



Judicial Sales in Partition Proceedings

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Agenda

- What is a judicial sale?
- Public vs. Private Sale Procedure
- Commissioner
- What is not a judicial sale/Consent order
- Realtor
- What to think about in initial order
- When a resale can be ordered
- Upset bids
- Defaulting Bidder

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Partition by Sale

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.

G.S. 46A-76(a).

		G.S. 1-339	§ 1-339. Repealed by Session Laws 1949, c. /19, s. 2.
		Article 29A - Judicial Sales.	
		G.S. 1-339.1	§ 1-339.1. Definitions.
		G.S. 1-339.2	§ 1-339.2. Application of Part 1.
		G.S. 1-339.3	§ 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.
		G.S. 1-339.3A	§ 1-339.3A. Judge or clerk may order public or private sale.
		G.S. 1-339.4	§ 1-339.4. Who may hold sale.
		G.S. 1-339.5	§ 1-339.5. Days on which sale may be held.
		G.S. 1-339.6	§ 1-339.6. Place of public sale.
		G.S. 1-339.7	§ 1-339.7. Presence of personal property at public sale required.

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What is a judicial sale?

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Judicial Sales under G.S. Chapter 1, Art. 29A

“A judicial sale is a sale of property made **pursuant to an order** of a judge or **clerk** in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust...”

G.S. 1-339.1(a)



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Judicial Sales

Except for sales ordered by the clerk that are not defined as judicial sales pursuant to G.S. 1-339.1, **the procedures prescribed by this Article apply to all sales ordered by a clerk** of the superior court.

G.S. 1-339.3(a).

Except for sales ordered by a judge that are not defined as judicial sales pursuant to G.S. 1-339.1, the procedure prescribed by this Article applies to all sales ordered by a judge of the superior or district court, **except that the judge having jurisdiction may**, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property.

G.S. 1-339.3(b).

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A judicial sale is not...

- Sale in a Ch. 45 non-judicial power of sale foreclosure
- Execution sale
- Sale ordered in a criminal action
- Tax foreclosure sale (including in rem tax foreclosure)
- Sale of entireties property ordered pursuant to Article 15 of G.S. Ch. 35A when one or both spouses are incompetent
- Sale made in the course of liquidation of a bank pursuant to Art. 9 of Ch. 53C
- Sale made in the course of liquidation of an insurance company pursuant to Art. 30 of Ch. 58
- A lease, sale, or exchange made pursuant to G.S. 35A-1251(17) or G.S. 35A-1252(14), unless any order thereunder requires.
- Any other sale the procedure for which is specifically provided by any statute other than Article 29A of G.S. Chapter 1
G.S. 1-339.1(a)

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Types of Judicial Sales

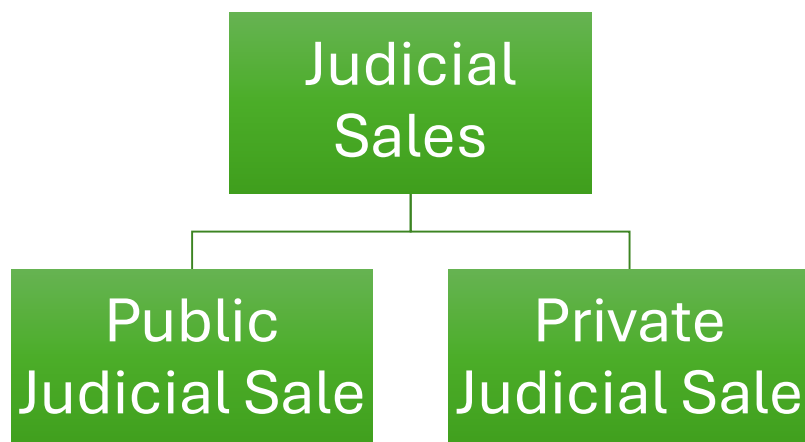
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Public or Private

“The judge or **clerk of court having jurisdiction** has authority in his discretion to determine **whether** a sale of either real or personal property shall be a **public or private sale** and whether a public sale of timber shall be by auction or by sealed bid.”

