

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

H

4

HOUSE BILL 578
Committee Substitute Favorable 5/7/09
Committee Substitute #2 Favorable 5/12/09
Senate Judiciary II Committee Substitute Adopted 7/21/09

Short Title: Partition Sales/Commrs., Sellers, Buyers.

(Public)

Sponsors:

Referred to:

March 16, 2009

A BILL TO BE ENTITLED

AN ACT TO CLARIFY NOTICE REQUIRED TO PARTIES WHO MAY BE UNKNOWN OR UNLOCATABLE IN A PARTITION PROCEEDING; TO CODIFY THE CURRENT PRACTICE OF GRANTING OWNERS CREDIT FOR THEIR EXISTING INTEREST IN LAND WHEN BIDDING ON A PARTITION SALE; TO PERMIT A COURT TO ORDER AN INDEPENDENT APPRAISAL IF REQUESTED AND PAID FOR BY A PARTY TO THE PARTITION WHO CHALLENGES THE AMOUNT BID IN A PARTITION SALE; TO REVISE THE STANDARD FOR DETERMINING WHAT CONSTITUTES "SUBSTANTIAL INJURY" WITH REGARDS TO A PETITION FOR A SALE OF THE PROPERTY; AND TO PROVIDE FOR MEDIATION OF PARTITION DISPUTES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 46-6 reads as rewritten:

"§ 46-6. Unknown or unlocatable parties; summons and summons, notice, and representation.

(a) If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. The notice by publication shall include a description of the property which includes the street address, if any, or other common designation for the property, if any, and may include the legal description of the property.

(b) ~~If Before or~~ after such general notice by publication if any person interested in the premises and entitled to notice fails to appear, the court shall ~~in its discretion~~ appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown or unlocatable and unrepresented."

SECTION 2. G.S. 46-22 reads as rewritten:

"§ 46-22. **Sale in lieu of partition.**

(a) Subject to G.S. 46-22.1(b), the ~~The~~ court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to ~~any of the interested parties.~~ parties taking into account the totality of the circumstances.

(b) ~~"Substantial injury" means the fair market value of each share in an in kind partition would be materially less than the share of each cotenant in the money equivalent that would be~~



1 ~~obtained from the sale of the whole, and if an in-kind division would result in material~~
2 ~~impairment of the cotenant's rights.~~

3 (b1) In determining whether a partition in-kind of all the property or some of the
4 property cannot be made without substantial injury, the court shall consider the following
5 factors:

- 6 (1) Whether the property is able to be fairly and equitably divided, in whole or
7 in part, between the party or parties seeking a partition by sale and those
8 seeking to remain tenants in common;
9 (2) Whether a partition in-kind would apportion the property in such a way that
10 the fair market value of the parcels resulting from the division would be
11 materially less than the share of each cotenant in the money equivalent that
12 would be obtained from the sale of the whole, based upon a valuation that
13 takes into account the type of sale conditions under which the court-ordered
14 sale would occur;
15 (3) Evidence of long-standing ownership by any individual owner as
16 supplemented by the length of time of ownership within the chain of title of
17 any person or persons to whom such a cotenant is or was related to by blood,
18 marriage, or adoption;
19 (4) The use being made of the property by any of the owners and the degree to
20 which this owner or owners would be harmed if they could not continue to
21 use the property for these purposes;
22 (5) The degree to which the owners have contributed their pro rata share of the
23 property taxes, insurance, and other carrying charges associated with
24 maintaining ownership of the real property, as well as the degree to which
25 the owners have contributed to the physical improvement or the upkeep of
26 the property, including any upkeep related to protecting the interests of the
27 owners against any person who has no legal claim to the property but who
28 attempts to use the property without the consent of the owners;
29 (6) Whether the substantial injury from an actual division to the parties
30 requesting a sale outweighs the substantial injury to the parties opposing the
31 sale; and
32 (7) Any other economic or noneconomic factors that the court finds appropriate
33 to consider.

34 (b2) The court shall use the remedy of owelty where such remedy can aid in making a
35 partition in-kind occur without substantial injury to the parties.

36 (c) The court shall specifically find the facts supporting an order of sale of the property.

37 (d) The party seeking a sale of the property shall have the burden of proving substantial
38 injury under the provisions of this section."

39 **SECTION 3.** Article 2 of Chapter 46 of the General Statutes is amended by adding
40 a new section to read:

41 "**§ 46-22.1 Mediation.**

42 (a) Persons interested in the premises may agree at anytime to mediation of a partition.
43 A list of mediators certified by the Dispute Resolution Commission may be obtained from the
44 clerk or from the Commission through the Administrative Office of the Courts.

45 (b) When a partition sale is requested, the court or the clerk may order mediation before
46 considering whether to order a sale. The provisions of G.S. 7A-38.1 and G.S. 7A-38.3B shall
47 apply."

48 **SECTION 4.** G.S. 46-28 reads as rewritten:

49 "**§ 46-28. Sale procedure.**

50 (a) The procedure for a partition sale shall be the same as is provided in Article 29A of
51 Chapter 1 of the General ~~Statutes.~~ Statutes, except as provided herein.

