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Is It All About the Money? Considering a Multi-Factor Test for Determining the Appropriateness of Forced Partition Sales in North Carolina

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1. INTRODUCTION

Don’t know much about “the worst problem that no one’s ever heard about”? The following two brief hypothetical situations illustrate the major problem of judicial partition by sale in North Carolina.

A. Hypothetical I: How is This Fair?

Amy and Bobby, a young married couple, own a modest ranch-style house on a one-quarter acre suburban lot in the North Carolina foothills. All is not quiet on the home front and, despite repeated attempts to resolve conflicts and repair their damaged relationship, the couple unfortunately decides divorce is the only option. Amy stays in their marital home while Bobby goes to live with his brother. After the divorce is final, what was once a joint tenancy has become a tenancy in common. The two own their former marital property jointly and each has full rights to the use and enjoyment of his or her respective interest. There being no chance of reconciliation, Bobby asks Amy to agree to sell the home on the open market and split the sale proceeds after he reimburses Amy for her recent shouldering of the mortgage payment.

1. This phrase is attributed to John Pollock, Enforcement Director of the Alabama Fair Housing Center and directing member of the Heir’s Property Retention Coalition. Southern Coalition for Social Justice, http://www.southerncoalition.org/preservingheirsproperty/ (last visited Oct. 22 2010). This Author appreciates John’s generosity with his time and resources during the initial research for this Comment.

2. Thomas Steele, Speech at the Meeting of the North Carolina Senate Judiciary II Committee (July 30, 2009). The first hypothetical is inspired by an anecdote offered by Mr. Thomas Steele in the July 30, 2009 meeting of the North Carolina Senate Judiciary II Committee. Mr. Steele spoke on behalf of the Real Property Section of the North Carolina Bar Association opposing the consideration of non-economic factors by North Carolina clerks of court when considering whether a partitions sale of real property is appropriate. The second hypothetical presents a common argument for reform of North Carolina’s statute governing the forced partition of tenancy in common property.
Amy disagrees and wants nothing to do with Bobby; this is her house, her home, and that is final. Besides, she operates her small sewing shop out of the home and needs the space to continue tailoring to support herself. With few other assets and nowhere else to turn for money to start fresh, Bobby must realize the value in his property interest. After approaching Amy one last time for an amicable resolution to their predicament, he scrapes together his remaining cash and secures legal counsel. Bobby is now a client, and his attorney has petitioned the clerk of superior court for a partition.

While the state statute governing partition calls for actual, physical division of the property so that each cotenant will ultimately have the same interest that he or she did prior to any partition action, it is obvious that Amy and Bobby’s home and small residential lot cannot be subdivided. Partition by forced judicial sale is the only equitable remedy for the duo. But wait, the clerk of court is sympathetic to Amy’s situation as a young woman short on money with no other place to turn. Because the clerk is able to consider non-economic factors—namely that Amy lives on the couple's property and the home houses Amy’s business and sole source of income—in his determination of the “substantial injury” that each co-owner will face at partition, he has statutory authority to prevent a sale and allow Amy to retain the house and lot. Bobby cannot occupy the property, the property cannot be physically partitioned, and the clerk will not order a judicial sale. What is Bobby’s remedy? An appeal to the superior court and the added costs of litigation are inevitable for a co-owner like Bobby, who just wants to get out and move forward.

B. Hypothetical II: How Is This Fair?

Andy, Bubba, and Cliff are first cousins and each is the only child of his late parents. It was through each man’s late mother that he acquired a real property interest in a small eastern North Carolina farm; the land had been in the family for generations and passed to the three late sisters pro rata from their father. Andy and Bubba, the two elder cousins, grew up on the farm and remained there to continue the family’s small cotton and vegetable operation after their ancestors had long passed. Cliff, on the other hand, went off to college and then to New York where he immersed himself in the world of finance and eventually secured a lucrative Wall Street investment banking job.

Andy and Bubba reaped the benefit of their cousin's property through agri-business, but also shouldered the burden of upkeep of the
property and payment of the always increasing property tax bills. Their livelihood was the land, their identity was cut into the soil, and their senses of self grew in the crop fields, cattails, and creek bottoms. On their property, they grew crops and children, scratched-out a living at the only job they knew how to do, and continued a century-old family tradition.

On a speculative whim, Cliff filed a petition to partition Andy and Bubba's farm, their home, their livelihood. Gorgeous eastern North Carolina had become a popular destination for "half-backers," who were sick of the Florida heat but not wanting to retreat "all the way back" to their frigid, pre-retirement homelands in the northeast. The lay of the farm land meant that the tract could not be physically divided between the three co-owners, and because the statutes said that only economic interests can be accounted for when determining when to force a sale, that is exactly what the county clerk of court did. Cliff knew that he could easily purchase the whole parcel at auction from his stubborn, salt-of-the-earth cousins and flip it to a developer to cash in on wealthy immigrants to the Land of the Long Leaf Pine. Who cares if it is family land? Who cares if it is passed through generations and provided two cousins and their families a home? The real estate would make ten times the farm's yearly profits.

C. A Roadmap

This Comment examines partition sales in North Carolina. First is a brief review of tenancy in common ownership and the dissolution remedy of partition. This is followed by a more detailed look into North Carolina's current partition sales statute and recent efforts to amend it. Arguments favoring and opposing the addition of a multi-factor test to the current statute will be discussed, as well as case analysis from three states whose courts consider non-economic factors when determining the appropriateness of ordering a partition sale. The conclusion critiques the arguments for and against the addition of a multi-factor test, and also suggests a method of addressing concerns with North Carolina's current partition law.
II. A BRIEF OVERVIEW OF TENANCY IN COMMON OWNERSHIP AND
PARTITION

