

## Partition Case Summaries

NC Court of Appeals and NC Supreme Court  
Meredith Smith, UNC School of Government  
January 1, 2015 – March 19, 2019

### ***Equitable Authority of the Court; Division of Net Proceeds from Partition by Sale***

#### **Tarr v. Zalaznik (COA18-649; March 19, 2019)**

Petitioner and respondent, unmarried, purchased a lot with a house as joint tenants with a right of survivorship. Petitioner and respondent contributed \$145,000 and \$100,000 to the purchase price, respectively. Petitioner moved out of the house and then filed a petition to partition before the clerk, requesting a partition by sale. The clerk ordered the partition by sale and appointed a commissioner who then sold the property. The clerk then confirmed the sale. After payment of costs, a little more than \$192,000 remained from the purchase price. Petitioner filed a petition requesting the clerk order the net proceeds from the sale to be disbursed in an unequal amount pro rata based on the owner's initial contribution to the purchase price, roughly 59% for the petitioner and 41% for the respondent. The clerk ordered distribution of the requested unequal amount. Respondent appealed. The superior court ordered the same unequal distribution of the net proceeds. Respondent appealed to the NC Court of Appeals. The COA affirmed the trial court holding that a partition is equitable in nature and the court had the authority to enter orders to ensure justice is done between the parties. Although G.S. Chapter 46 on partitions did not specifically state the court could order an unequal division of the net proceeds, the clerk and the superior court had the authority to do so as the statutes do not constitute a strict limitation on the court's authority to make orders in the best interests of the parties in a partition proceeding. The COA also stated that Chapter 41 pertaining to property owned as joint tenants with a right of survivorship did not prevent the trial court from exercising its equitable powers in the partition proceeding.

### ***Partitioning of property pursuant to G.S. Chapter 46***

#### **Donnell-Smith v. McLean (COA18-613; March 5, 2019)**

Petitioners filed an action for actual partition of a tract 98.34 acres in size and for partition by sale of a smaller, separate, tract that was later determined to be 2.27 acres in size. The petition identified sixteen tenants in common who each owned various shares of eleven different interests in the properties at issue. After a hearing, the clerk entered an order allocating the shares to the various tenants in common, and allowing the submission of non-binding special requests concerning the division of property. After appointed commissioners consulted experts, they filed their report. Respondent, who received the largest portion of land, filed an exception to the report. After a hearing, the clerk confirmed the report, as did the superior court upon appeal and a *de novo* hearing. Respondent appealed to the NC Court of Appeals. Respondent argued that the superior court failed to conduct a proper inquiry before confirming the commissioner's report. The COA affirmed the superior court and noted that when Respondent filed his exception, he gave a specific ground, which is not required by statute. He then argued a different ground in his hearing before the clerk. The COA determined the clerk and the superior court properly considered whether the report should be confirmed in light of the noted exception and dismissed Respondent's argument as not having been properly preserved for review.

Nevertheless, the COA went on to analyze the superior court's order for abuse of discretion and found none. First, all parties consented to the partition by signing a consent order for in kind division of the main property, which the court deemed to extend to the sale of the smaller tract. Second, the sale had not yet occurred and Respondent was free to attempt to purchase the tract, and was entitled to his share of the proceeds if and when a sale did go through. Third, the unequal partition was based on the commissioners' evaluation of the value of the property, itself based on numerous factors. The commissioners acknowledged the difference in value of the property as a whole versus after division. Since the commissioners applied their method consistently, and Respondent produced no evidence that he received a tract less valuable than what he was entitled to, the superior court did not abuse its discretion in upholding the partition. Finally, Respondent's argument that he was denied a proper *de novo* hearing failed where the superior court heard testimony from all commissioners and all parties were given the opportunity to ask questions and present evidence. Affirmed.

*Summary by Aly Chen.*

### ***Waiver of Right to Partition; Equitable Authority of the Court***

#### **[Ward v. Ward \(COA16-832; March 7, 2017\)](#)**

Husband and wife owned real property as tenants by entirety; parties subsequently divorced resulting in ownership of the property as tenants in common. Husband filed for partition by sale. Wife filed a response raising two defenses: (i) husband waived right to partition by implied in fact contract, and (ii) equitable principles precluded distribution of the property by partition. Clerk and superior court judge on *de novo* appeal from the clerk both authorized the partition by sale. Wife appealed the superior court's order to the NC Court of Appeals. The court affirmed the trial court's order authorizing partition by sale. The court found competent evidence to support the trial court's findings that there was no written agreement, action, or conduct that gave rise to an implied in fact contract and no implied in fact contract existed to waive the husband's right to partition. Second, the court noted that a partition proceeding is equitable in nature and the court has the authority to adjust all equities with respect to the property, including authorize reimbursement of an owner for improvements to the property. However, the husband's extra-marital affair did not have any bearing on such equity when partitioning a marital home.

### ***Division of Proceeds from Partition Sale***

#### **[Harris v. Gilchrist \(COA15-437; March 1, 2016\)](#)**

Dispute over the division of sale proceeds arising out of an action for partition by sale of real property owned by tenants in common, including awards made for (i) betterments, (ii) fair rental value, and (iii) contributions for property expenses.