G.S. 1-339.3A

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Public v. Private

➤ Goal



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Judicial Sales

- Part 1. General Provisions
 - G.S. 1-339.1 through G.S. 1-339.12
- Part 2. Procedure for Public Sales
 - G.S. 1-339.13 through G.S. 1-339.32
- Part 3. Procedure for Private Sales
 - G.S. 1-339.33 through G.S. 1-339.40

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Order Authorizing Sale

Public Sale

- ✓ **Designate** person authorized to hold sale;
- ✓ Direct that the property be sold at **public auction** to the highest bidder;
- ✓ **Describe** real property to be sold, by reference or otherwise, sufficiently to identify it;
- ✓ Designate, consistently with G.S. 1-339.6, the **county and the place** of sale;
- ✓ Prescribe the **terms** of sale, specifying the amount of cash deposit, if any, to be made by the highest bidder at the sale;
- ✓ **May** also direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G.S. 1-339.17 which the clerk deems advantageous.

G.S. 1-339.13

Private Sale

- ✓ **Designate** person authorized to make the sale;
- ✓ **Describe** real property to be sold, by reference or otherwise, sufficiently to identify it;
- ✓ Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
- ✓ Prescribe such **terms** of sale as the judge or clerk of court ordering the sale deems advisable.

G.S. 1-339.33

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Notice & Advertisement

Public Sale

- ✓ **Written** notice of sale
- ✓ **Sent** by first-class mail at least 20 days prior to sale to the last known address of parties previously served pursuant to Rule 4(j)
- ✓ **Posted** at least 20 days prior to sale
- ✓ **Published** in a qualified newspapers once per week for two consecutive weeks
- ✓ Sale of separate tracts situated in different counties require separate advertisement.

Private Sale

- **No** statutory requirement for a notice of sale
- Clerk prescribes terms of sale as clerk deems advisable in order authorizing sale

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Report of Sale

Public Sale

- ✓ Written report of sale filed with clerk in county where proceeding is **pending**
- ✓ Within **5 days** after the date of sale
- ✓ When order requires sale of separate tracts situated in different counties, **separate** reports of sale
- ✓ **Signed** by commissioner
- ✓ Include **contents** listed in G.S. 1-339.24(b).

Private Sale

- ✓ Written report of sale filed with clerk in county where proceeding is **pending**
- ✓ Within **5 days** after the date of sale
- ✓ **Signed** by commissioner
- ✓ Include **contents** listed in G.S. 1-339.35(b).

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Contents of Report of Sale

Public Sale

- Contents** listed in G.S. 1-339.24(b)
- (1) The **title** of the action or proceeding;
 - (2) The **authority** under which the person making the sale acted;
 - (3) The **date, hour and place** of sale;
 - (4) A **description** of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and
 - (5) The names of the **purchasers**;
 - (6) The **price** at which the property, or each part thereof, was sold and that this price was the highest bid; and
 - (7) The **date** of the report.

Private Sale

- Contents** listed in G.S. 1-339.35(b)
- (1) The **title** of the action or proceeding;
 - (2) The **authority** under which the person making the sale acted;
 - (3) A **description** of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
 - (4) The **name(s)** the person(s) to whom the property was sold;
 - (5) The **price** at which the property, or each part thereof, was sold, and the terms of the sale; and
 - (6) The **date** of the report.

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Upset Bids & Confirmation

Public Sale

- ✓ Subject to **upset bidding**. G.S. 1-339.25
- ✓ Must be **confirmed**. G.S. 1-339.28
 - If minor or incompetent, sale confirmed by both clerk and superior court judge. G.S. 1-339.28.
- ✓ Subject to **revocation** procedures in G.S. 46A-83, -84, and 84.5.

Private Sale

- ✓ Subject to **upset bidding**. G.S. 1-339.36
- ✓ Must be **confirmed**. G.S. 1-339.37
 - If minor or incompetent, sale confirmed by both clerk and superior court judge. G.S. 1-339.37; 1-339.28.
- ✓ Subject to **revocation** procedures in G.S. 46A-83, -84, and 84.5.

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PUBLIC SALE



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Order of public sale *shall:*

- Designate the **person** authorized to hold the sale;
- Direct that the property be sold at **public auction** to the **highest bidder**
- **Describe** real property to be sold, by reference or otherwise, sufficiently to identify it;
- Designate the **county and the place** where sale is to be held;
- Prescribe the **terms of sale**, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale. G.S. 1-339.13.