A. Tenancy in Common Ownership

Real property is most commonly owned not by an individual, but by multiple, concurrent owners.3 The most common form of joint ownership of real property is the tenancy in common.4 In this ownership form, two or more people own the same property concurrently and have absolute rights to possess their respective shares of the property; thus, co-owners must compromise on the use of the property.5 Each tenant’s interest is alienable, devisable, and inheritable.6 If a property owner does not devise property by will at his death, that owner’s share of cotenancy property passes via intestacy to his heirs (because the tenancy in common ownership form does not have a right of survivorship), and these heirs then own the property as tenants in common with each other.7 Each new owner has an undivided property interest, and thus the right to possess and use the entirety of the property as long as they do not exclude the other owners.8

B. Partition

If co-owners cannot agree on how land should be used, the primary legal remedy is partition.9 Partition is the most common method of terminating concurrent ownership and converting a shared estate into two or more estates in severalty.10 Voluntary partition can be had by a mere exchange of deeds among cotenants, such that each co-owner joins in each deed in order to subdivide the subject land into separate

4. Id.; see, e.g., Evelyn Lewis, Struggling With Quicksand: The Ins And Outs Of Cotenant Possession Value Liability And A Call For Default Rule Reform, 1994 Wis. L. REV. 331, 398 n.204 (1994) (describing how tenancy in common ownership rose over the course of the 20th century to become the type of ownership for roughly 60% of property).
5. STOEBUCK & WHITMAN, supra note 3, at 177.
6. Id. at 178–79.
7. See JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 353 (2d ed. 2005).
8. See, e.g., id. at 353–54.
10. STOEBUCK & WHITMAN, supra note 3, at 214.
parcels.\textsuperscript{11} If voluntary partition into equal portions is not possible, the co-owners who receive more valuable parcels can compensate other co-owners through money payments known as "owelty."\textsuperscript{12} The most efficient remedy, when co-owners oblige, is that property held in tenancy in common can be liquidated upon agreement by co-owners and the proceeds shared.\textsuperscript{13}

In the event that voluntary partition cannot be had, all American jurisdictions legislatively recognize and authorize judicial partition.\textsuperscript{14} In an action for partition, all cotenants must be joined as either petitioners or defendants.\textsuperscript{15} Any cotenant in actual possession of land, or one holding a right to immediate possession of an estate in land, can compel judicial partition.\textsuperscript{16} Petitions for partition will normally be granted unless the co-owners have expressly agreed not to partition.\textsuperscript{17} It is commonly recognized that the right to partition real property may be waived by contract or agreement.\textsuperscript{18} Although such agreements restrain free alienation of property and could be void under common law policy, they are sustained in equity as long as limited to a "reasonable" period of time.\textsuperscript{19} In the final accounting of any partition action each cotenant may be credited with improvements made to the subject property or charged

\begin{itemize}
\item \textsuperscript{11} Id. at 215.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} See Ark Land Co. v. Harper, 599 S.E.2d 754, 759 n.5 (W. Va. 2004) (citing each state's statute or code section governing the partition of real property).
\item \textsuperscript{15} STOEBUCK & WHITMAN, supra note 3, at 218.
\item \textsuperscript{16} Id. at 215, 217. One possessing a future interest as a tenant in common in an estate in land or a reversion interest as a tenant in common in an estate subject to a leasehold may also generally force a partition, but may not disrupt possession of the life estate holder or leaseholder in actual possession of the entire estate. Id.
\item \textsuperscript{17} Id. at 215. For cases discussing expressed and implied agreements between cotenants not to force judicial partition of tenancy in common property, see N.N.H. Mental Health & Dev. Servs. Inc. v. Cannell, 593 A.2d 1161 (N.H. 1991); Bessen v. Glatt, 170 A.D.2d 924 (N.Y. App. Div. 1991).
\item \textsuperscript{18} 59A AM. JUR. 2D Partition § 52 (2003); see STOEBUCK & WHITMAN, supra note 3, at 181, 217 (discussing concurrent ownership of common elements in a condominium community and stating "[c] ondominium enabling legislation usually prohibits any action by individual unit owners to compel partition of the common elements of the development").
\item \textsuperscript{19} STOEBUCK & WHITMAN, supra note 3, at 216. An agreement against partitioning a concurrent estate should not exceed a "reasonable" amount of time, which may include any duration up to a jurisdiction's rule against perpetuities statutory period.
\end{itemize}
for any rents, profits, or actual use that he enjoyed in excess of his pro-
rata share.  

Physical partition, or “actual” or “in-kind” partition, is the preferred
method of judicial partition in most jurisdictions. This method is
desirable because it leaves cotenants holding the same estates that they
had prior to the proceeding and does not force a sale on an unwilling
party. The laws in all American jurisdictions seem to reflect this
principle by providing for a clear presumption of actual partition of
commonly held lands.

While legislatures maintain a preference for physical partition, all
states have statutorily authorized the forced sale of tenancy in common
property when an equitable in-kind division of the property is
impossible. A forced sale of property is generally used only when
physical partition of the property will result in “great prejudice” to one of
the property owners. The party petitioning for partition has the
burden of proving that prejudice or injury will occur. Parties can
present evidence of uneven topography, insufficient access to divided
parcels, the existence of a dwelling on the property, and the existence of
too many interests in commonly owned property as reasons that in-kind
division is impossible. Unlike partition in-kind, which existed under
earlier common law, partition by forced judicial sale was an American
creation. The relative newness of such statutes has prompted at least
one scholar to warn against their potentially abusive use. Despite its

20. Id. at 220.
21. POWELL, supra note 9, at § 50.07[4][a].
22. Id.
24. STOEBUCK & WHITMAN, supra note 3, at 222. Partition by sale occurs most
frequently when the tenancy in common property is one of two forms: (1) a small parcel
is improved with one structure, such as a residence, and (2) a large parcel is unimproved
and in-kind partition would decrease the aggregate value of the property or render it
unmarketable as several small parcels. Id.
28. Id. at 751–52.
29. John G. Casagrande, Acquiring Property Through Forced Partitioning Sales: Abuses
and Remedies, 27 B.C. L. REV. 755, 775 (1986) (“Thus, partitioning sale statutes should be
construed narrowly and used sparingly because they interfere with property rights.”).
absence from the common law and only recent creation, partition by sale has become the norm in modern real property partition actions.\(^\text{30}\)

