substantial Injury Test – Factor #3

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

Things to Consider:

- What's the evidence?
 - May hear from appraisers, surveyors, other experts
- Can owerty fix (eliminate or mitigate) cotenant's substantial injury?



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Substantial Injury - Other Factors to Consider

1. Nature, character, extent, condition and location of the land.
2. Respective ownership interests of the owners.
3. Number of owners.
4. Possibility of dividing the land according to value.
5. Any economic waste that may be caused by a division.

See Duke v. Hill, 68 N.C. App. 261 (1984) (42 acres could not be divided due to unusual characteristics of the land).



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Consider: Is a Hybrid Partition Appropriate?

Although Chapter 46A does not direct the clerk to expressly consider whether a hybrid partition is appropriate, this analysis is permitted under G.S. 46A-26 (providing that the court “shall order one of the following methods of partition real property....” including hybrid partition).



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Hybrid Partition Considerations

- Ask:
 - Can a portion of the property be divided without substantial injury to a cotenant?
 - Could the portion that would cause substantial injury be sold and the rest be divided by actual partition?
 - Keep an eye on hidden costs (additional surveys, subdivision of tracts, etc.)



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What if...

Two parties are both claiming the same interest in the property?



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G.S. 46A-52 – Actual Partition, Disputed or Unknown Cotenant

- 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 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.



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G.S. 46A-75(d) – Partition Sale, Disputed Cotenant

- As provided in G.S. 46A-52, if two or more parties claim the same undivided interest in the property, ***the court is not required to decide the issue*** before ordering a partition sale of the property.

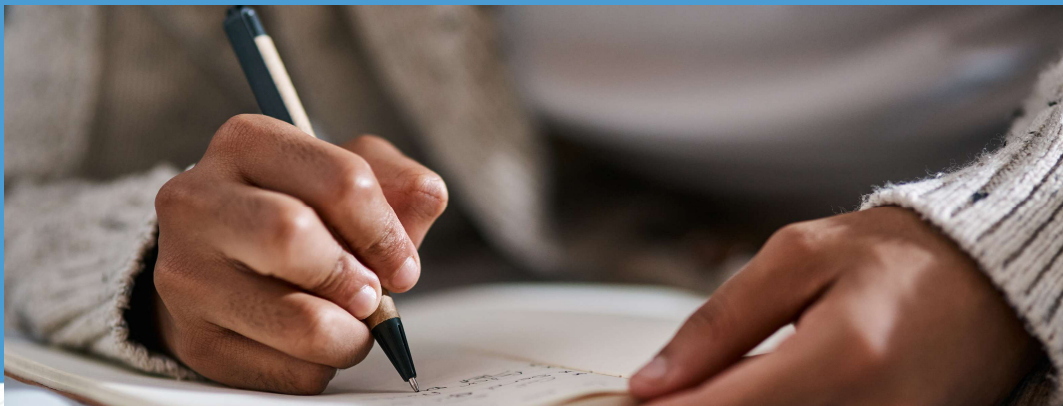


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What about transfer?

- Is transfer under G.S.1-301.2(b) appropriate?
 - *“(b) Transfer. – Except as provided in subsections (g) and (h) of this section, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court.”*
- Transfer after type of partition determined? After sale or division occurs?

Drafting the Order



Basics of an Order

- Caption
- Introductory Paragraph
- Findings of Fact
- Conclusions of Law
- Order/Decree

What are Findings of Fact?

Determining what the facts are from the evidence—especially disputed evidence.

Findings of Fact - Generally

- Consider petition requirements:
 - ✓ Petitioner and defendants are tenants in common or joint tenants;
 - ✓ All parties in interest have been joined as petitioners or defendants;
 - ✓ A description of the land;
 - ✓ A description of the interest (the nature and extent of the interest) of each cotenant;
 - ✓ What kind of partition was requested?



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Findings of Fact – Ordering a Partition Sale

- If the party seeking a sale meets the burden to show substantial injury, the clerk must
 - make a specific finding to that effect and
 - make specific findings of facts and conclusions of law supporting an order of sale of the property. G.S. 46A-75(c).
- Findings of fact that a cotenant receiving a physical portion of the property would be worth materially less than what the cotenant would receive at a sale must be supported by evidence of the value of the property in its unpartitioned state and evidence of what the value of each share of the property would be were an actual partition to take place. *Partin v. Dalton Prop. Assoc.*, 112 N.C. App. 807 (1993) (new trial ordered where trial court failed to make required findings).



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Findings of Fact – Actual Partition v. Partition Sale

If a partition sale was requested...

- ✓ What are the facts that helped you determine if there was substantial injury?
- ✓ Think about the factors of substantial injury test...



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Substantial Injury Test Factors – *What does your evidence show?*

- | | |
|---|---|
| 1. Would the fair market value of each cotenant's share in an actual partition be materially less than the amount each cotenant would receive from the sale of the whole? | 1. Nature, character, extent, condition and location of the land. |
| 2. Would an actual partition result in material impairment of any cotenant's rights? | 2. Respective ownership interests of the owners. |
| 3. Would charging owelty eliminate or mitigate any substantial injury to any of the parties caused by an actual partition? | 3. Number of owners. |
| | 4. Possibility of dividing the land according to value. |
| | 5. Any economic waste that may be caused by a division. |



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Conclusion of Law – What is it?

Application of the law at issue to the facts you have just found.

- Should include statement re: jurisdiction and basis for it.

Conclusions of Law – What to Consider

- What law applies?
 - What is my authority to enter an order?
 - Does the law provide the remedy the party seeks?
- Who are the parties to this proceeding?
- What does the petitioner need to prove? Have they proven it by the applicable burden of proof?
- What are my (fact) findings?
- How does the law apply to those findings?
- What will I order?

Conclusions of Law – Partition specific stuff to think about

- Determine jurisdiction over the parties and subject matter.
 - Service?
 - Where's my statutory authority to do what the parties are asking me to do?
- The order should specify what type of partition has been authorized. See G.S. 46A-26.
- If the party seeking a partition sale fails to prove, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to any interested party, the clerk must proceed with actual partition by appointing commissioners. G.S. 46A-75(a).
- Court has authority to make any order necessary to do justice between the parties.
Henson v. Henson, 236 N.C. 429, 430 (1952); *Chamberlain v. Beam*, 63 N.C. App. 377, 380 (1983).



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“But... isn’t it obvious?”

- Extensive findings are not always required. For example, it is obvious that a single-family residence in a subdivision development or a one-acre lot with 100 owners cannot be divided without substantial injury to one of the parties.

However:

- You still need to make the FoF
- ...And apply CoL



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Considerations in ordering hybrid partition.

- An order authorizing a hybrid method of partition must include the elements of each method of partition that is being authorized (such as an actual partition and a partition sale).



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Let's Hypo!



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Are there more things to put in the order?

- Anything else specific to actual partitions or partition sales?

Stay tuned...



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