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Order for Public Sale Directs Separate Tracts in Different Counties

- Jurisdiction is in the county where sale ordered was issued.
- Separate advertisement, sale, and report of sale with respect to the property in each county.
- Separate upset bids filed in county where order sale was issued.

G.S. 1-339.8.

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Sale as a Whole or in Parts

When real property to be sold consists of separate lots or other units, the clerk may direct specifically

- (1) That it be sold as a whole, or
- (2) That it be sold in designated parts, or
- (3) That it be offered for sale by each method, and then sold by the method which produces the highest price.
 - ❖ Commissioner has discretion to decide when order is silent.

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Order of public sale *may*:

- State the **method** by which the property shall be sold, pursuant to G.S. 1-339.9 (separate lots sold as whole, designated parts, or the method that produces the highest price).
- Direct any **posting** of the notice of sale or any **advertisement** of the sale, **in addition to** that required by G.S. 1-339.17, which the clerk deems advantageous.
- Provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued.

G.S. 1-339.13; G.S. 1-339.16

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Written notice of public sale contents *shall...*

- Refer to the order authorizing the sale;
- Designate the date, hour and place of sale;
- Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add any further description as will acquaint bidders with the nature and location of the property;
- State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and
- Include any other provisions required by the order of sale to be included therein. G.S. 1-339.15

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Notice & Advertisement of Public Sale

Notice of public sale must be..

- 1) **Posted** in the area designated by the clerk for the posting of notices in the county in which the property is situated for **at least 20 days** immediately preceding the sale; and
- 2) **Published** once a week for at least two successive weeks:
 - In a newspaper qualified for legal advertising published in the county; or
 - If none, in a newspaper having general circulation in the county; and
- 3) **Advertised** as required by clerk in order in accordance with G.S. 1-339.13(b)(2).
 - Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous. G.S. 1-337.17.

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Notice & Advertisement of Public Sale

PLUS one more for **partition public** sales only (not private)

- 4) At least **20 days prior to sale, send** a copy of the notice of sale by **first-class mail** to the last known address of all parties previously served pursuant to G.S. 1A-1, Rule 4(j).
- Commissioner must certify this notice was completed to the court.
 - Affidavit filed by commissioner certifying 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.

G.S. 46A-76(d)

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Public Sales

Sale location

- Held on any day except Sunday. G.S. 1-339.5.
- Single tract; two counties - Sale is held in any county where property is situated. G.S. 1-339.6.

Report of sale

- Filed in county where order of sale was issued. G.S. 1-339.8(b).

Upset Bids

- Filed with clerk in county where order of sale was issued. G.S. 1-339.8(a).

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PRIVATE SALE



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Order for Private Judicial Sale

The order for private sale SHALL:

1. **Designate** the person authorized to make the sale
2. **Describe** real property to be sold, by reference or otherwise, sufficiently to identify it
3. Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity
4. Prescribe such **terms** of sale as the judge or clerk of court ordering the sale deems advisable.

G.S. 1-339.33

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Order for Private Judicial Sale

Can the commissioner hire a realtor?

Article 29A does not expressly address this.



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Order for Private Judicial Sale

The order for private sale SHALL:

1. Designate the person authorized to make the sale
2. Describe real property to be sold, by reference or otherwise sufficiently to identify it
3. Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity
4. **Prescribe such terms of sale as the judge or clerk of court ordering the sale deems advisable.**



G.S. 1-339.33

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Order for Private Judicial Sale

The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure.

G.S. 1-339.3(c)