1 (b) The commissioners shall certify to the court that at least 20 days prior to sale a copy
2 of the notice of sale was sent by first class mail to the last known address of all petitioners and
3 respondents who previously were served by personal delivery or by registered or certified mail.
4 The commissioners shall also certify to the court that at least ten days prior to any resale
5 pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last
6 known address of all parties to the partition proceeding who have filed a written request with
7 the court that they be given notice of any resale. An affidavit from the commissioners that
8 copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance
9 with this section shall satisfy the certification requirement and shall also be deemed prima facie
10 true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a
11 sale or subsequent resale was mailed notice as required by this section prior to the date of the
12 sale or subsequent resale, then that party shall not prevail under the provisions of
13 G.S. 46-28.1(a)(2)a. and b.

14 (c) Any cotenant who enters the high bid or offer at any sale of one hundred percent
15 (100%) of the undivided interests in any parcel of real property shall receive a credit for the
16 undivided interest the cotenant already owns therein and shall receive a corresponding
17 reduction in the amount of the total purchase price owed after deducting the costs and fees
18 associated with the sale and apportioning the costs and fees associated with the sale in
19 accordance with the orders of the court. The high bid or offer shall be for one hundred percent
20 (100%) of the undivided interests in the parcel of real property sold, and the credit and
21 reduction shall be applied at the time of the closing of the cotenant's purchase of the real
22 property. When jointly making the high bid or offer at the sale, two or more cotenants may
23 receive at the closing an aggregate credit and reduction in the amount of the total purchase
24 price representing the total of such cotenants' undivided interests in the real property. Any
25 credits and reductions allowed by this subsection shall be further adjusted to reflect any
26 court-ordered adjustments to the share(s) of the net sale proceeds of each of the cotenants
27 entering the high bid or offer, including, but not limited to, equitable adjustments to the share(s)
28 of the net sales proceeds due to a court finding of the lack of contribution of one or more
29 cotenants to the payment of expenses of the real property."

30 **SECTION 5.** G.S. 46-28.1 reads as rewritten:

31 **"§ 46-28.1. Petition for revocation of confirmation order.**

32 (a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the
33 partition sale of real property shall not become final and effective until 15 days after entered.
34 At any time before the confirmation order becomes final and effective, any party to the
35 partition proceeding or the purchaser may petition the court to revoke its order of confirmation
36 and to order the withdrawal of the purchaser's offer to purchase the property upon the following
37 grounds:

- 38 (1) In the case of a purchaser, a lien remains unsatisfied on the property to be
39 conveyed.
- 40 (2) In the case of any party to the partition proceeding:
 - 41 a. Notice of the partition was not served on the petitioner for revocation
42 as required by Rule 4 of the Rules of Civil Procedure; or
 - 43 b. Notice of the sale was not mailed to the petitioner for revocation as
44 required by G.S. 46-28(b); or
 - 45 c. The amount bid or price offered is inadequate and inequitable and
46 will result in irreparable damage to the owners of the real property.

47 In no event shall the confirmation order become final or effective during the pendency of a
48 petition under this section. No upset bid shall be permitted after the entry of the confirmation
49 order.

50 (b) The party petitioning for revocation shall deliver a copy of the petition to all parties
51 required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make

1 such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court
2 shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the
3 hearing to be served on the petitioner, the officer or person designated to make such a sale and
4 all parties required to be served under Rule 5 of G.S. 1A-1.

5 (c) In the case of a petition brought under this section by a purchaser claiming the
6 existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a
7 preponderance of the evidence that:

- 8 (1) A lien remains unsatisfied on the property to be conveyed; and
- 9 (2) The purchaser has not agreed in writing to assume the lien; and
- 10 (3) The lien will not be satisfied out of the proceeds of the sale; and
- 11 (4) The existence of the lien was not disclosed in the notice of sale of the
12 property, the court may revoke the order confirming the sale, order the
13 withdrawal of the purchaser's offer, and order the return of any money or
14 security to the purchaser tendered pursuant to the offer.

15 The order of the court in revoking an order of confirmation under this section may not be
16 introduced in any other proceeding to establish or deny the existence of a lien.

17 (d) In the case of a petition brought pursuant to this section by a party to the partition
18 proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a
19 case pursuant to sub-subdivision (a)(2)a., b., or c. of subsection (a)(2), this section, the court
20 may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and
21 order the return of any money or security to the purchaser tendered pursuant to the offer.

22 (d1) In the case of a petition brought pursuant to sub-subdivision (a)(2)c. of this section,
23 and when an independent appraisal of the property being sold has not been previously entered
24 into evidence in the action, and upon the request of any party, the court may order an
25 independent appraisal prepared by a real estate appraiser currently licensed by the North
26 Carolina Appraisal Board and prepared in accordance with the Uniform Standards of
27 Professional Appraisal Practice. The cost of an independent appraisal shall be borne by one or
28 more of the parties requesting the appraisal in such proportions as they may agree. Before
29 ruling on the petition brought pursuant to sub-subdivision (a)(2)c. of this section, the court may
30 in its discretion require written evidence from the appraiser that the appraiser has been paid in
31 full for the appraisal. If based on the appraisal and all of the evidence presented, the court finds
32 the amount bid or price offered to be inadequate, inequitable, and resulting in irreparable
33 damage to the owners, the court may revoke the order confirming the sale, order the withdrawal
34 of the purchaser's high bid or offer, and order the return to such purchaser of any money or
35 security tendered by the purchaser pursuant to the high bid or offer.

36 (e) If the court revokes its order of confirmation under this section, the court shall order
37 a resale. The procedure for a resale is the same as is provided for an original public sale under
38 Article 29A of Chapter 1 of the General Statutes."

39 **SECTION 6.** This act becomes effective October 1, 2009, and applies to partition
40 actions filed on or after that date.