

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

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HOUSE BILL 579

Short Title: Partition Sales/Buyout, Factors, Attny Fees. (Public)

Sponsors: Representatives Bryant, Michaux, Allen, Harrison (Primary Sponsors); Hall, Lucas, Parmon, Pierce, Wainwright, and Womble.

Referred to: Ways and Means/Broadband Connectivity, if favorable, Judiciary I.

March 16, 2009

A BILL TO BE ENTITLED

AN ACT TO PROVIDE A BUYOUT OPTION IN THE PARTITION PROCEDURES WHEREBY NONPETITIONING EXISTING OWNERS MAY BUY OUT THEIR CO-OWNERS WHO SEEK THE SALE OF THE PROPERTY, TO CHANGE THE CURRENT PURELY ECONOMIC "SUBSTANTIAL INJURY" TEST TO DETERMINE WHEN A COURT SHOULD ORDER A PARTITION SALE INTO A MULTIPLE FACTOR TEST THAT ALSO CONSIDERS NONECONOMIC FACTORS, AND TO PROHIBIT THE ASSESSMENT OF ATTORNEYS' FEES IN A PARTITION SALE AGAINST A CO-OWNER WHO OPPOSES THE PARTITION SALE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2 of Chapter 46 of the General Statutes is amended by adding a new section to read:

"§ 46-22.1. Sale of cotenants' interest in lieu of sale of property.

(a) If the court determines the property cannot be partitioned in-kind as provided in this Chapter, the court shall, prior to ordering a sale of the property described in the petition, or of any part, allow the nonpetitioning cotenants to purchase the petitioner's interest in the property (the 'buyout option'). The court shall explain the buyout option procedures to any cotenant who appears in person before the court without counsel.

(b) Within 15 days of the determination that the property cannot be divided in-kind, a petitioner may, with permission of the court, withdraw as petitioner and become a nonpetitioning cotenant with the ability to purchase the interest of any petitioners. Likewise, a nonpetitioning cotenant who wishes to be bought out may, with permission of the court, become a petitioner. If no petitioner remains in the partition action 15 days after the court determines that the property cannot be partitioned in-kind, then the proceeding shall be dismissed, and the petitioners who have withdrawn shall be liable for the costs of the action.

(c) A nonpetitioning cotenant who wishes to exercise the buyout option shall notify the court of the cotenant's intent no sooner than 15 days and no later than 30 days after the court has determined that the property cannot be partitioned in-kind. A nonpetitioning cotenant may purchase an interest in the property as provided in this section even if a default judgment has been entered against the cotenant. If more than one nonpetitioning cotenant wishes to exercise the buyout option, each cotenant shall be entitled to purchase a portion of the available interest equal to the cotenant's existing percentage ownership divided by the total percentage ownership of all cotenants participating in the buyout.

(d) If the cotenants cannot agree on the price of the petitioner's interest, the value of the interest shall be determined by one or more competent and independent real estate appraisers approved and appointed by the court. A second appraiser shall be appointed if a second



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1 appraisal is requested by the cotenants and the court finds that a second appraisal is needed.
2 The cost of any appraisals ordered pursuant to this section shall be taxed as part of the costs of
3 court to all cotenants. Any of the cotenants may also submit an appraisal to the court from an
4 appraiser not appointed by the court, but those cotenants shall pay the cost of that appraisal.

5 (e) An appraiser appointed under subsection (d) of this section shall file a written
6 appraisal of the property to the court within 30 days of being appointed. If the court receives
7 appraisals of different values, the court shall evaluate the appraisals and determine the weight
8 to be given to each in determining the value of the interest subject to sale.

9 (f) If the petitioner objects to the value of the interest as determined by an appraiser, the
10 petitioner shall file written notice of the objection with the court no later than 10 days after the
11 filing of the appraiser's report and shall request a hearing on the value of the interest subject to
12 sale. The court shall hold a hearing limited to determining the value of the interest subject to
13 sale and, after hearing evidence as to the issue, shall enter an order stating the value.

14 (g) Upon a determination of the value of the interest as provided in this section, the
15 nonpetitioning cotenants who have exercised the buyout option shall have 45 days to pay into
16 the court the price set as the value of the interest. Upon payment of the price, the court shall
17 order that the proper instruments transferring title in the interest be executed and delivered to
18 the purchasing cotenants.