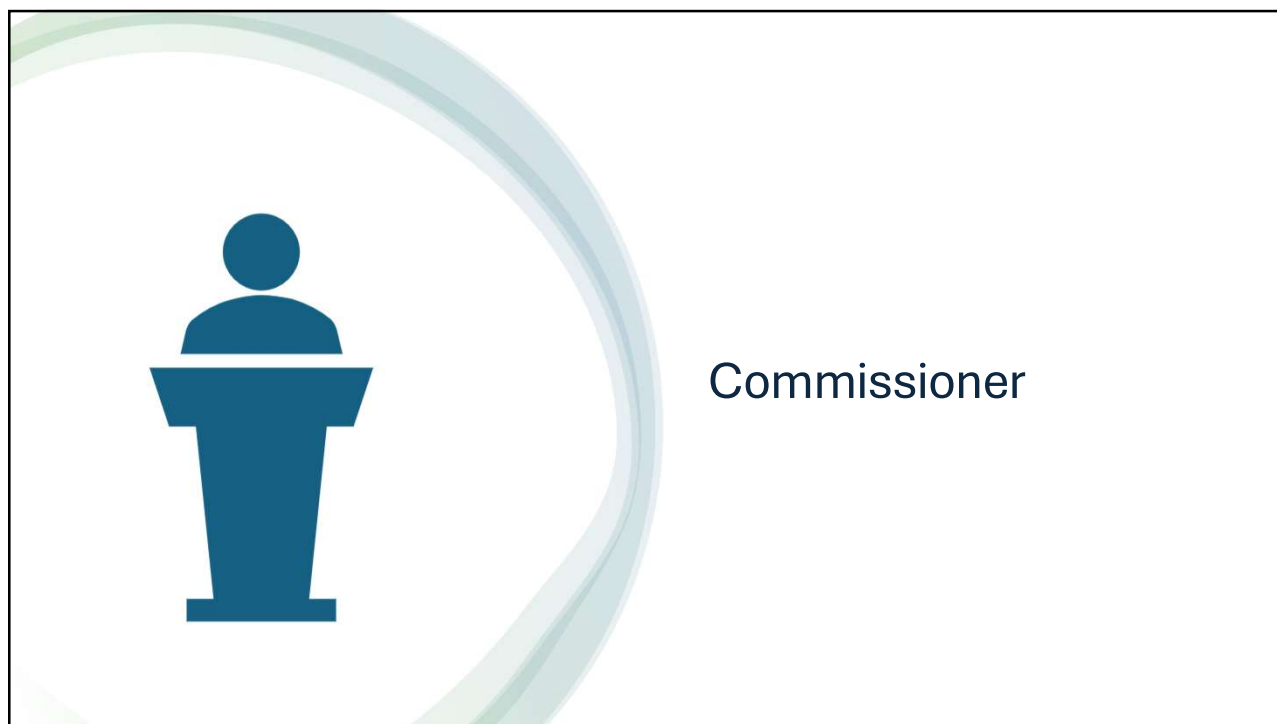
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Order for Private Judicial Sale

- If parties desire to list the real property with a realtor, the order may include such authority.
- Order should authorize commissioner to hire broker.
- Order should authorize commissioner to pay the broker *reasonable* fees from sale proceeds.
- Should require commissioner to make sure contract for purchase is made subject to provisions in Article 29A.



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Who May Hold the Sale	An order of sale may authorize in any proceeding, a <u>commissioner specially appointed</u> therefor. G.S. 1-339.4(1). In a partition sale, the court is not required to appoint more than one commissioner. G.S. 46A-76(b).
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Price v. Calder, 240 N.C. App. 190, 193 (2015)

The Commissioner

- Is a fiduciary
- Is empowered to do one specific act to sell the land and distribute the proceeds to the parties entitled to them.
- Immediately upon appointment ceases to be an attorney or agent for either party but becomes in a certain sense an officer of the court for the specific purposes designated in the order.

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Davis v. Jenkins, 236 N.C. 283 (1952)

A commissioner may not purchase the property at sale.

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Who can be a commissioner?

Not the clerk –

G.S. 46A-76(c) expressly prohibits the clerk of superior court, an assistant clerk, or a deputy clerk as a commissioner to make the sale.

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Who can be a commissioner?

Avoid conflicts of interest

No relationship with a party

Will not be a purchaser

Understands procedures required in Article 29A

Is available and willing to be appointed

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Who can be a commissioner?

Not an attorney for a party unless –

- attorney concludes that he or she can serve fairly and impartially and
- attorney terminates his representation of any person with an interest in the property.



State Bar Ethics Opinion, 2009 FEO 8

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Commissioner Compensation

“If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or **clerk of court** having jurisdiction **shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.**”

G.S. 1-339.11(a)



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Commissioner Compensation

What is
reasonable?

What is the
value for
services?