### III. Partition in North Carolina

In the event that cotenants cannot agree on how to divide their property, North Carolina recognizes both partition in-kind and partition by forced judicial sale.\(^\text{31}\) Every North Carolina tenant in common is entitled to an actual partition of land as a matter of right and may institute a special proceeding before the clerk of superior court to achieve this equitable relief.\(^\text{32}\) A petition to partition land is a special proceeding, and the decision as to whether a partition should or should not be granted is one for the court and not a jury.\(^\text{33}\) In response to a petition for partition, in-kind partition is favored over judicial sale unless a sale is necessary to avoid injury to a party.\(^\text{34}\) If in-kind partition cannot be made without "substantial injustice" or "material impairment" to one of the cotenants, then the tenant in common seeking partition is entitled to partition by sale.\(^\text{35}\) A partition by sale will not be ordered

\(^{30}\) 2 THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY § 6.26 at 114 (A. James Casner ed., 2d Printing 1974); see also JESSE DUKEMINIER ET AL., PROPERTY 296–97 (6th ed. 2006) ("Although it is usually said . . . that partition-in-kind is preferred, the modern practice is to decree a sale in partition actions in a great majority of cases, either because the parties all wish it or because courts are convinced that sale is the fairest method of resolving the conflict."); Faith Rivers, Inequity in Equity: The Tragedy of Tenancy in Common for Heirs Property Owners Facing Partition in Equity, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 60 (2007) (citing RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY 601 (one vol. ed., abr. from POWELL ON THE LAW OF PROPERTY in seven vols., reprint 1973) ("It is the author's considered judgment, unsupported by actual statistical data, but amply supported by long years of practice, that division in kind has become actually infrequent of occurrence. Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish for it or because courts are easily convinced that sale is necessary for the fair treatment of the parties.").


\(^{32}\) Id. §§ 46-1 to -34; Kayann Props., Inc. v. Cox, 149 S.E.2d 553, 556 (N.C. 1966); see also Coats v. Williams, 136 S.E.2d 113, 115 (N.C. 1964); Moore v. Baker, 24 S.E.2d 749, 750 (N.C. 1943); Talley v. Murchison, 193 S.E.148, 148 (N.C. 1937); Robertson v. Robertson, 484 S.E.2d 831, 834 (N.C. Ct. App. 1997).

\(^{33}\) Brown v. Boger, 139 S.E.2d 577, 582 (N.C. 1965).


\(^{35}\) Kayann Props., 149 S.E.2d at 557.
simply for the convenience of one of the tenants in common; findings of fact must be made to determine actual injury will result.\textsuperscript{36}

The party seeking a partition by sale must show "substantial injury" or "material impairment" of his rights or position such that the value of his share of the real property would be materially less on actual partition than if the land were sold and the tenants paid according to their respective shares.\textsuperscript{37} A simple example would be a family farm, owned by two brothers as tenants in common, that is determined to be physically indivisible: if the farm as a contiguous piece of land is worth more than the sum of the values that each brother could get for his one-half share, then "substantial injury" exists in North Carolina such that one brother could petition for partition and force a sale of the property.\textsuperscript{38}

\textbf{A. Case Law}

North Carolina courts look to pecuniary interests alone in determining whether to order partition in-kind instead of partition by forced sale.\textsuperscript{39} In \textit{Partin v. Dalton Property Associates}, the trial court decided that the general nature of the land sought to be partitioned and the large number of interests in the property made partition in-kind impractical.\textsuperscript{40} Because actual partition was not a realistic option, the court ordered the subject property to be sold and the resulting proceeds from the sale divided among the tenants in common.\textsuperscript{41} On review, the court of appeals remanded the action because of uncertainty about the impracticality of an in-kind partition.\textsuperscript{42} Its opinion also instructed the trial court to determine whether partition in-kind would definitely result in one cotenant receiving a portion of the land with a value greater than his proportionate share of the property’s total value.\textsuperscript{43} Economic factors alone controlled the decision to affirm the trial court.\textsuperscript{44}

The recent court of appeals decision in \textit{Lyons-Hart v. Hart} further demonstrates North Carolina’s focus on economic factors when deciding

\begin{itemize}
  \item \textsuperscript{36} \textit{Brown}, 139 S.E.2d at 583.
  \item \textsuperscript{37} \textit{N.C. GEN. STAT.} § 46-22; see \textit{Brown}, 139 S.E.2d 585; see also \textit{Whatley v. Whatley}, 484 S.E.2d 420, 421 (N.C. Ct. App. 1997).
  \item \textsuperscript{39} \textit{Id.} at 904.
  \item \textsuperscript{40} \textit{Id.} at 906.
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} \textit{Id.}
  \item \textsuperscript{44} \textit{Id.}
\end{itemize}
partitions.\textsuperscript{45} In \textit{Lyons-Hart}, one of two cotenants of a small, inherited, coastal lot sought to partition his joint tenancy by sale.\textsuperscript{46} The small size of the lot, its orientation to public roadways, its single septic system, and the limited scenic views from the property all contributed to determinations by the Hyde County Clerk of Court, and subsequently by the superior court itself, that the property could not be divided in-kind.\textsuperscript{47} The superior court ordered the lot to be sold and the proceeds divided between the cotenants.\textsuperscript{48} The non-petitioning cotenant, who resided in the mobile home on the property, appealed.\textsuperscript{49} In reversing the order to partition the subject property by sale, the court of appeals stated, "[T]he trial court made no findings regarding the value of the property in its unpartitioned state and the value of the land should it be divided."\textsuperscript{50} Although the trial court heard testimony from a real estate agent as to the value of the contiguous property versus its divided portions, the court made no judicial findings regarding fair market value.\textsuperscript{51} Therefore, its conclusion of law regarding substantial injury could not be sustained.\textsuperscript{52} The court of appeals went on to say that, had the trial court made proper findings based on the real estate agent's testimony, its conclusion of law still could not be upheld because the agent's uncontested trial testimony indicated that the property was worth more divided in-kind than sold as a whole.\textsuperscript{53} This discussion showcases the importance that North Carolina courts place on economic value when determining partition actions; pecuniary interests, to the exclusion of any other factors, are alone determinative.\textsuperscript{54}

