

Understanding the Partition Sale Process

Catherine Wilson, Assistant Professor, *UNCSOG*
July 2026



1

Goals for this Session

- Review Standard for Ordering Sale
- Overview of Sale Process
- What's in the Order?
- Partitioning Other Kinds of Property
 - Personal property
 - Remainder interest
 - Mineral, Oil, and Gas
 - Timber
 - Timeshares

2

Standard for Ordering Partition Sale



Review Time!

Legal Standard for ordering partition sale:

Substantial Injury Test

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?



Substantial Injury Test – Burden of Proof

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

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

Substantial Injury Test – Evidentiary Standard

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

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

Substantial Injury Test – Statutory Factors

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. G.S. 46-75(b).

In other words, will the land materially lose its value if there is an actual division?



7

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*)?



8

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? Access issues? (Right of way, water, etc.)
- Compare: partitioned lot vs. loss of/impaired rights
- What's "material"?



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?
- What's the evidence?
 - May hear from appraisers, surveyors, other experts
- Can owelty fix cotenant's substantial injury?



Owerty - Defined

Owerty – “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.”

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



11

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.



12

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).

Overview of Sale Process



Overview of the Process

1. Determine type of judicial sale.
2. Appoint the Commissioner.
3. Commissioner
 - a. Conducts sale
 - b. Waits for Upset Bids
 - c. Files Report of Sale after no more upset bids
4. Parties can challenge sale
5. Report of Sale is confirmed
6. Deed is signed; Sale proceeds are distributed

Appointment of Commissioner for Sale

- **One Commissioner Sufficient.** – In a partition sale, the court is not required to appoint more than one (1) commissioner.
- **Persons Not to Be Appointed.** – The clerk of the superior court shall not appoint the clerk, an assistant clerk, or a deputy clerk to make a sale of the real property.

[G.S. 46A-76](#)

Sale Procedure

- 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 Part 3 of Chapter 46A ([G.S. 46A-75](#) through [G.S. 46A-86](#)).
- See "Judicial Sales," Special Proceedings: Real Property and Motor Vehicle, Chapter 4.
 - ✓ clerks.sog.unc.edu/special-proceedings-real-property-and-motor-vehicle/judicial-sales
- Sales can be public or private.

Public Judicial Sale

Clerk issues order of sale	Comm'r posts and publishes notice of sale of real property	Comm'r sells property	Comm'r files report of sale with the clerk
10-day upset bid period begins	Upset bid and deposit filed with clerk	Clerk sends Notice of upset bid to Comm'r	Comm'r notifies last high bidder and owner
Upset bid periods continue until 10 days with no bid	Clerk signs order of confirmation	Comm'r tenders deed to high bidder	Comm'r files final account

Additional Partition Requirement: Pre-Sale Notice

If a **public sale** is ordered,

- The commissioner must provide notice of sale *to all parties by first class mail* to their last known address *at least 20 days before the sale* and *certify to the clerk by affidavit* that such notice was given. [G.S. 46A-76\(d\)](#).
- This is an additional duty not otherwise required by the judicial sales statutes.
- This rule does NOT apply to **private sales**.

[G.S. 46A-76](#)

Public Sales



Public Sale – What if no upset bid?



What if the bidder defaults?

- Clerk orders resale
- ...and the whole process begins all over again

Public Sales



What if an owner is a minor or incompetent adult?

- Superior Court judge must also sign the order of confirmation.

Private Judicial Sale



Report of Sale



The person holding a private or public sale must file a report of sale to the clerk within **5 days** after the date of the sale.

