



# Session Law 2020-23 Changes to Partition Law

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# Agenda

1. Overview of Legislative Changes
2. Partition 101 + Ten Key Changes

# Overview of Legislative Changes

Session Law 2020-23

Applies to partition proceedings commenced on or after October 1, 2020.

G.S. Chapter 46 replaced by a new G.S. Chapter 46A.



# Recodification Chart and Other Materials

## Summary of Ten Key Effects of G.S. Chapter 46A

### Partition Proceedings Generally

#### I. Attorneys' Fees

##### A. Old law (G.S. 6-21(7))

Pursuant to G.S. 6-21(7), reasonable attorneys' fees are allowed as costs in a partition proceeding (real or personal property) and may be taxed against either party or apportioned among the parties in the discretion of the court. See NC Clerk of Superior Court Procedures Manual, pg. 163.35 [CSC Manual].

##### B. New law (G.S. 46A-3)

Under the new G.S. 46A-3(a), the court must allocate among all cotenants reasonable attorneys' fees



### General Statutes Commission

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#### MEMORANDUM

**To:** House Judiciary  
**From:** General Statutes Commission  
**Re:** SB 729 (GSC Modernize Partition Laws)  
**Date:** June 8, 2020

#### General Comments

Under current law, when property is concurrently owned by multiple cotenants, a cotenant has a right to partition the property in a special proceeding before a clerk of superior court. There are two partition procedures: (i) actual partition, where property is physically apportioned among the cotenants, and (ii) partition sale, where property is sold and the sale proceeds are divided among the cotenants.

This bill modernizes the partition of property statutes by reorganizing them into a new chapter, updating and clarifying language, and making substantive changes, including the following:

- Generally, the court shall allocate among all the cotenants those reasonable attorneys' fees incurred for the benefit of all the cotenants. (§ 46A-3)
- The petitioner is not required to serve or join spouses of cotenants of real property, unless the spouse is also a cotenant. (§ 46A-21(c))

Meredith Smith  
2020 Summer Conference  
Prepared for Instructional Purposes

#### Session Law 2020-23 Changes to Partition Law Recodification Chart

New General Statute Chapter 46A Provision	Corresponding Old General Statute Chapter 46 Provision
<b>Article 1: General Provisions</b>	
46A-1	46-1
46A-2	46-2.1
46A-3	NONE
<b>Article 2: Real Property</b>	
<b>Part 1: General Provisions</b>	
46A-20	46-2
46A-21(a) and (b)	46-3
46A-21(c)	NONE
46A-22	46-6
46A-23	46-5
46A-24	46-4
46A-25	46-14
46A-26	46-16
46A-27	NONE
46A-28	46-3.1
46A-29	46-22.1
<b>Part 2: Actual Partition</b>	
46A-50(a)	46-7
46A-50(b)	46-7.1

# Partition 101

## Two Types Property Subject to Partition

1. Real property
2. Personal property



# Partition of Real Property

Special proceeding brought before the clerk to divide land owned by two or more people as joint tenants or tenants in common.

G.S. 46A-21(a)

# Two Types of Partitions

## 1. **Actual partition** (aka “partition in kind”)

- Results in actual division of the land

## 2. **Partition by sale** (aka “sale in lieu”)

- Sale of property and proceeds divided among cotenants

The law favors.....

# The Law Favors...

The law favors **actual partition**.

Partition by sale **only allowed** if the court finds by preponderance of the evidence that:

1. Actual partition cannot be made
2. Without **substantial injury** to any of the parties
3. After consideration of evidence in favor of actual partition and partition by sale

Burden of proof – party seeking the sale must prove substantial injury.

G.S. 46A-75(a)



# Partition Procedure

Partition proceeding initiated by the filing of a **petition** with the clerk.

G.S. 46A-1

**Petition must include written notice** in a “manner reasonably calculated to make the respondent aware” of:

1. The right to seek the advice of any attorney and free service might be available through Legal Aid or others, and
2. The court may order reasonable attorneys’ fees pursuant to G.S. 46A-3.

G.S. 46A-2.

# #1: Attorneys' Fees

## **Old Law:**

Pursuant to G.S. 6-21(7), reasonable attorneys' fees are allowed as costs in a partition proceeding (real or personal property) and may be taxed against either party or apportioned among the parties in the discretion of the court.

