Contribution & Adjustments to Sales Proceeds

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Agenda

- Hearing after Sale
- Special Cotenant Situations (minors, etc.)
- Contribution
- Cotenant is High Bidder
- Fees and Costs
  - Commissioners
  - Surveyors
  - Attorney's Fees

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Hearing after Sale

Hearing after Sale

"Upon receipt of the sale proceeds by either the court or the commissioner, the court shall secure to each cotenant the cotenant's ratable share in severalty of the proceeds of sale. If the ratable share due to each cotenant has not yet been determined by the court, the **court shall set the matter for hearing** on the court's own motion or upon motion of a party or commissioner."

G.S. 46A-85(d)

Special Cotenant Situations

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Payment of Proceeds to Minors or Incompetent Adults

The court must take **appropriate steps** to secure the proceeds for the benefit of a minor or an incompetent adult, **including any of the following**:

1. the court may receive, administer, and disburse the proceeds up to the allowable amounts and pursuant to G.S. 7A-111.
2. order the proceeds disbursed to any of the following:
   a. A **guardian of the estate** or **general guardian** under Chapter 35A of the General Statutes.
   b. An **agent** under Chapter 32C of the General Statutes.
   c. In the case of a minor, a **custodian** under Chapter 33A of the General Statutes.
   d. A **custodial trust** under Chapter 33B of the General Statutes.
   e. A **trust** under Chapter 36C of the General Statutes.

G.S. 46A-86.

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Proceeds owed to Imprisoned or Unlocatable Persons

The court shall invest or deposit sale proceeds under G.S. 7A-112 and G.S. 7A-112.1 for

- party who is imprisoned, if the proceeds cannot be disbursed to, or at the direction of, the party.
- an unknown or unlocatable cotenant.

A party may seek disbursement of these proceeds by filing a motion. If the party shows that the proceeds belong to the party, the court shall order that the proceeds be disbursed to the party.

G.S. 46A-86

Contribution

Right of Contribution

A content has the right to contribution from the other cotenants for the cotenant's payment of **carrying costs** and **improvements** on real property.

- Applies in both actual partition and partition by sale.

G.S. 46A-27(a).

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Right of Contribution: Carrying Costs

Carrying costs: actual costs of preserving the value of and the cotenant's interests in the real property, including:

1. Property taxes (limited to previous 10 years plus interest at legal rate)
2. Homeowner's insurance
3. Repairs
4. Payments on a loan used to acquire the property.

G.S. 46A-27(a), (c), and (e).

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Right of Contribution: Improvements

Improvements: amount of the improvements is **the lesser of**

1. the value added to the real property from the cotenant's improvements as of the commencement date of the partition proceeding, and

2. the actual costs of the improvements.

G.S. 46A-27(a).

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Right of Contribution

- May be ordered as part of a **partition proceeding.**
- **May NOT be ordered if no partition is ordered by the court.**

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Right of Contribution: Deadline to Claim

Actual partition: cotenant may apply asserting a right to contribution at any time before the commissioners file a final report.

Partition by sale: cotenant may apply asserting a right to contribution at any time during the partition proceeding.

G.S. 46A-27(b).

What if…

For two years, Catherine has been living in the house she and Lisa inherited from Meredith. The court has ordered a partition sale of the home. Catherine and Lisa own the house equally as tenants in common (50% each). After the sale, Catherine files a motion asking the clerk to order contribution for paying the following:

- Property taxes - $4,000
- Electric bills - $2,000
- Water bills - $1,000
- Natural gas bills - $2,000
- Landline phone bills - $1,000
- Plumbing repairs to kitchen and bath - $10,000

What do you do?

What if…

For two years, Catherine has been living in the house she and Lisa inherited from Meredith. Catherine and Lisa own the house equally as tenants in common (50% each). The court has ordered a partition sale of the home. After the sale, Catherine files a motion asking the clerk to order contribution for paying the following:

- Property taxes - $5,000
  - *Evidence: C and L agree that these have to be paid.*
- Electric bills - $3,000
  - *Evidence: $750 needed to keep minimum AC running to prevent mold/moisture damage.*
- Water bills - $2,000
  - *Evidence: $500 needed to keep water on and prevent pipe freeze.*
- Natural gas bills - $2,000
  - *Evidence: This was for cooking only. $0 needed to protect property.*
- Landline phone bills - $1,000
  - *Evidence: Required to keep security system turned on.*
- Security system - $2,000
  - *Evidence: C says security system needed to protect value of house. L says not needed, only protected C possessions inside the house.*
- Plumbing repairs to kitchen and bath - $10,000
  - *Evidence: C and L agree that these repairs were needed.*

But what if….