\textsuperscript{46} Id. at 819.
\textsuperscript{47} Id. at 819–20.
\textsuperscript{48} Id. at 820.
\textsuperscript{49} Id. at 819.
\textsuperscript{50} Id. at 822.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} See also Sheffer v. Rardin, No. COA09-1562, 2010 WL 5419073 (N.C. Ct. App. Dec. 21, 2010) (reaffirming prior guiding principles). In this recent North Carolina opinion published in December, 2010, the Court of Appeals further demonstrates its attention to pecuniary interests alone as the determining factor for when partition sale should be ordered. Id. at *4.
B. Development of the Statutory Law

Prior to 1985, the language of section 46-22 of the North Carolina General Statutes regulating partition sales stated:

Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof.\(^{55}\)

A clerk of court could order partition by sale if an in-kind partition resulted in "injury," but there was no statutory definition of what injury meant. The North Carolina Supreme Court, however, had previously defined injury as "substantial injustice or material impairment of [a cotenant's] rights or position, such that it would be unconscionable to require him to submit to actual partition."\(^{56}\) In a 1985 re-write of section 46-22, the legislature incorporated this definition of injury and rooted its ultimate determination in purely economic terms,\(^{57}\) such that if an in-kind partition were ordered, "one of the cotenants would receive a share with fair market value materially less than the value of the share the cotenant would receive were the property partitioned by sale and a cotenant's rights would be materially impaired."\(^{58}\) This clarified the legislature's intent to have North Carolina courts consider only one factor when deciding whether a sale should be ordered—fair market value.

Entering the 2009 session of the North Carolina General Assembly, the language of section 46-22 remained the same as it had since the 1985 rewrite.\(^{59}\) Despite attempts to amend the statutory section covering partition to include non-economic factors,\(^{60}\) there remained a purely economic definition of the "substantial injury" required to force a judicial sale over in-kind partition.\(^{61}\) Because of a growing concern over the fairness of section 46, a study commission was formed in the 2008 session to evaluate the partition statute, including the possibility of allowing clerks of court to use non-economic factors when determining

\(^{56}\) Brown v. Boger, 139 S.E.2d 577, 583 (N.C. 1965).
\(^{57}\) See N.C. GEN. STAT. §§ 46-22(a), (b).
\(^{61}\) See N.C. GEN. STAT. § 46-22(b).
the appropriateness of a forced judicial sale.\textsuperscript{62} This committee, the "Partition Sales Study Committee," met four separate times between December 2008 and February 2009 before reporting back to the 2009 session of the General Assembly.\textsuperscript{63} Numerous advocates of a multi-factor test appeared before the committee and shared hard and anecdotal data that favored the institution of a multi-factor test which emphasized value in real property beyond merely economic utility.\textsuperscript{64} In its report, the study committee, composed of legislative members, General Assembly legal staff, and numerous public members,\textsuperscript{65} made specific recommendations to the 2009 session.\textsuperscript{66} The committee drafted proposed legislation which addressed numerous technical, largely non-substantive issues with the existing partition statutes.\textsuperscript{67} It also addressed the definition of "substantial injury" used to determine the appropriateness of a forced sale.\textsuperscript{68} The committee proposed amendment of the existing section 46-22, which defined "substantial injury" solely on economic factors, to include non-economic factors.\textsuperscript{69} While economic factors remained relevant,\textsuperscript{70} the committee added numerous non-economic considerations\textsuperscript{71} as well as an express provision stating that no

\begin{itemize}
\item \textsuperscript{63} North Carolina General Assembly Partition Sales Study Committee, Report to the 2009 Session of the 2009 General Assembly, at 4-6 (N.C. 2009), available at http://www.ncga.state.nc.us/documents/sites/legislativepublications/Study\%20Reports\%20to\%20the\%202009\%20NCGA/Partition\%20Sales\%20Study\%20Committee.pdf.
\item \textsuperscript{64} Id. at 4–5. Presenters appearing before the Study Committee who advocated for the inclusion of a multi-factor test include the following: Mr. John Pollock, Enforcement Director of the Alabama Fair Housing Center; Savonala Horne, Executive Director of the Land Loss Prevention Project; Anita Earls, Co-founder of Director of the Southern Coalition for Social Justice.
\item \textsuperscript{65} Id. at 3.
\item \textsuperscript{66} Id. at 9.
\item \textsuperscript{67} Id. at 9–13, 15.
\item \textsuperscript{68} Id. at 14–15.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. Proposed section 46-22(b)(2) reads as follows: "whether a partition in kind would apportion the property in such a way that the value of the parcels resulting from the division, in the aggregate, would be materially less than the actual value of the property if it was sold as a whole, based upon a valuation that takes into account the type of sale conditions under which the court-ordered sale would occur." Id.
\item \textsuperscript{71} Id. at 15. Proposed section 46-22(b)(3)-(7) reads as follows: "(3) evidence of longstanding ownership by any individual owner as supplemented by the period of time that any person or persons that such a cotenant is or was related to by related by blood,
During the 2009 regular session, members of the North Carolina General Assembly attempted to implement the Partition Sales Study Committee's recommendations by sponsoring legislation to interpose a multi-factor test into the existing partition sale statutory scheme. Their efforts were ultimately stifled, and section 46-22 currently includes the same, historical definition of "substantial injury" that considers only the economic value of land as an entire tract versus the summed value of its partitioned parts.

IV. ARGUMENT: SHOULD N.C. GEN. STAT. SECTION 46-22 BE AMENDED TO ALLOW FOR THE JUDICIAL CONSIDERATION OF NON-ECONOMIC FACTORS IN DETERMINING THE APPROPRIATENESS OF FORCED JUDICIAL SALE OF TENANCY IN COMMON PROPERTY?