NC Clerk of Superior Court Procedures Manual, pg. 163.35.

# #1: Attorneys' Fees under G.S. 46A-3

G.S. 46A-3 creates three types of attorneys' fees:

1. “**Common benefit**” attorneys' fees – requires the court to allocate among *all cotenants* reasonable attorneys' fees incurred by any cotenant for the common benefit of all cotenants
  - Court “shall” allocate, unless a cotenant shows doing so would be **inequitable**
  - Allocation is according to each cotenant's interest in the property

G.S. 46A-3(a)

# #1: Attorneys' Fees under G.S. 46A-3

G.S. 46A-3 creates three types of attorneys' fees:

2. **Dispute Fees.** The court shall allocate reasonable attorneys' fees incurred by a cotenant disputing either (a) the method of partition or (b) the division of proceeds.
  - Allocated among cotenants aligned with the cotenant on that issue
  - Allocation according to each cotenant's interest in the property

G.S. 46A-3(b)

# #1: Attorneys' Fees under G.S. 46A-3

G.S. 46A-3 creates three types of attorneys' fees:

**3. "Old Chapter 46 Law" fees.** Carries forward from the old G.S. Chapter 46 the courts authority to allocate all other reasonable attorneys' fees among the parties.

- Pursuant to G.S. 6-21(7), reasonable attorneys' fees are allowed as costs and may be taxed against either party or apportioned among the parties in the discretion of the court.

G.S. 46A-3(c).

# Partition Procedure

- **Petition.** Proceeding initiated by the filing of a petition with the clerk.
- **Summons.** Partition Proceeding Summons (AOC-SP-101)
- **Service.** Petition and summons must be served by the petitioner on the respondents pursuant to Rule 4. G.S. 1-394.
  - If petitioner shows (by affidavit or otherwise) there are unknown or unlocatable parties
    - The court must authorize service by publication under Rule 4 and
    - Appoint a GAL to represent them before or after notice by publication. G.S. 46A-22(a).

## #2: Service on Spouse of Cotenant

### **Old Law:**

The spouse has a marital interest in the property even if the spouse is not a cotenant.

Name that marital interest....

## #2: Service on Spouse of Cotenant

### Old Law:

Spouse was **proper** but not **necessary** party – but if did not name spouse as party left open whether spouse continued to have marital interest in the property after cotenant spouse's death.

→ Best practice **was** make the spouse a party so can convey clear title.

CSC Manual, pg. 163.3.



## #2: Service on Spouse of Cotenant

### **New Law:**

Petitioner is not required to serve or join spouses of cotenants of the real property **unless the spouse is also a cotenant.**

G.S. 46A-21(c)

Changes to G.S. 29-30(a) – spouse is not entitled to take a life estate in any real property of the deceased spouse that was apportioned or sold pursuant to a partition proceeding initiated before the deceased spouse's death.

G.S. 29-30(a).

## #2: Service on Spouse of Cotenant

### **New Law:**

May, but don't have to avoid the possible marital interest under G.S. 29-30 (life estate in lieu of intestate share).

→ May see it where actual partition – spouse is not a cotenant but joins so they can take property out of partition as tenants by entirety (allowed under G.S. 39-13.5).

# Partition Procedure

- **Petition.** Proceeding initiated by the filing of a petition with the clerk.
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  - If petitioner shows (by affidavit or otherwise) there are unknown or unlocatable parties
    - The court must authorize service by publication under Rule 4 and
    - Appoint a GAL to represent them before or after notice by publication. G.S. 46A-22(a).
- **Time to Respond.** Respondents have 30 days to respond; clerk may extend once up to 30 additional days. G.S. 1-394.