- [G.S. 1-339.24](#) (public sale)
- [G.S. 1-339.35](#) (private sale)

Upset Bids

- After the initial sale, the statute provides for rolling upset bids in subsequent 10-day periods. [G.S. 1-339.25](#)
 - If no upset bid is filed within a 10-day period, the last bidder at the original sale becomes the highest bidder.
 - If there are upset bids, the last upset bidder becomes the highest bidder.
- The clerk should not accept an upset bid filed after the close of *normal* business hours of the tenth (10th) day. To determine whether an upset bid was timely filed, see "Judicial Sales," *Special Proceedings: Real Property and Motor Vehicle*, Chapter 4.
- No upset bids may be taken after entry of the confirmation order. [G.S. 46A-83\(a\)](#).

Order of Confirmation

- A partition sale is not effective until confirmed and the confirmation becomes final.
- **Caution!**
 - The clerk may not confirm the sale until the time for submitting an upset bid has passed.
 - Sales involving minors or incompetent persons must be confirmed by both by the clerk and a resident superior court judge of, or a judge regularly holding the courts of, the district.
- An order confirming a partition sale becomes final and effective 15 days after entered if no petition to revoke the order has been filed within that time.

[G.S. 1-339.28](#)

Revocation of Confirmation of Partition Sale



Revocation of Confirmation Order

The purchaser or any party may, within **15 days** of entry of the order confirming the partition sale of real property, 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-76(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.

[G.S. 46A-83](#)

Hearing on Revocation: Brought by Purchaser

If brought by a purchaser who claims the existence of an unsatisfied lien, must by prove a *preponderance of the evidence*, **all** of these:

1. A lien remains unsatisfied on the property to be conveyed; and
2. The purchaser has not agreed in writing to assume the lien; and
3. The lien will not be satisfied out of the proceeds of the sale; and
4. The existence of the lien was not disclosed in the notice of sale of the property.

If the clerk revokes the order of confirmation, clerk must order a resale under the same procedures as an original public sale.

[G.S. 46A-83](#)

Hearing on Revocation: Brought by Party

If brought by a party to the partition proceeding, must prove by a *preponderance of the evidence*, **any** of these:

1. Notice of the partition was not served on the petitioner for revocation as required by Rule 4; or
2. Notice of the sale as required by G.S. § 46-28(b) was not mailed to the petitioner who is seeking revocation; or
3. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.*

If the clerk revokes the order of confirmation, clerk must order the withdrawal of the purchaser's offer, the return of any money or security to the purchaser tendered pursuant to the offer, and order a resale under the same procedures as an original public sale.

[G.S. 46A-83](#)

Hearing on Revocation: Inadequate Price

If an independent appraisal of the property being sold has not been previously entered into evidence,
and
Upon the request of any party,

The court may order an independent appraisal of the property.

- Cost shall be borne by one or more of the parties requesting the appraisal in such proportions as determined by the court.
- If 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.

[G.S. 46A-84](#)

When is It Over?

RULE:

1. 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.
2. A party may **appeal** an order confirming the sale within 10 days of the order becoming final.
3. After the order of confirmation becomes final (with no appeal), the successful bidder may immediately purchase the property.
 - 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.
 - Sale proceeds are distributed to cotenants (can be considered at a separate hearing).

[G.S. 46A-85](#)

What if Purchaser Won't Pay?

1. Any party or the officer or person designated to make the sale may at any time petition the court to revoke its order confirming the partition sale.
2. The petitioner for revocation shall serve all parties required to be served under G.S. 1A-1, Rule 5, and, if the purchaser is not a party, serve the purchaser under G.S. 1A-1, Rule 4(j).
3. If the court finds that the purchaser defaulted on the purchaser's bid and is unable to cure the default, the court shall revoke its order of confirmation and order a resale.

[G.S. 46A-84.5](#)

What's in the Order?



Let's hypo!

Catherine and Lisa inherit a house from Meredith in equal shares as tenants in common. The house is a single-family dwelling in a local subdivision that sits on one-quarter of an acre.

Lisa files a partition proceeding asking for the property to be sold. The clerk finds at the hearing that the property cannot be divided without substantial injury to both parties and orders the property sold in a partition sale.