There are persuasive arguments both in favor of and in opposition to the institution of a multi-factor test. Below are arguments why North Carolina's statute should be amended, and conversely why the current statutory language offers sufficient protections for co-owners involved in partition proceedings.

72. Id. Proposed § 46-22(c) reads as follows: "In considering the factors set forth in Section 46-22(b) as well as any other economic or non-economic factor that the court may consider to be relevant, a court should not consider any single factor to be dispositive." Id.


A. Arguments in Favor of a Multi-Factor Test in North Carolina

The above mentioned Hypothetical II\textsuperscript{75} is often lauded as the classic case for why a multi-factor (or totality of the circumstances) test should be instituted for determining whether partition in-kind or by sale is appropriate. North Carolina courts should ask an important question: is one co-owner of land entitled to force a sale upon his unwilling co-owners (who are equally entitled to the land) simply because he would earn a bit more money if the property was sold as opposed to divided in-kind? Is the sacrificed income, however large or menial the amount may be, "injury" enough that a petitioning party can force a sale of the land by which his co-owners may earn a living, or on which his co-owners maintain their home, or through which his co-owners continue family traditions and identify themselves?

1. Real Property Has Non-Economic Value

Real property is not just a fungible commodity as real estate brokers, land developers, and some attorneys may believe.\textsuperscript{76} There is more than economic value in land; one's history, pride in his ancestors, and sense of self may all be tied to property ownership.\textsuperscript{77} In utilizing the remedy of partition, courts are entitled to consider the equities of the parties, and equity dictates that factors other than economic value should affect the clerk of court's determination of when the remedy is used to deprive an interest holder of ownership of land. The legislature

\textsuperscript{75} See Hypothetical II supra Part 1.B.

\textsuperscript{76} Life experience indicates that real estate brokers, land developers, and some attorneys regard real property to be simply a fungible commodity similar to money. However, situations such as the one presented in Hypothetical II supra Part I.B evidence the degree to which personhood can be intimately connected to land. The "personhood theory" of property rights emphasizes that property can be so closely connected to an individual's emotional and psychological existence that it practically becomes part of the individual. See, e.g., Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 40–41 (T. Knox trans. 1942). Thus, rights associated with property ownership require liberal protection.

\textsuperscript{77} See Harris v. Harris, 275 S.E.2d 273, 276 (N.C. Ct. App. 1981) ("[M]any considerations, other than monetary, attach to the ownership of land."); see also John Fee, Eminent Domain and the Sanctity of Home, 81 NOTRE DAME L. REV. 783, 786–88 (2006) (discussing the unique legal treatment that personal homes receive); Lynch v. Union Inst. for Sav., 34 N.E. 364, 364–65 (Mass. 1893) ("A particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money.").
should mandate judicial consideration of how a forced sale would affect co-owners who did not want a partition in the first place. Individuals who, when faced with a partition action, prefer an in-kind partition so they are left with the same property rights they had before the action, should be protected against forced sales. These sales force co-owners to forfeit their property—their land, history, and livelihood—for a one-time cash payment. Justice mandates a balancing of all interests involved, not just economic value.  

2. The Consideration of Multiple Factors Provides an Actual Test Which Does NOT Compel Any Specific Result

One advantage of a "totality of the circumstances" test is that it does not compel any result; it simply calls on local judicial officers to analyze all pertinent factors when deciding whether to order a sale of commonly owned property. Of course, a sale may be appropriate. For example, if there are numerous heirs entitled to claim an interest in a relatively small tract of property, or if all co-owners agree to a sale, then a sale should be ordered by the court. Obviously, this will not always be the case. A petitioning cotenant might attempt, perhaps in bad faith, to force the sale of family property that is not easily divided.  

In instances where a statutory test must be utilized by a clerk of court to determine which method of partition is appropriate, the fair market value/economic consideration "test" currently employed in North Carolina is not really a test at all. As a matter of common sense, division of a tract of property affects the land value and causes some marginal economic "injury" via a decrease in the potential sales revenues. Calling the current determination scheme a "test" is not fully accurate, because, under it, the proponent of partition can easily prove economic injury. Although the burden of proof is on the petitioner, the "test" legislatively instituted amounts to nothing more than a procedural step. The institution of a multi-factor test would be a true test of which partition remedy is appropriate in any given case. While not mandating any particular result, it would institute what North Carolina claims to have been doing.

78. Sims v. Sims, 930 P.2d 153, 163–64 (N.M. 1996) ("Partition by its very nature, because it requires the court to balance the individual interests and circumstances of each party, can be none other than an equitable remedy. A strictly legal remedy that applied rigid formulae for dividing property would be unworkable. A court of law is inherently "unable to adjust the often complicated rights of the parties . . . ."") (quoting 6 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE & EQUITABLE REMEDIES § 702 (3d ed. 1905)).

79. See Hypothetical II supra Part I.B.
A multi-factor test including factors other than economic value would insure and enable clerks of court to weigh all the competing interests in an action for partition.

3. A Multi-Factor Test Will Actually Codify the Existing Practice

Institution of a multi-factor test will codify what North Carolina clerks of court have been doing already in partition proceedings. There is anecdotal evidence that clerks of court in North Carolina regularly consider factors other than pure economic value when deciding whether to order partition by sale.\(^{80}\) Testimony during Senate Judiciary II Committee meetings from the 2009 session indicates that it is the regular practice of clerks of court to weigh factors such as whether the subject property is occupied by a respondent party to a partition action and whether a party's livelihood is directly connected to the property. Codification of the current practice seems wise. During one committee meeting, Senator Don Vaughn (D-Guilford) asked if clerks were already considering non-economic factors, and Thomas Steele (of the Real Property Section of the North Carolina Bar Association) responded they were.\(^ {81}\) The problem is that the current law does not authorize clerks to consider legitimate concerns of landowners other than monetary ones.\(^ {82}\) Legislative priority should focus on the citizens of North Carolina who are attached to the land, not on lawyers who direct real estate transactions and represent parties to partition actions. If the North Carolina Bar Association acknowledges that there is an implicit, multi-factor test already in use by clerks,\(^ {83}\) then the legislature should codify it. Admittedly, there will be instances of deviation from the legislature's statutory direction, but an express test will minimize instances of unfettered utilization of the partition procedure. In addition to clarity, an explicit test will ensure that there is uniform, fair treatment of the landowners in North Carolina's 100 counties.