# Transfer of a Partition Proceeding

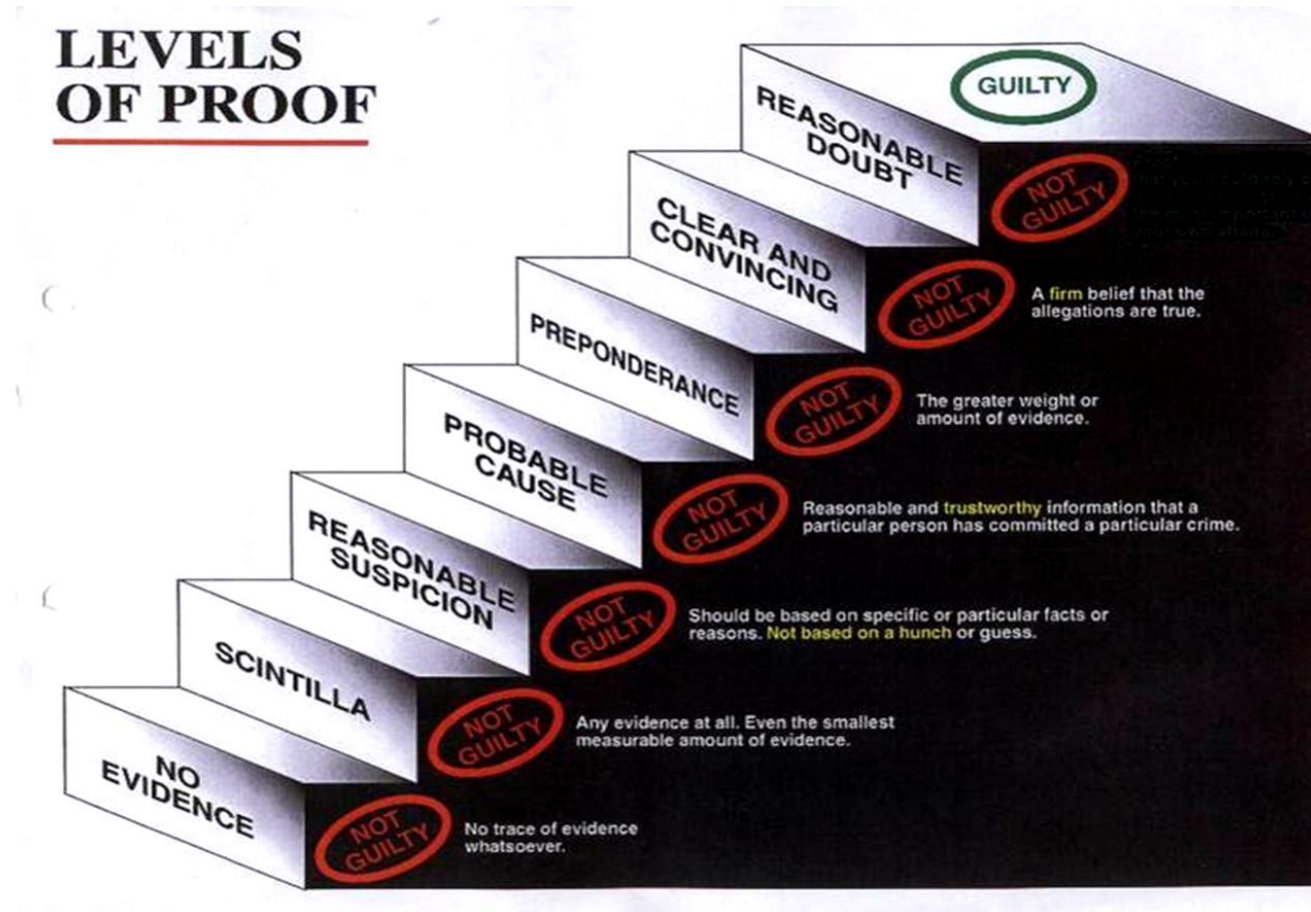
- Issue of fact, request for equitable relief, equitable defense is raised in a pleading, the clerk must transfer to the proceeding to superior court. G.S. 1-301.2(b).
- The issue of whether to order actual partition or partition by sale **MAY NOT BE TRANSFERRED.** G.S. 1-301.2(h).

# Who has the burden?

1. Petition filed requests actual partition; answer filed requests partition by sale.
2. Petition filed requests partition by sale, no answer filed.

Who has the burden of proving substantial injury?

# Preponderance of the Evidence



# Substantial Injury

To determine substantial injury the court **must** consider whether:

1. 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. An actual partition would result in material impairment of any cotenant's rights.
3. Charging owelty under G.S. 46A-51 would eliminate or mitigate any substantial injury to any of the parties cause by actual partition.