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Commissioner Bond

- Clerk **may** require a bond to cover proceeds of sale before receiving proceeds.
- Clerk **shall** require a bond “when the commissioner is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.”
- Executed by one or more sureties approved by clerk
- Amount
 - Personal sureties – 2 x amount of expected proceeds
 - Surety company – 1 ¼ x amount of proceeds
- Payable to State of North Carolina for use of parties in interest; conditioned that the principal shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received
- Bond premium is a cost paid out of sale proceeds. G.S. 1-339.10.

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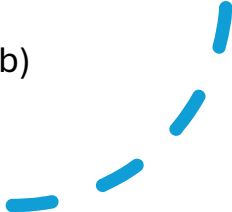
Commissioner's Account of Sale Proceeds

Commissioner is required to file an account within 30 days after receipt of proceeds.

G.S. 1-339.31(a) (public);
G.S. 1-339.40 (private)

The clerk is required to “audit and record the reports and accounts required to be filed.”

G.S. 1-339.31(b)



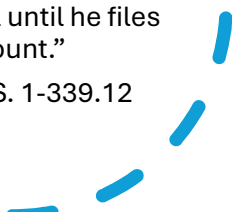
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Commissioner's Account of Sale Proceeds

The clerk can compel the account.

“Whenever any person fails to file any report or account, as provided by this Article, or files an incorrect or incomplete report or account, the **clerk** of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days **after service of the order** on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account.”

G.S. 1-339.12



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Compel Account

AOC-SP-915

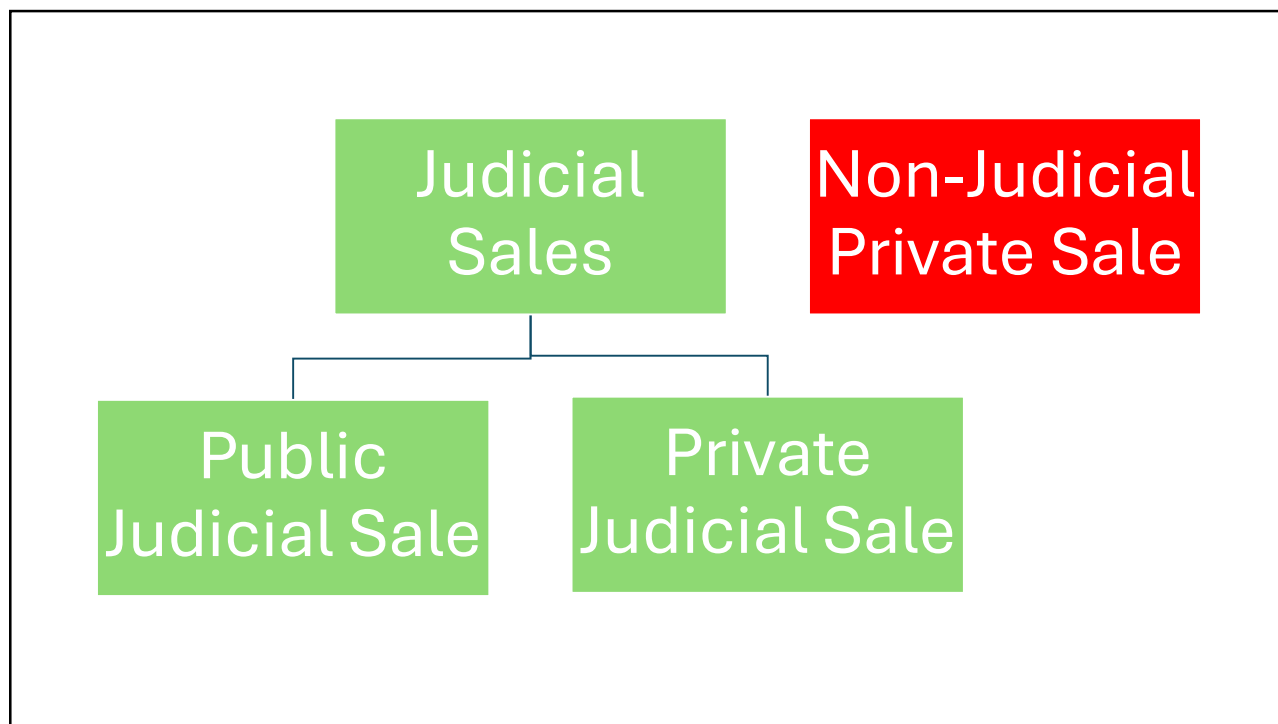
STATE OF NORTH CAROLINA	
County	
In The General Court Of Justice Superior Court Division Before the Clerk	
ORDER TO FILE ACCOUNT	
G.S. 45-21.14	
IN THE MATTER OF:	
Name And Address Of Mortgagee/Lender/Petitioner	
VERSUS/IN THE MATTER OF:	
Name And Address Of Trustee/Commissioner	
To The Trustee/Commissioner Named Above:	
You are hereby notified that:	
☐ you have failed to file your final account as if required by law.	
☐ the account which you submitted is insufficient or unsatisfactory.	
It is ORDERED that you file the required account in this office within twenty (20) days after service of this Order upon you.	
TAKE NOTICE that if your account is not filed, or good cause shown for your failure to do so within twenty (20) days after the service of this Order, a contempt proceeding may be begun against you, and you may be imprisoned until a correct and complete account is filed.	
Date	Signature ☐ Assistant Clerk ☐ Clerk Of Superior Court
To The Sheriff:	
You are commanded to deliver a copy of this Order To File Account to the Trustee/Commissioner whose name and address are shown above and make due return to the undersigned within twenty (20) days after the date of this Order.	
Date	Signature ☐ Assistant Clerk ☐ Clerk Of Superior Court
RETURN OF SERVICE	
I certify that this Order To File Account was received and served as follows:	
Date Served	Name Of Defendant
☐ By delivering to the Trustee/Commissioner named above a copy of this Order.	
☐ The Trustee/Commissioner WAS NOT served for the following reason:	
Service Fee Paid \$	Date Received
Signature Of Deputy Sheriff Making Return	
Title Of Deputy Sheriff Making Return (Type Or Print)	
County Of Deputy Sheriff Making Return	
AOC-SP-915, Rev. 10/13 © 2013 Administrative Office of the Courts	