19 (h) If one or more but not all of the cotenants who exercised the buyout option under
20 subsection (c) of this section fail to pay the price set as the value of the interest, the remaining
21 cotenants who exercised the buyout option may purchase a portion of the defaulting cotenant's
22 interest by paying the price of the share into the court within 10 days after the expiration of the
23 45-day deadline provided in subsection (g) of this section. The portion that each of the
24 remaining cotenants may purchase shall be equal to the cotenant's original percentage
25 ownership divided by the total percentage ownership of all cotenants interested in purchasing
26 the defaulting cotenant's interest. If none of the cotenants who exercised the buyout option pays
27 the price set as the value of the interest, the court may order a sale of the property as provided
28 in G.S. 46-22.

29 (i) This section shall not apply when there is a written tenants-in-common or joint
30 tenants management agreement."

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

32 **"§ 46-22. Sale in lieu of partition.**

33 (a) The court shall order a sale of the property described in the petition, or of any part,
34 only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot
35 be made without substantial injury to any of the interested parties.

36 (b) ~~"Substantial injury" means the fair market value of each share in an in-kind partition~~
37 ~~would be materially less than the share of each cotenant in the money equivalent that would be~~
38 ~~obtained from the sale of the whole, and if an in-kind division would result in material~~
39 ~~impairment of the cotenant's rights. In determining "substantial injury," the court shall consider~~
40 at least the following factors:

41 (1) Whether the property is able to be divided between the party or parties
42 seeking a partition by sale and those seeking to remain tenants in common;

43 (2) Whether a partition in-kind would apportion the property in such a way that
44 the value of the parcels resulting from the division, in the aggregate, would
45 be materially less than the actual value of the property if it were sold as a
46 whole, based upon a valuation that takes into account the type of sale
47 conditions under which the court-ordered sale would occur;

48 (3) Evidence of long-standing ownership by any individual owner as
49 supplemented by the period of time that any person or persons that such a
50 cotenant is or was related to by blood, marriage, or adoption who was in the
51 chain of title owned an interest in the property;

- 1 (4) Any owner's particular sentimental links with or attachment to the property,
2 including any attachments arising out of the fact that the property has
3 ancestral or other unique or special value to one or more of the co-owners;
4 (5) The use being made of the property by any of the owners and the degree to
5 which this owner or owners would be harmed if they could not continue to
6 use the property for these purposes;
7 (6) The degree to which the owners have contributed their pro rata share of the
8 property taxes, insurance, and other carrying charges associated with
9 maintaining ownership of the real property as well as the degree to which the
10 owners have contributed to the physical improvement or the upkeep of the
11 property, including any upkeep related to protecting the interests of the
12 owners against any person who has no legal claim to the property but who
13 attempts to use the property without the consent of the owners; and
14 (7) Any other economic or noneconomic factors that the court finds appropriate
15 to consider.

16 (c) In considering the factors set forth in G.S. 46-22(b) as well as any other economic
17 or noneconomic factor that the court may consider to be relevant, a court should not consider
18 any single factor to be dispositive.

19 ~~(e)~~(d) The court shall specifically find the facts supporting an order of sale of the property.

20 ~~(d)~~(e) The party seeking a sale of the property shall have the burden of proving substantial
21 injury under the provisions of this section."

22 **SECTION 3.(a)** Article 2 of Chapter 46 of the General Statutes is amended by
23 adding a new section to read:

24 **"§ 46-22.2. Attorneys' fees prohibited.**

25 In a partition proceeding under Article 1 or 2 of this Chapter, the court shall not assess
26 attorneys' fees against a nonpetitioning cotenant who contests the partition or sale of the
27 property by appearing in person before the court."

28 **SECTION 3.(b)** G.S. 6-21(7) reads as rewritten:

29 **"§ 6-21. Costs allowed either party or apportioned in discretion of court.**

30 Costs in the following matters shall be taxed against either party, or apportioned among the
31 parties, in the discretion of the court:

32 ...

- 33 (7) All costs and expenses incurred in special proceedings for the division or
34 sale of either real estate or personal property under the Chapter entitled
35 Partition. Partition, except as otherwise provided therein.

36 ...

37 The word "costs" as the same appears and is used in this section shall be construed to
38 include reasonable attorneys' fees in such amounts as the court shall in its discretion determine
39 and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs
40 as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4."

41 **SECTION 4.** This act becomes effective October 1, 2009.