G.S. 46A-75(b) (old G.S. 46-22(b) and (b1)).

## Examples

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- Single family home
- Office buildings, strip malls with common elements





# Owerty

A sum of money one cotenant pays another cotenant when the land is susceptible to division but not exactly equal shares.

The cotenant receiving the more valuable portion pays owerty to the other cotenant(s) to make the assigned portions equal.

G.S. 46A-51 (former G.S. 46-10).



# Methods of Partition

1. Actual Partition
2. Partition by Sale

Two more...

# Methods of Partition

1. Actual Partition
2. Partition by Sale
3. Actual partition of part, partition by sale of remaining
4. Partition of part (actual or by sale) and order remaining part continue to be held as cotenants

G.S. 46A-26 (old G.S. 46-16)

# #3: No Order to Hold Property as Cotenants

## **New Law**

Adds provision that the court “shall not order a cotenant to continue to hold property in cotenancy over a cotenant’s objection.

G.S. 46A-26(4)

# Interlocutory Orders

Before final determination of the partition proceeding, any party may apply to the court for an interlocutory order that is in the best interests of the parties.

G.S. 46A-28 (former G.S. 46-3.1)

Includes, but not limited to, orders:

1. Related to possession
2. For the payment of secured debt or other liens on the property
3. Occupancy and payment of rent
4. Appointment of a receiver.... and



# #4: Interlocutory Order: Access to the Property

## **New Law (G.S. 46A-28)**

Adds to the list:

#5 – Orders for the purpose of granting access to the property for purpose of inspecting, surveying, appraising, or selling the property.

Also adds **procedure** applicable to obtain such orders.

# #4: Interlocutory Order: Procedure

## **New Law (G.S. 46A-28(b))**

Party makes a written application + must serve a copy on:

1. All other parties
2. Any other person required by the court

If any person files a response or requests a hearing within 10 days of service of the application, the court must schedule a hearing on the application.

If no response or no timely response, the court may decide the matter summarily.



# Equitable Nature of Partitions

- Petitions for partition are equitable in nature.

Henson v. Henson, 236 N.C. 429 (1952)

- In addition to specific statutory duties and procedures regarding partition, the court has jurisdiction “to adjust all equities in respect to the property.”

Allen v. Allen, 263 N.C. 496 (1965)

# Right to Contribution

In partition by sale, cotenant who is the high bidder at the sale is entitled to equitable adjustments of net sales proceeds based on lack of contribution of one or more cotenants to payment of expenses.

G.S. 46A-77 (old G.S. 46-28(c))

A TiC who has made improvements upon the common property is entitled upon actual partition to have that improved portion of the property allotted to him and its value assessed as if no improvements have been made, if this can be done without prejudice to cotenants.

Etheridge v. Etheridge, 41 N.C. App. 44 (1979)

# #5: Right of Contribution

A cotenant 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).

# #5: Right of Contribution: Carrying Costs

**Carrying costs:** actual costs of preserving the value of the and 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).

# #5: 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).

## #5: 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(a).

# Actual Partition: Chapter 46A (mirrors 46)

Clerk appoints three disinterested commissioners; Clerk may give directions to the commissioners.

Clerk fixes compensation for commissioners (may collect in advance); administers oath.

Commissioners divide the property, allocate shares to cotenants, determine owelty, if any.

Must report to the clerk within a reasonable time not exceeding 90 days after appointment; clerk may extend for up to additional 60 days.

Report filed; exceptions within 10 days and, if any, hearing on exceptions; confirmation.

**Terminology Change** – “impeachment” of report under old G.S. 46-19 is now “motion for relief” under G.S. 46A-56

# #6: Order for Possession in Actual Partition

Old Law:

Order for possession did not exist in case of actual partition.

→ Note, clerk was authorized, and continues to be, authorized to issue an OFP in case of **partition by sale**.

G.S. 46A-76(a) (previously, G.S. 46-28(a));  
1-339.29(c),(d) (public sale); 1-339.38 (private sale).