The house Catherine and Lisa inherited from Meredith is a remote mountain cabin that does not require electricity or running water (it has a well). There is an electrical line connected to the house, but it is only needed if someone is living there; otherwise, due to the location of the house, electricity and continuous running water are not needed to prevent damage.

Does this make you think differently about carrying costs necessary to preserving the value of and the cotenants' interests in the real property?

Which ones?

On the other hand…

What if the house Catherine and Lisa inherited from Meredith has a three-hole golf course and an extensive landscaping and irrigation system?

Does this make you think differently about carrying costs necessary to preserving the value of and the cotenants' interests in the real property?

Which ones?

Takeaway on Carrying Costs

- Whether the costs preserve the value of the property will depend entirely on the ***specific characteristics of the property***.

- Details matter.

Let's talk Improvements….

What if…

Assume the house that Lisa and Catherine inherit is an ordinary single-family home in a local subdivision.

Catherine also asks for the following improvement costs:

- Installing a new roof - $8,000
- Installing new landscaping and sprinkler system - $20,000
- Installing an in-ground swimming pool - $50,000

What do you do?

Right of Contribution: Improvements

Improvements: amount of the improvements is **the *lesser* of**

1. the value added to the real property from the cotenant's improvements as of the commencement date of the partition proceeding, and

2. the actual costs of the improvements.

G.S. 46A-27(a).

What if…

Catherine also asks for the following improvement costs:

- Installing a new roof - $8,000
  - *Increase in property value - $12,000*
- Installing new landscaping and sprinkler system - $20,000
  - *Increase in property value - $5,000*
- Installing an in-ground swimming pool - $50,000
  - *Increase in property value $30,000*

What do you do?

Applying the Improvements standard:

- Installing a new roof - $8,000
  - *Increase in property value - $12,000*
- Installing new landscaping and sprinkler system - $20,000
  - *Increase in property value - $5,000*
- Installing an in-ground swimming pool - $50,000
  - *Increase in property value $30,000*

How much is Catherine owed?

Total Improvements recognized by G.S. 46A-27(a) = $43,000 (8k + 5k + 30k)

What does "Contribution" mean?

Contribution – "The right that gives one of several persons who are liable on a common debt ***the ability to recover ratably*** from each of the others when that one person discharges the debt for the benefit of all."

BLACK'S LAW DICTIONARY, Contribution (7th Ed. 1999).

Ratable – "Proportionate."

BLACK'S LAW DICTIONARY, Contribution (7th Ed. 1999).

So what does Catherine receive?

Total Improvements recognized by G.S. 46A-27(a) = $43,000 (8k + 5k + 30k)

- Let's assume the house sells for $100,000 (including the increase in value C added due to improvements)
  - C gets $21.5k off the top (this is ***Lisa's 50% contribution*** towards the $43k of improvements C paid for)
  - Lisa and I split the rest ($78.5k) and each get $39,250.
    - ***Result:*** C gets a total of $60,750 and Lisa gets $39,250 (= $100,000)

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Let's talk other stuff….

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What if…?

Lisa files a motion requesting that

- That the court order that she receive $20,000 in rent payments that Catherine collected from a former tenant before moving in and never shared with her, and
- That Catherine pay her rent for the time she lived in the house.

What do you do?

§ 46A-27. Carrying costs, including property taxes; improvements; right to contribution.

(a) Right to Contribution. – A cotenant has a right to contribution from the other cotenants for the cotenant's payment of the real property's carrying costs and for the lesser of the following:

(1) The value added to the real property by the cotenant's improvements as of the date of the commencement of the proceeding.

(2) The actual costs of the cotenant's improvements.

(b) Procedure. – In the case of an actual partition, a cotenant may on application assert the cotenant's right to contribution at any time before the commissioners file their report. In the case of a partition sale, a cotenant may on application assert the right at any time during the partition proceeding.