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What is not a
judicial sale?

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Consent Orders

The clerk cannot deviate from statutory procedures.

- “The procedure prescribed by this Article **applies to all sales ordered by a clerk** of the superior court.” G.S. 1-339.3(a).
- “The procedure prescribed by this Article applies to all **sales ordered by a judge** of the superior or district court, except that the **judge** having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, **vary the procedure** from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property.” G.S. 1-339.3(b).
- The judge or **clerk** of court having jurisdiction has authority to **fix and determine** all necessary **procedural details** with respect to sales **in all instances in which this Article fails to make definite provisions as to such procedure**. G.S. 1-339.3(c).

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Consent Orders

Issues that come up in proposed consent orders...

- Contract already signed
- We need to close next week
- Waive report of sale and upset bids
- Can agree to sell, but can't agree to division of proceeds



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Other Orders

Issues that come up in other orders...

- Request to enter order requiring parties to hire a realtor and sign a listing agreement and deed
- Compel one party to sign documents



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Judicial Sales under G.S. Chapter 1, Article 29A

Subject to certain requirements in G.S. Chapter 1, Article 29A

- Requirement of a commissioner to conduct the sale: G.S. 1-339.37; G.S. 46A-76(b)
- Filing of a report of sale: G.S. 1-339.35 (private); 1-339.8 (public)
- Upset bid period: G.S. 1-339.36 (private); 1-339.25 (public)
- Confirmation of sale: G.S. 1-339.37 (private); 1-339.28 (public)

→ These **cannot** be waived.

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Consent & Other Orders

Remember:

1. The clerk does not have to sign an order just because all parties consent and the order is presented to the clerk.
2. Clerk can't order things in that the clerk does not otherwise have jurisdiction to order.
3. Consent order should otherwise meet the requirements for a valid order in the proceeding before you i.e. necessary findings of fact and conclusions of law.
4. Consent order holds the same power as a standard order – including enforcement powers i.e. contempt.



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Keen v. Parker, 217 N.C. 378 (1940)

“It is generally held that provisions in judgments and decrees entered by consent of all the parties may be sustained and enforced, though they are outside the issues raised by the pleadings, **if the court has general jurisdiction of the matters adjudicated.**”

“[A] judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court and would seem to uphold the position that **such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction**, and this with or without regard to the pleadings...”