Considering the steps in the judicial sale process, what else might you consider adding to your order?

Considerations in ordering a Partition Sale

Find your group...

Huddle up...

Think about what else you may want in your order, and

...write it down.

Considerations in Ordering Partition Sale

My list:

- Findings of fact supporting the conclusion that that actual partition cannot be made without substantial injury to any of the interested parties. G.S. 46A-75(c).
- Specify whether the sale is by a public or private sale. G.S. 1-339.3A.
- Appoint a commissioner to advertise and conduct the sale. G.S. 1-339.4.
- How much advice to give to Commissioner?
- Fees of commissioner?
- Other instructions to Commissioner?

What else?

Stay tuned....

Partitioning Other Kinds of Property



Personal Property

- 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.

G.S. 46A-100.



Partition of Personal Property – The Basics

- Clerk may order actual partition or partition sale of personal property. G.S. 46A-101 or -102.
 - Caution! Hybrid methods described in G.S. 46A-26 apply to real property only.
 - Sales are more common.
- Promissory notes can be partitioned.
 - *Central Bank & Trust Co. v. Board of Comm'rs*, 195 N.C. 678 (1928).

Why not just file a regular lawsuit to get the property?

A tenant in common cannot maintain an action against a co-tenant to recover specific goods; the tenant's remedy is partition.

- *Powell v. Hill*, 64 N.C. 169, 169 (1870); *Grim v. Wicker*, 80 N.C. 343, 344 (1879).

Partition of Personal Property – Parties and Procedure

- Cotenants are necessary parties to a partition of personal property. G.S. 1A-1, Rule 19.
- No other persons are specified by statute as necessary or permissible parties; thus, depending upon the facts and circumstances of the case, Rules 19 (Necessary joinder of parties), Rule 20 (Permissive joinder of parties), and Rule 24 (Intervention) may also apply. G.S. 1-393.
- Summons and service on parties by Rule 4 are required. G.S. 46A-1 and -2.

Partition of Personal Property – Petition and Hearing

- Same rules apply as to partitions of real property:
 - Petition must state that respondent has (i) right to seek advice of an attorney and that free legal services may be available by contacting Legal Aid of North Carolina or other legal services organizations, and (ii) That pursuant to G.S. 46A-3, the court may order reasonable attorney fees to be paid as part of the costs of the proceedings. G.S. 26A-2(b).
 - The clerk must hold a hearing on the petition unless all parties consent to relief. See G.S. 1-400 and -401.

What does the clerk consider at the hearing?

- If a party requests a partition sale, the clerk must determine that an **actual partition** of personal property **would injure some of the parties** and that a partition sale is necessary. G.S 46A-102(a).
 - No substantial injury test.
 - No direction to compare loss of value.

Order on Partition of Personal Property

- If actual partition is order, clerk appoints 3 disinterested commissioners. G.S. 46A-101(a).
- If partition sale is granted, clerk is not required to appoint more than one commissioner. G.S. 46A-102(a).

What else should be considered in the order?

Duties of Commissioner(s) for Personal Property

ACTUAL PARTITION

- Commissioners must be sworn. G.S. 46A-101(a).
- ***Within 20 days*** after their notice of appointment, commissioners must proceed to partition the personal property in shares that are as nearly proportionate as possible to the interests of the cotenants. G.S. 46A-101(a).

Duties of Commissioner(s) for Personal Property

PARTITION SALE

- The partition sale must be a judicial sale as provided in Article 29A of Chapter 1 of the General Statutes.
 - Sale can be public or private.
- G.S. 46A-86 applies to sale proceeds under this section. (Proceedings belong to minors, incompetent, imprisoned or unknown/unlocatable persons.)

Partitions with Life Estates

- The existence of a life estate in land does not prevent partition (by sale or actual division) of the property, with some limitations. G.S. 46A-79.
- In all proceedings for partition of land whereupon there is a life estate, the life tenant may join in the proceeding. G.S. 46A-78; *Davis v. Griffin*, 249 N.C. 26, 31 (1958).