(c) Property Taxes. – A cotenant's right to contribution for property taxes under this section is limited to the amount of property taxes paid by the cotenant during the 10 years preceding the filing of the partition petition, plus interest at the legal rate under G.S. 24-1.

(d) Scope. – Nothing in this section affects the rights of cotenants outside a real property partition proceeding initiated under this Chapter.

(e) Carrying Costs Defined. – For purposes of this section, "carrying costs" means the actual costs of preserving the value of and the cotenants' interests in the real property, including property taxes, homeowner's insurance, repairs, and payments for a loan to acquire the real property. (2020-23, s. 3.)

Cotenant is High Bidder

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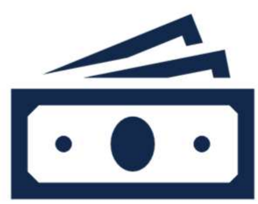
What if….

Catherine is the high bidder at the partition sale and she bids $300,000.



How does this affect the sales proceeds?

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What if Cotenant is the high bidder?

1. A cotenant who is the high bidder at a sale of 100% in any parcel of real property **is entitled to a credit** on the bid equal to the undivided interest the cotenant already owns in the parcel.

2. Cotenant receives a corresponding *reduction* in the amount of the total purchase price owed after
   a. Deducting the costs and fees associated with the sale and
   b. Apportioning the costs and fees in accordance with the orders of the court.

3. The credit is applied at the time of the closing of the cotenant's purchase of the real property (payment to the commissioner).

G.S. 46A-77

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What if Cotenant is the high bidder? (cont'd.)

4. If two or more cotenants make a joint bid that is the high bid, they are entitled to an aggregate credit and reduction in the amount of the total purchase price representing the total of the cotenants' undivided interests in the real property.

5. Any credits and reductions allowed must be **further adjusted** to reflect any court-ordered adjustments to the share or shares of the net sale proceeds of each of the cotenants entering the high bid, ***including, but not limited to***, equitable adjustments to the share or shares of the net sales proceeds due to a court finding of the lack of **contribution** of one or more cotenants to the payment of expenses of the real property.

G.S. 46A-77

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What if….

- Catherine is the high bidder at the partition sale and she bids $300,000.
- How does this affect the sales proceeds?

- Let's assume $15,000 of costs and fees (including Commissioner's fees).

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Remember: G.S. 46A-77, Step #1

1. A cotenant who is the high bidder at a sale of 100% in any parcel of real property **is entitled to a credit** on the bid equal to the undivided interest the cotenant already owns in the parcel.

    - How much of the property does C own?
        - Equal share (50%)
    - Entitled to credit of 50%, representing her ownership interest.
        - $300,000 sales price

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G.S. 46A-77, Step #2

2. Cotenant receives a corresponding *reduction* in the amount of the total purchase price owed after
   a. Deducting the costs and fees associated with the sale and
   b. Apportioning the costs and fees in accordance with the orders of the court.

- Total purchase price: $300,000
- Costs and fees: $15,000
- Each cotenant's share of costs and fees: $7,500
  – Each cotenant is entitled to net proceeds of $142,500

Applying the Cotenant's Credit

- Sales price: $300,000
  – Minus costs and fees ($300,000 - $15,000 = $285,000)
  – Lisa and C are both responsible for $7,500 each in fees and costs
  – Lisa and C are entitled to receive $142,500 net sales proceeds
    - C applies credit of $142,500 after deducting $15K in costs/fees
    - C pays $15,000 in total costs/fees and receives credit for L's $7,500 ½ share of costs and fees
    - C pays commissioner total of $150K:
      – $135K for Lisa's share +
      – $15k for costs/fees
    - **Commissioner then disburses (L's $142,500 less her ½ of the $7,500 paid by C):**
      – **$135K to Lisa and**
      – **$15K for costs/fees**

What if….

What about Catherine's carrying costs and improvement amounts?

How much should she pay Lisa?

Let's assume to following total payments by Catherine were found to be proper under G.S. 46A-27:

- $43,000 in improvements
- $17,000 in carrying costs
  - Total Contribution: $60,000

G.S. 46A-77

§ 46A-77. Cotenant credit.