1. **Betterments.** The NC Court of Appeals applied G.S. 1-340 to affirm the trial court's award of an allowance for improvements made by a co-tenant occupying the property because he made improvements to the property while in possession of the land under a color of title believed to be good. The court remanded the issue for findings on the value of the improvements because the sole finding by the trial court that there was an

increase in tax value was alone insufficient to show how much improvements made by the occupying co-tenant added to the value of the property.

2. **Fair Rental Value.** The court noted the Betterments statutes under Article 30 of G.S. Chapter 1 allow a claim for rent to offset a betterments claim, provided one would be entitled to rents in the first instance. A non-occupying co-tenant is entitled to rents when there has been an actual ouster by the occupying co-tenant of the non-occupying co-tenant. Here the court did not find actual ouster because there was no evidence tending to show that the occupying co-tenant prevented the other co-tenants from accessing the property. The court affirmed the trial court's order denying the claim for rents and profits during the co-tenancy.
3. **Contributions.** The court noted that under GS 105-363(b) and an earlier decision of the court a co-tenant who pays a greater share of taxes, mortgage interest, and costs may enforce a lien in his favor upon the shares of other joint owners for such payments, except when the co-tenant paying the taxes and costs is in exclusive possession of the property. The court noted that exclusive possession is not the same as sole possession. For possession to be exclusive, the court stated there must be a finding that the occupying co-tenant withheld the property from the other co-tenants and the other co-tenants made a demand to possess the property. In this case, neither had occurred therefore the court affirmed the trial court's award of an allowance for taxes and insurance to the occupying co-tenant during the time he was a tenant in common with the non-occupying co-tenants.

### ***Judicial Immunity of Commissioner***

#### **[Price v. Calder \(COA14-832; April 7, 2015\)](#)**

Defendant served as a commissioner appointed by the Clerk of Superior Court in a partition proceeding. Plaintiff, a co-owner of the land subject to the partition, filed a complaint against the defendant after the partition by sale was completed alleging, among other things, that the defendant breached his fiduciary duty in carrying out his role as commissioner. The trial court dismissed the plaintiff's complaint. On appeal, the NC Court of Appeals held that a commissioner in a partition proceeding acting within the scope of his or her duties is a quasi-judicial official and is covered by the rule of judicial immunity. The court found no merit to the plaintiff's argument that the defendant acted outside the scope of his duties and therefore concluded that the defendant was immune from suit and affirmed the trial court's dismissal of the case.

### ***Actual Partition vs. Partition by Sale***

#### **[Solesbee v. Brown \(COA16-1214; Sept. 19, 2017\)](#)**

Four sisters own three parcels of land as tenants in common. One sister filed a petition for partition by sale and two other sisters acknowledged in their response that a sale of all parcels was necessary. The fourth sister agreed that partition by sale was necessary for parcel one but contested a partition by sale for parcels two and three. The clerk of superior court and the superior court on appeal entered orders authorizing the partition by sale of all three parcels. The NC Court of Appeals (COA) reversed the superior court and remanded for additional findings of fact pursuant to GS 46-22 and re-examination of the trial court's conclusions of law.

The COA noted that the law favors actual partition and before ordering a partition by sale, the court must find by preponderance of the evidence that an actual partition would cause substantial injury to the interested parties. Specifically, the COA found the trial court erred in ordering a partition by sale because:

1. **The trial court failed to make specific findings of fact.**
  - a. The trial court failed to make specific findings of fact as to the value of each share of each parcel if the parcels were to be physically divided. The court's findings were limited to the value of one-fourth of the total value of all three parcels. The court's findings were thus insufficient to support the conclusion of law that each cotenant's share from an actual partition of each parcel would be materially less than from a sale of the whole parcel.
  - b. The trial court failed to make specific findings as to the value of each of the three parcels. The trial court determined the value of each parcel was a range spanning from the current residential value to a re-zoned commercial value. The sweeping nature of the ranges, including a range in value of \$110,000 for parcel one, failed to yield *specific* findings of fact by the court as to the value of each parcel.
2. **The trial court erred by considering certain factors when determining a substantial injury would result to the parties from an actual partition.**
  - a. *Personal value.* The COA noted that prior case law establishes that economic factors alone control whether substantial injury will result to the parties from an actual partition. The trial court's consideration of the personal value of the property to the cotenants who lived adjacent to parcels two and three was inappropriate.
  - b. *Difficult to physically partition.* A determination that the property is difficult to physically partition does not replace the obligation of the court to make findings as to the fair market value of each cotenant's share resulting from an actual partition. The court erred in relying on the difficulty in physically partitioning the property without making findings as to the actual value of each share of the physically partitioned property.
  - c. *Highest and best use.* The trial court erred by relying on the "highest and best use" of the land in determining whether substantial injury would result to the parties from an actual partition of the land. The COA stated that substantial injury to a party does not occur simply because an actual partition would not result in the highest and best use of the land.