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Consent Orders: Partition

If the petition seeks partition by sale, the clerk **must hold a hearing** to determine whether a sale in lieu of partition is necessary, **even if all interested parties consent to selling the land, fail to object, or fail to file an answer.**

Sale of the property may be ordered only if the clerk finds, by a preponderance of the evidence, that actual partition cannot be made without “substantial injury” to any interested party.

See G.S. 46-75A;

Lyons-Hart v. Hart, 205 N.C. App. 232 (2010) (decided under G.S. 46-22)

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All Parties Consent: Partition

1. Petitioners take dismissal and arrange non-judicial, private sale.
2. Keep the matter open until property is sold in case of later disagreement; petitioners dismiss upon completion of sale.

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Upset Bids

Public and private sales are subject to upset bidding.

G.S. 1-339.25 & G.S. 1-339.36

- 10 day upset bid period from filing of report of sale or filing of last upset bid
 - filed by the close of normal business hours on the 10th day
 - if the 10th day falls on a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deadline is on the day following when the office is open for the regular dispatch of its business
- Minimum increase of 5% but no less than \$750
- Minimum deposit is 5% of the bid but no less than \$750

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Upset Bids

- Filing of notice of upset bid + payment of deposit = upset bid
- No upset bid shall be permitted after entry of the confirmation order.
G.S. 46A-83(a)
- If a motion for resale is filed during the upset bid period pursuant to G.S. 1-339.27A, upset bids may not be filed while the motion is pending.
G.S. 1-339.25(b).

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Upset Bids

Notice of upset bid shall...

- (1) **State** the name, address, and telephone number of the upset bidder;
- (2) Specify the **amount** of the upset bid;
- (3) Provide that the sale shall **remain open** for a period of **10 days** after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
- (4) Be **signed** by the upset bidder or the attorney or the agent of the upset bidder.

G.S. 1-339.25(d1)

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Upset Bids

“When an upset bid is made as provided in this section, the **clerk shall notify the person holding the sale** who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owners of the property.”

G.S. 1-339.25(d2)

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Upset Bids

Be careful...

- counting 10 days
- calculating bid amount
- calculating deposit amount

STATE OF NORTH CAROLINA		File No:
County		In The General Court Of Justice Superior Court Division Before this Clerk
IN THE MATTER OF:		
Name of Debtor (Name of Person)		
VERSUS		
Name of Respondent(s)		
NOTICE OF UPSET BID IN JUDICIAL SALE NOTICE TO PERSON HOLDING THE SALE		G.S. 1-339.25
NOTICE OF UPSET BID The undersigned, as the upset bidder, or as the attorney or agent for the upset bidder named below, gives notice of the filing of an upset bid in the above referenced matter. The filing of this bid establishes a new sales price, and the sale shall remain open for a period of 10 days after this Notice of Upset Bid is filed for the filing of additional upset bids as provided by law. (NOTE: The upset bid, as set forth below must exceed the reported sale price or last upset bid by a minimum of 5%, but in any event must represent a minimum increase of at least \$750.)		
Name and Address Of Upset Bidder	Name and Address Of Attorney Or Agent For Upset Bidder	
Telephone No.	Telephone No.	
Amount of Last Previous Sale Or Upset Bid	Amount of New Upset Bid	Amount With Clerk (Greater Of \$750 Or 5% Of Last)
\$	\$	\$
Date Of Filing Of New Upset Bid	Signature	
	See Note to Clerk below.	
NOTICE TO PERSON HOLDING THE SALE You are notified that, in the above referenced matter, the Clerk of Superior Court of the above referenced county is in receipt of a deposit by cash, certified check or cashier's check satisfactory to the Clerk, in an amount at least equal to the minimum required by G.S. 1-339.25, together with the above timely filed Notice of Upset Bid. YOU ARE DIRECTED TO MAIL WRITTEN NOTICE of the upset bid by first class mail to the last known address of the last prior bidder, the current record owner(s) of the property, and to all other persons or entities you may deem appropriate.		
Date	Signature	☐ Deputy Clerk ☐ Clerk Of Superior Court ☐ Assessor/CDC
Last Day For Next Upset Bid	Minimum Amount Of Next Upset Bid	Amount Of Deposit For Next Minimum Upset Bid
	\$	\$
NOTE TO CLERK: Deliver upset bid deposit along with completed form AOC-G-120 to the bookkeeper.		
AOC-SP-405, Rev. 4/09 © 2009 Administrative Office of the Courts		

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Upset Bids

Be cautious when releasing an upset bidder's deposit.