Any cotenant entering the high bid or offer at any sale of one hundred percent (100%) of the undivided interests in any parcel of real property shall receive a credit for the undivided interest the cotenant already owns in the real property and shall receive a corresponding reduction in the amount of the total purchase price owed after deducting the costs and fees associated with the sale and allocating the costs and fees associated with the sale in accordance with the orders of the court. The high bid or offer shall be for one hundred percent (100%) of the undivided interests in the parcel of real property sold, and the credit and reduction shall be applied at the time of the closing of the cotenant's purchase of the real property. When two or more cotenants jointly make the high bid or offer at the sale, they may receive at the closing an aggregate credit and reduction in the amount of the total purchase price representing the total of their undivided interests in the real property. Any credits and reductions allowed by this subsection shall be further adjusted to reflect any court-ordered adjustments to the share of the net sale proceeds of each of the cotenants entering the high bid or offer, including, but not limited to, equitable adjustments to the share of the net sales proceeds due to a court finding of the lack of contribution of one or more cotenants to the payment of carrying costs or improvements of the real property under G.S. 46A-27. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7; 2009-512, s. 4; 2020-23, ss. 2(gg), 3.)

Applying the Contribution

- Sales price: $300,000
  - Minus costs and fees ($300,000 - $15,000 = $285,000)
  - Lisa and C are both responsible for $7,500 each in fees and costs
  - Lisa and C are entitled to receive $142,500 net sales proceeds
    - C's purchase credit $142,500 (after reducing for ½ of costs):
    - Further reduced by Lisa's share of Contribution - $30,000 and Lisa's share of ½ costs and fees -$7,500 = $105,000
      - Lisa is owed $105,000
      - C pays costs of $15,000
    - **C owes Commissioner $120,000**
    - **Commissioner then disburses (L's $142,500 less her ½ of the costs $7,500 and Lisa's $30,000 share of Contribution paid by C):**
      - **$105K to Lisa and**
      - **$15K for costs/fees**

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Costs & Fees

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Commissioners: Setting Compensation

1. The clerk is to fix the compensation of the commissioners according to the provisions of G.S. § 1-408. G.S. 46A-50

2. G.S. 1-408 provides that the clerk may fix a ***reasonable*** fee for the services of the commissioners, which fees are to be taxed as part of the costs in the proceeding.

3. What's the right amount?
   - Enough to motivate individuals to be willing to serve as commissioners (can't be too low).
   - Reasonableness will vary from case to case: how complex is the job, market rates for services, etc.
   - Should reflect fair value for the service performed.

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Fees of surveyors

In civil actions and special proceedings commenced in superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, *the clerk may*, if all parties to the action or proceeding will benefit by a survey, *order a survey* of the land involved, appoint a surveyor for this purpose, *and fix a reasonable fee* for the services of the surveyor. [G.S. 1-408]

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What about Attorney's Fees?

§ 46A-3. Attorneys' fees.

(a) In proceedings to partition property under this Chapter, the court shall allocate among all the cotenants of the property those reasonable attorneys' fees incurred by any cotenant for the common benefit of all the cotenants, unless a cotenant shows that doing so would be inequitable. The allocation shall be according to each cotenant's interest in the property.

(b) The attorneys' fees described in subsection (a) of this section do not include attorneys' fees incurred in disputing the method of partition or the division of the proceeds of a partition sale. Reasonable attorneys' fees incurred by a cotenant in disputing an issue described in this subsection shall be allocated by the court among those cotenants determined by the court to be aligned with the cotenant on that issue. The allocation shall be according to each aligned cotenant's interest in the property relative to the total interest of all the aligned cotenants in the property.

(c) The court has discretion to allocate among the parties reasonable attorneys' fees that are not described in subsection (a) or (b) of this section. (2020-23, s. 3.)

Attorney's Fees – Let's break it down

Three categories of fees:

1. Clerk shall allocate among all the cotenants of the property those reasonable attorneys' fees incurred by any cotenant for the **common benefit** of all the cotenants, unless a cotenant shows that doing so would be inequitable. The allocation shall be according to each cotenant's interest in the property.