Definition Check

Life Estate

- An estate (ownership of property) held only for the duration of a specified person's life, usually the possessor's.
 - Life Estate, BLACK'S LAW DICTIONARY 688 (12th ed. 2024).
 - Holder of a life estate is a **life tenant**.

Remainder Interest

- A future interest arising in a third person—that is, someone other than the creator or the creator's heirs—who is intended to take after the termination of the preceding estate.
 - Remainder, BLACK'S LAW DICTIONARY 1549 (12th ed. 2024).
 - Holder of a remainder interest is a **remainderman**.
 - Term *reversionary interest* is sometimes used.

Partitions with Life Estates – Rights of Life Tenant

- If the life tenant joins in requesting a partition sale, the current interest (the life estate) and future interest (the remainder) can be sold at the same time, and the life tenant receives the sale proceeds representing the value of the life tenant's share as calculated by mortality tables accepted by the clerk. G.S. 46A-78.
 - For mortuary tables and tables applicable to annuities, see G.S. 8-46 and 8-47. (Use 6% formula.)
- Life tenants may seek partition between themselves of their interest in the life estate. *Davis v. Griffin*, 249 N.C. 26, 30 (1958).

Partitions with Life Estates – Rights of a Person with a Remainder Interest

- A person with a remainder interest in property may institute a partition proceeding against any cotenant remaindermen, even though a life tenant may be in actual possession. G.S. 46A-79; *Moore v. Baker*, 222 N.C. 736, 738 (1943).
- Remainder interest must be a vested remainder, not a contingent remainder. See *Bunting v. Cobb*, 234 N.C. 132, 134 (1951) (owner of a vested remainder is entitled to a partition); *Vinson v. Wise*, 159 N.C. 653 (1912).
- However, the right of the life tenant to possess or live on the land during his or her life tenancy must not be disturbed by the partition. G.S. 46A-79; *Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 19 (1966); *Moore v. Baker*, 222 N.C. 736, 738 (1943).

Partitions with Life Estates – What can be done?

- There may be a partition in kind of the remainder interests without consent of the life tenant so long as life tenant's possession is not disturbed.
- In a partition of the remainder interests, the life estate may not be sold without consent of the life tenant. *Priddy & Co. v. Sanderford*, 221 N.C. 422 (1942).
 - If the life tenant does not consent to the sale, the sale is only of the remainder interest.
 - If the life tenant does consent to the sale, all interest may be sold (present and future) and the life tenant receives the sale proceeds representing the value of the life tenant's share as calculated by mortality tables.

Partitions Involving Oil, Gas, or Mineral Interests



- Partitions are allowed for these types of property. G.S. 46A-81.
- The court must order a sale of oil, gas, or mineral interests of real property, when the court determines *any* of the following:
 - It is in the best interest of the cotenants of the oil, gas, or mineral interests to sell the interests.
 - 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. G.S. 46A-81.
- The mere conclusion of the court that a mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale. *Carolina Mineral Co. v. Young*, 220 N.C. 287 (1941).

Partition Sale of Standing Timber

- 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. G.S. 46A-80(a).



Timber – When Life Estate is Involved

- 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. G.S. 46A-80(b).
 - G.S. 8-46 and 8-47.
- 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. G.S. 46A-80(c).

Partitions involving timeshares

- A person who owns an interest in a timeshare as tenants in common or as joint tenants may seek a partition by sale of that *interest* under Chapter 46A of the General Statutes, but...
 - No owner of a timeshare may seek actual partition or by partition sale of the timeshare unit, the timeshare project, or the timeshare program in which the timeshare is held. G.S. 93A-43.
- The terms timeshare, timeshare unit, timeshare project, and timeshare program are defined in G.S. 93A-41





Questions?



59



Catherine Wilson – cwilson@sog.unc.edu

60