In addition to providing for the consideration of non-economic factors, the legislature should provide the administrative offices of the courts with the resources to train clerks in the analysis of non-economic

\(^{80}\) See Audio File: N.C. Gen. Assem., Senate Judiciary II Committee discussion (July 21, 2009).

\(^{81}\) Id.

\(^{82}\) See N.C. GEN. STAT. § 46-22(b) (2009) (referencing how the current law relies solely on economic rather than non-economic factors in order to define a "substantial injury").

\(^{83}\) See supra text accompanying note 80.
factors. Clerks should not value one interest, economic or not, over any other another, but should balance all relevant interests involved. Partition cannot be a fair remedy unless it is fairly administered.

4. A Multi-factor Test Will Help Address the “Taking” Issue Inherent in Forced Partition Sales

Partition is perhaps the only area of law wherein an interest in land can be taken from its rightful owner and sold to a private party even where the owner has not committed a crime or breached an obligation to another interest-holder. The current statute has facilitated the non-consensual “taking” of property by allowing a holder of a small, fractional interest to force the sale of tenancy in common property solely on the basis of a few extra dollars of income being declared to be too substantial of an injury for an interest holder to bear.\footnote{See N.C. GEN. STAT. § 46-22(b).} The forcing of a non-petitioning co-owner to accept below-market considerations for the property interests which he is judicially ordered to sell is a “taking” in the sense that the government, albeit not directly conducting a conversion, facilitates the conversion of real property into a less valuable, inequivalent monetary sum without consent of the holder.

5. The National Conference of Commissioners on Uniform State Laws Advocates a Multi-Factor Test for Determining the Appropriateness of a Forced Judicial Sale

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") has recommended in its Uniform Partition of Heirs Property Act that all states allow their courts to consider factors in addition to fair market value before forcing a sale of tenancy in common property.\footnote{National Conference of Commissioners on Uniform State Laws, UNIF. PARTITION OF HEIRS PROP. ACT § 9 (2010), available at http://www.law.upenn.edu/bll/archives/ulc/utcpa/2010am_approved.htm.} This proposal by NCCUSL should influence the General Assembly's revision of section 46-22 because NCCUSL is a long-standing and respected national entity that has, since 2007, convened a committee specifically charged with investigating partition.\footnote{See NCCUSL website, Drafting Committee on Uniform Partition of Inherited Property Act, http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=290.} The NCCUSL committee's decision to include a multi-factor test in its Uniform Partition Act is a sign as to the direction the law is heading in the United States.
States. In addition, the General Assembly has already demonstrated its confidence in NCCUSL's work by passing amended versions of previous uniform acts and proposing another act last legislative session. The Uniform Apportionment of Tort Responsibility Act, completed by NCCUSL in 2003, passed the state house in 2009 and will likely be taken-up again for the General Assembly's consideration in the 2011 session. NCCUSL's Uniform Trust Code and its revisions of the Uniform Commercial Code have found wide national support, including in North Carolina, demonstrating that the committee creates quality work product deserving of the General Assembly's attention.

6. The Institution of a Multi-Factor Test Would Remove North Carolina from the Minority of States that Specifically Limit Factors Which Courts Can Consider in Dictating Partition Remedies

North Carolina is one of only a few states to constrain its courts as to the factors to be considered in determining the appropriateness of a partition sale. The vast majority of states leaves the decision to courts and does not address by statute what factors should be considered.  


89. See H.R. 813, 3d ed., 2009 Gen. Assem., Reg. Sess. (N.C. 2009). The bill, although previously held in the Senate Judiciary I Committee without action, is likely to be discussed and debated in the next legislative session because North Carolina's adherence to a contributory fault system in tort law is increasingly questioned among the state's bars; this is merely the informed opinion of the author.


91. Most states leave the balancing test up to the discretion of the judge or clerk presiding over the partition action; North Carolina specifically constrains this discretion to only economic factors by statute. See N.C. GEN. STAT. § 46-22(b). Ohio and Wyoming also specifically mention "value" in their statutes describing "manifest injury." See OHIO REV. CODE ANN. § 5307.09 (2010); WYO. STAT. ANN. § 1-32-109 (2010).

While some of these states adhere to the rule that economic value is the only legitimate determinant of what constitutes substantial injury sufficient to order a sale, they have arrived there by judicial decision and were not forced there by statute. Neighboring South Carolina utilizes more of a totality of the circumstances test to determine when a forced sale is appropriate. This southern neighbor is socially and politically similar to North Carolina.

The following are examples of how three different state courts have decided partition actions using factors other than purely economic factors.

i. Connecticut

In the case *Delfino v. Vealencis*, the Connecticut Supreme Court reversed a lower court's decision to forcibly sell tenancy in common