# #6: Order for Possession in Actual Partition

## **New Law: G.S. 46A-59**

Application filed for OFP - clerk may issue OFP against a party who is in possession of the property if:

1. The party is in possession at the time of the application,
2. The party was a party to the actual partition proceeding,
3. No appeal from the order of confirmation commissioners' report has been made or if there has been an appeal of the clerk's order the judge confirmed the report,
4. The report and confirmation have been recorded with the register of deeds, and
5. Ten days' notice is given by the applicant to each party who remains in possession at the time of the application.

**\*\* The notice may not be given until the clerk confirms the report of the commissioners.**

# #6: Order for Possession in Actual Partition

## **New Law: G.S. 46A-59**

The OFP:

- Directs to the sheriff and authorizes the sheriff to remove the occupants and their personal property from the property and put the new owner in possession.
- Executed in the same manner as a writ of possession in summary ejectment proceedings (party entitled to possession treated effectively as a landlord for purposes of the execution of the order).

# Partition by Sale: Chapter 46A (mirrors 46)

CSC orders partition by sale

1. Must find substantial injury
2. Specify private or public sale
  - Same as procedure for judicial sale under G.S. Chapter 1, Article 29A
  - Report of sale, upset bid period, order of confirmation
3. Appoints commissioner to advertise and conduct sale
  - Some clerks order payment of fee in advance

# #7: Number of Commissioners

## **New Law:**

Clarifies that in a partition by sale the clerk is not required to appoint more than one commissioner.

G.S. 46A-76(b)

# #8: No Annual Payment for Life Tenant

Deletes Option for Life Tenant to Receive Annual Payment

## **Old law (G.S. 46-24)**

If the life tenant joins in the proceeding, on a sale the life tenant receives either

1. the interest on the value of the share of the life tenant paid annually; or
2. the value of the life tenant's share as calculated by mortuary tables and tables applicable to annuities in G.S. 8-46 and 8-47.

# #8: No Annual Payment for Life Tenant

Deletes Option for Life Tenant to Receive Annual Payment

## **New law (G.S. 46A-78)**

G.S. 46A-78 eliminates the option of the life estate holder to receive an annual payment and clarifies that the owners of the remainder or reversionary interest have no interest in payments due to the life tenant.

# #9: Duty to Hold a Hearing

## **Old law (G.S. 46-33)**

In the case of a partition by sale, when the order of confirmation becomes final, the court is required to secure the ratable share in severalty of the proceeds of sale to each tenant in common, or joint tenant. G.S. 46-33.

# #9: Duty to Hold a Hearing

## **New law (G.S. 46A-85(d))**

Incorporates the existing provisions in G.S. 46-33 into G.S. 46A-85(d) and adds that if the ratable share due to each cotenant has not been determined by the court at the time the confirmation order becomes final, **the court must set the matter for hearing on the court's own motion or upon motion of a party or commissioner.**

G.S. 46A-85(d).



# #10: Distribution of Proceeds

## **Old law (G.S. 46-34)**

In the case of a partition by sale, if any party to the proceedings is an infant, non compos mentis, imprisoned, or beyond the limits of North Carolina, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

**New law (G.S. 46A-86):** G.S. 46A-86 expands and clarifies prior law in G.S. 46-34.

# #10: Distribution of Proceeds

## **G.S. 46A-86(a): Minor or Incompetent Adult is a Party to the Partition by Sale -**

The court must take appropriate steps to secure the proceeds for the benefit of the minor or incompetent adult. Includes any of the following:

1. Payment to clerk under G.S. 7A-111 (up to \$50,000 minor or \$5,000 incompetent adult).
2. Order the proceeds disbursed to :
  1. A GOE or GG under G.S. Chapter 35A.
  2. An agent under G.S. Chapter 32C (Powers of Attorney).
  3. A custodian under G.S. Chapter 33A (North Carolina Uniform Transfers to Minors Act).
  4. A custodial trust under G.S. Chapter 33B (North Carolina Uniform Custodial Trust Act).
  5. A trust under G.S. Chapter 36C (NC Uniform Trust Code).

# #10: Distribution of Proceeds

## **G.S. 46A-86(a): Party Imprisoned or Unknown or Unlocatable**

Court must invest or deposit the proceeds under G.S. 7A-112 and G.S. 7A-112.1.

A party may seek disbursement of proceeds by filing a motion in the proceeding.

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(b).