“When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, **is released** from any further obligation on account of the bid, and **any deposit or bond provided by the last prior bidder shall be released.**”

G.S. 1-339.25(d3)



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Upset Bids

What happens when something goes wrong?

The clerk of superior court shall make all orders as may be just and necessary to safeguard the interests of all parties and may fix and determine all necessary procedural details **with respect to upset bids** in all instances in which **this Article fails to make definite provisions** as to that procedure.

G.S. 1-339.25(d5)



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Confirmation



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Confirmation

- Private and public judicial sale must be confirmed by the clerk.

G.S. 1-339.28 (public)

G.S. 1-339.37 (private)

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Requirements for Sale of Minor's Property

Confirmation

- Clerk *and* superior court judge must confirm the sale. G.S. 1-339.28(b) (public); 1-339.37 (private).

Bond

- Court may, in its discretion, require a good and sufficient bond to protect the interests of a minor in a special proceeding. G.S. 1-407.1.
- Court may, in its discretion, waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court in a special proceeding. G.S. 1-407.2.

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Confirmation Order Final

- An order confirming the partition sale 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.
- THEN...successful bidder may purchase after the order of confirmation is final.
 - minimum of 25 days after confirmation order signed
- Deed – Commissioner 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.

G.S. 46A-85

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Revocation

- Petition must be filed within **15 days of entry** of confirmation order
- **Purchaser or any party** to the proceeding may petition for revocation and to order withdrawal of purchaser's offer
- Petitioner must **serve** petition for revocation:
 - all parties required to be served under Rule 5, and
 - the commissioner under Rule 4(j).
- The court must 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 commissioner, and all parties required to be served under Rule 5.

G.S. 46A-83

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Revocation

Purchaser – lien remains unsatisfied

Must prove by preponderance of the evidence **all** of the following:

- (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.

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Revocation

Party- Grounds

- a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4.
 - petitioner shall not prevail if mailed notice required by G.S. 46A-76(d)
- b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46A-76(d).
 - petitioner shall not prevail if mailed notice 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.
- Must prove by a preponderance of the evidence

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Revocation by Party for Inadequate Price

- A party may request an independent appraisal if one was not previously entered into evidence
- The court may order an independent appraisal prepared by a real estate appraiser currently licensed by the North Carolina Appraisal Board
- The cost of the 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, the court may in its discretion require written evidence from the appraiser that the appraiser has been paid in full for the appraisal.

G.S. 46A-84

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Revocation for Inadequate Price

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.

G.S. 46A-84

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Revocation

“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-76.”

G.S. 46A-83(f)

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Revocation Based on Default Bid

- Any party or the commissioner may at any time petition the court to revoke its order confirming the partition sale based on a default bid.
- 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).
- 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

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Default Bidder

- Defaulting bidder at any sale or resale or any defaulting upset bidder is liable on the bid.
- In case a resale is had because of the default, the defaulting bidder remains liable **to the extent that the final sale price is less than the bid, and for all costs of the resale or resales**.
- Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for any liability.
- Does not deprive any person of any other remedy against the defaulting bidder.

G.S. 1-339.30 (public); G.S. 1-339.36 (private)

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Resale - Default Bidder

- Default bidder in **public** sale – failure to comply within 10 days after the commissioner tenders a deed. G.S. 1-339.30(d).
- The procedure for a resale of real property is the same in every respect as is provided by this Article in the case of an original public sale of real property.
 - Defaulting bidder at any sale or resale or any defaulting upset bidder is liable on the bid.
 - In case a resale is had because of the default, the defaulting bidder remains liable **to the extent that the final sale price is less than the bid, and for all costs of the resale or resales.**
 - Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for any liability.
 - Does not deprive any person of any other remedy against the defaulting bidder.

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Order for Possession

The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession **who are parties to the proceeding.**

G.S. 1-339.29(c) (public)

G.S. 1-339.38(b) (private)

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Order for Possession

Public sale -

An order for possession granted shall

- be directed to the sheriff,
- shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and
- 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.

Private sale – Does not include this but order should mirror these provisions.

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Questions?

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