94. Partition sale in South Carolina is permissible if physical partition cannot be "fairly and impartially made and without injury to any of the parties in interest." S.C. CODE ANN. § 15-61-50 (2009). Thus, South Carolina statutory law does not constrain the factors to be considered before partition is ordered. See *id.* While South Carolina case law indicates that financial interests of the parties remains the primary consideration in determining how property should be partitioned, the South Carolina statutory scheme permits the factors such as sentimental value and length of ownership to be considered. *Zimmerman v. Marsh*, 618 S.E.2d 898, 901 (S.C. 2005).
property. The court based its decision on the need to weigh pecuniary and non-pecuniary interests equally when determining the appropriate form of partition remedy. The defendant, Helen Vealencis, lived on her approximately 45/144 undivided interest in the 20.5 acre subject property where she operated a rubbish and garbage removal business. The plaintiffs, one of whom was a professional real estate developer, were not in actual possession of their 99/144 remaining shares, but sought to develop their interests into forty-five residential building lots. The plaintiffs petitioned to partition the land by forced sale and divide the proceeds according to the cotenant's respective interests in the property; the defendant motioned for actual partition so that she could remain in her home and operate her small business. The trial court determined that in-kind partition was not possible without causing "material injury" to the interests of the parties and therefore ordered a sale of the property. Vealencis appealed, arguing the trial court's decision to force a sale was not supported by specific findings of fact and the court improperly considered certain factors in arriving at its decision. The supreme court held an in-kind partition would be possible because the subject property was (1) owned by a small number of cotenants so that there were few competing interests, (2) rectangular in shape with uniform road frontage, and (3) the defendant's dwelling was located on the far western boundary. These characteristics allowed for the physical partitioning of the property.

The court found economic factors were improperly considered by the trial court in ordering a partition by sale. The trial court's determination was driven, in large part, by a finding that continuation of Vealencis' business on the property would preclude the plaintiffs' development of residential lots (which the trial court had determined was the most economically efficient use of the land). The trial court found: (1) the city planning commission would not likely give residential zoning permits in the vicinity of a garbage hauling business;

96. See id. at 32-33.
97. Id. at 29.
98. Id.
99. Id.
100. Id. at 29.
101. Id.
102. Id. at 31.
103. Id.
104. Id.
(2) if the development were to be built, the homes therein would sell at lower prices if Vealencis' business continued; and, (3) if she were granted her three-tenths interests via an in-kind partition, planned roadways and home lots would have to be relocated or abandoned at economic cost to the developers. The trial court also determined Vealencis was in violation of the governing zoning laws such that her garbage hauling business would likely be shut-down and the city would not likely grant development permits to her co-owners while she was violating the local ordinance. Basically, the trial court deemed it in everyone's best interest for the land to be sold and the proceeds divided among the cotenants.

After dismissing that trial courts' assumptions about the continuance of the defendant's business, the supreme court addressed the issue of the fair market value of the proposed residential lots and the issue of loss of certain planned lots and rerouting of planned neighborhood roads. The court emphasized that "it is the interests of all the tenants in common that the court must consider." The trial court had not considered the fact that Vealencis had been in exclusive, actual possession of part of the subject property for an extended period of time, or that she made her home on the property and her livelihood came from her family business located on the property. The supreme court held that, under such circumstances as these, where a judicial sale of tenancy in common property would force a defendant out of her home and jeopardize her livelihood, the legal preference for actual physical partition should rule. Because the physical division of the subject property was practical, despite the trial court's emphasis on the highest use of the land and resulting abandonment of in-kind division, partition by sale was not legitimate relief for the plaintiffs. The court held that where actual, in-kind partition is physically possible it should

105. Id. at 31.
106. Id.
107. Id.
108. Id. at 32–33.
109. Id. at 33 (citing Lyon v. Wilcox, 119 A. 361 (Conn. 1923)).
110. Id.
111. Id.
112. Id.
113. Id.
be ordered regardless of some resulting loss, perhaps significant, to the petitioning cotenant's realizable value in his property interest. 114

ii. West Virginia

The West Virginia partition sales statute should serve as a model for other states. 115 The statute provides any party seeking to partition land through forced judicial sale must demonstrate the following: (1) that the property cannot be conveniently partitioned in-kind, (2) that the interests of one or more of the parties will be promoted by the sale, and (3) that the interests of the other parties will not be prejudiced by the sale. 116 Under this statute, the economic value of tenancy in common property, in terms of the aggregate value of all actual partitions compared to the fair market value of the subject property as a whole, is an important factor in ordering in-kind partition or a sale. However, the economic value of the property is not the exclusive factor utilized. The statute recognizes considerations other than monetary value attach to land and should be considered by courts in deciding whether to wrench away landowners' rights to retain property interests in specific parcels of land.

The West Virginia Supreme Court of Appeals has applied this statute to support a multi-factor test, beyond simple consideration of economic factors, to determine when a judicial sale of tenancy in common land is appropriate. 117 In Ark Land Company v. Harper, the court reversed the lower court's decision to partition seventy-five acres of real property by forced judicial sale. 118 The court emphasized that the subject property, with a farmhouse, several small barns, and a garden, had been in the Caudill family for "nearly 100 years." 119 The property had been owned exclusively by the Caudills until 2001 when the Ark

114. Id.; see also Leake v. Casati, 363 S.E.2d 924, 927 (Va. 1988) ("Even evidence that the property would be less valuable if divided [has been] held 'insufficient' to deprive a co-owner of his 'sacred right' to property." (quoting Sensabaugh v. Sensabaugh, 349 S.E.2d 141, 146 (Va. 1986))).


117. See Ark Land Co., 599 S.E.2d 754.

118. Id. at 757.

119. Id.
Land Company purchased a 67.5% undivided interest from several willing Caudill family members. After unsuccessful attempts to buy out the remaining family members, Ark filed a petition to partition. As statutorily required, an evidentiary hearing was conducted by three commissioners and the court decided the property could not be partitioned in-kind and thus ordered it to be sold. The Caudill heirs appealed. The dispositive issue at trial was whether the property could be practically partitioned in-kind, or whether partition in-kind was impractical and the court needed to order the property sold. Both parties presented expert testimony concerning the possibility of partition in-kind; the Caudill heirs said that the property was capable of physical division, while Ark emphasized the millions of dollars of extra cost it would incur mining (its sole intention) the property if the tract were actually partitioned. The court ultimately held that partition by sale was not appropriate despite the extra costs of actual partition to the petitioning company.