2. Does **not** include attorneys' fees incurred in *disputing the method of partition* or the *division of the proceeds* of a partition sale.
   - These fees are allocated by the court among those cotenants determined by the court to be aligned with the cotenant on that issue.
   - The allocation shall be according to each aligned cotenant's interest in the property relative to the total interest of all the aligned cotenants in the property.

3. **Other** attorneys' fees: The court has discretion to allocate among the parties.

G.S. 46A-3

Category #1 – The Clerk SHALL

- **Allocate what?**
  - Reasonable attorney's fees
- **For what?**
  - Incurred by any cotenant for the **common benefit** of all the cotenants
- **Among whom?**
  - All the cotenants of the property
- **Unless:**
  - A cotenant shows that doing so would be inequitable.

The allocation shall be according to each cotenant's interest in the property.

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Category #2 – The Clerk SHALL

- **Allocate what?**
  - Reasonable attorney's fees
- **For what?**
  - attorneys' fees incurred in *disputing the method of partition* or the *division of the proceeds* of a partition sale
- **Among whom?**
  - Those cotenants determined by the court to be aligned with the cotenant on that issue.

Allocation shall be according to each aligned cotenant's interest in the property relative to the total interest of all the aligned cotenants in the property.

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Category #3 – Clerk MAY

- **Allocate what?**
  - Reasonable attorney's fees
- **For what?**
  - Other fees not included in category #1 or #2
- **Among whom?**
  - among the parties
- **How?**
  - As the clerk may decide in the clerk's discretion.

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What if…

Lisa and Catherine both hired attorneys to represent them in the partition.

- Catherine's attorney charges $18,000, and $12,000 of his charges include arguing that a petition sale was necessary and proving the substantial injury test (it was not successful). $4,000 was spent preparing the petition, appearing in court, and working with the Commissioner and opposing counsel to complete the sale. The remaining $2,000 was spent arguing about division of the proceeds re: carrying costs and improvements.
- Lisa's attorney charges were $12,000 and $8,000 of his charges include arguing against a partition sale (it was successful). $2,000 was spent preparing the petition, appearing in court, and working with the Commissioner and opposing counsel to complete the sale. The remaining $2,000 was spent arguing about division of the proceeds re: carrying costs and improvements.

They both file a motion to charge their attorney fees charged against the partition sale proceeds. What do you do?

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What if… "You can't have it."

"Attorney's fees are confidential and subject to attorney-client privilege."

What do you do?

How can you rule on a motion for attorney's fees?

Hint: *You can only approve "reasonable" attorney's fees. How do you know what is reasonable if you have no fee information?*

Let's break it down…

- What fees are in Category #1?
- What fees are in Category #2?*
  - *Start here.*
- What fees are in Category #3?

Category #2 – The Clerk SHALL

- **Allocate what?**
  - Reasonable attorney's fees
- **For what?**
  - attorneys' fees incurred in *disputing the method of partition* or the *division of the proceeds* of a partition sale
- **How much?**
  - **Catherine: $12k arguing about the sale, $2k arguing about division of proceeds (total $14k)**
  - **Lisa: $8k arguing about the sale, $2k arguing about division of proceeds (total $10k)**
- **Among whom?**
  - Those cotenants determined by the court to be aligned with the cotenant on that issue.
    - **Aligned on the issues: Catherine v. Lisa**
    - **Catherine pays $14k out of her share**
    - **Lisa pays $10k out of her share**

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What about the rest of the fees?

- Catherine started with 18k – 14k (category #2) = $4,000
- Lisa started with 12k – 10k (category #2) = $2,000

- Are they category 1 (common benefit) or category 3 (other)?

- …it depends on your findings of fact.

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What if…

Local attorneys serves as Commissioner for partition sale, and he wants to be paid 5% fees for serving as Commissioner and 3% fee for attorney's fees.

What do you do?

Thoughts?

1. YOU set the Commissioner's fee. G.S. 46A-50; G.S. 1-408.

2. Attorney fees for what?
   - Who is the attorney's client?
   - What services is he performing?
     - Closing atty for the sale?
     - Other?
   - Does this fit under "other" fees in
   - Did the original order allow the Commissioner to hire a closing attorney? Did it allow him to hire himself?

Questions?

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