In overturning the lower court's order of forced judicial sale, the high court recognized that partition by sale could be an extremely harsh result for responding cotenants. Consistent with the personhood theory of property, the court stated: "[A] particular piece of real estate cannot be replaced by any sum of money, however large; and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money." The lower court found that partition in-kind was not possible because it would prejudice Ark's highest and best use of the land, a coal mine. The court found that actual partition would require the company to alter its mining practices and incur certain costs such that its share of divided land would be worth less than its fractional share of any sale proceeds. However, the lower court did not consider the Caudill family's sentimental, non-economic interests in...

120. Id.
121. Id.
122. Id.
123. Id. at 756.
124. Id. at 758.
125. Id.
126. Id. at 761–62.
127. Id. at 759.
128. Id. (quoting Wight v. Ingram-Day Lumber Co., 17 So. 2d 196, 198 (Miss. 1944)).
129. Id. at 760.
130. Id.
maintaining their family home place.131 West Virginia's standard for determining the form of partitions allows economic factors to be considered but not to be outcome determinative.132 The court must weigh all considerations that attach to the ownership of land, not just economic consequences.133 As a result, evidence of "long-standing ownership, coupled with sentimental or emotional interests in the property, may be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale."134 The Caudill's valued not money, but instead their family attachment to the particular piece of property. A forced sale of this family property would have completely ignored their sentimental interest.135 The West Virginia court recognized the determination of what form of partition should be ordered is necessarily fact-dependant.136 The facts here indicated that the Caudill family owned the property for almost 100 years, while Ark acquired its first interest in 2001 and petitioned for a forced sale that very year because the remaining Caudill cotenants refused to sell their shares.137

The West Virginia court noted that, more often than not, when a commercial entity identifies property from which it plans to profit, the land value will increase solely based on those business expectations.138 This "self-created enhancement in the value of property" cannot be allowed to serve as the sole factor for courts deciding whether to order a judicial sale.139 While sensitive to the increased business costs that Ark would incur without the entire property, the fact that Ark wagered on being able to purchase the remaining Caudill shares but subsequently failed to do so cannot be the reason for taking the interests of the remaining Caudill cotenants and ignoring their sentimental connections to their property.140 Partition in-kind was ordered.141

131. Id.
132. Id.
134. Id. at 761.
135. Id. at 762.
137. Ark Land Co., 599 S.E.2d at 762.
138. Id.
139. Id.
140. Id.
141. Id. at 763–64.
iii. South Dakota

The South Dakota Supreme Court has also emphasized the importance of considering factors beyond mere economic value when deciding whether to order a partition by sale.142 In Eli v. Eli, over 100 acres of land were owned in tenancy in common by three members of the Eli family.143 For nearly a century, the land was used by the family as a farm.144 When two cotenants sought to end the tenancy in common, and an amicable division of the property among the family members could not be achieved, a petition to partition was filed.145 Finding the sub-divided property would be worth less money than the property would bring at auction sale, a judge ordered the land be sold and the proceeds divided among the owners.146 The non-petitioning owner who wished to stay on the property appealed. The South Dakota Supreme Court held that the trial court erred in considering only the economic value of the subject property when deciding to forgo in-kind partition.147 The court reasoned that monetary considerations, while extremely important, did not alone control the decision whether partition by sale was appropriate.148 This was especially true when the subject land had been owned by a single family and inherited through generations of farmers.149 In the Eli family's case, although expert testimony revealed that divided parcels of property would sell for a lower price per acre than the tract in its entirety, this valuation was not outcome determinative as to the method of partition.150 The court emphasized that the ownership of property was important and valued beyond mere economic utility.151

143. Id. at 407.
144. Id.
145. Id. at 408.
146. Id. at 409.
147. Id. at 409–10.
148. Id. at 410.
149. Id.; see also Fike v. Sharer, 571 P.2d 1252, 1254 (Or. 1977) ("[S]entimental reasons, especially an owner's desire to preserve a home, may also be considered [in a partition action].").
151. Id.; see Schnell v. Schnell, 346 N.W.2d 713, 721 (N.D. 1984) (noting that emotional attachment by a tenant in common to real property may be sufficient to block an attempted partition sale by fellow co-owners).
B. Arguments Against Using a Multi-factor Test for Partition

Hypothetical 1\textsuperscript{152} demonstrates why the consideration of non-economic factors in determining the appropriateness of a partition sale may be an unneeded and possibly destructive legislative course for North Carolina. The current version of section 46-22 has proven effective and should not be amended to afford more protection to certain land owners than is provided to others. Partition is an absolute right of any co-owner of property; regardless of one's percentage of ownership, past use of the property, or ultimate motive behind seeking a partition. An individual is entitled to realize the economic value in his real property holdings. Section 46 is already an effective facilitator of equitable partition actions and should not be amended solely to accommodate the "warm and fuzzy" interests and arguments of partition opponents.

1. The Existing North Carolina Statutory Provision is an Efficient and Effective Way to Govern Partitions and Should Not be Amended

The existing law arguably protects all co-owners of property equally and should be preserved. Any one tenant in common or group of tenants in common can petition for a partition or defend the same petition. Co-owners have every right to reach amicable solutions to any differences via private offers to buy-out their cotenants, or agreements to liquidate property and share in the proceeds. In addition, co-owners who wish to remain on land or retain the land in its original, contiguous arrangement have the option of purchasing the whole parcel in a public sale. When agreement cannot be privately reached and partition is required, the current North Carolina partition statute expresses a clear judicial preference for in-kind division. Under the current law, a person cannot achieve the remedy of sale unless he proves that actual division cannot be made without causing substantial injury to a party.\textsuperscript{153} Only after actual division is determined impossible or substantially injurious may a sale be ordered. The burden of proof is already on the party

152. See Hypothetical I supra Part I.A.
seeking a sale; this is a fair statutory scheme and has operated efficiently.  

Substantial injury is statutorily defined and is arguably fair to all people, no matter their socioeconomic status. The existing law is color blind and free from subjective biases. Substantial injury deals first with whether a division can be had or not. Clerks arguably should not have to decide whether substantial injury exists so a physical division or sale can occur, and then also decide after a sale is determined to be the best remedial option whether a sale causes substantial injury. This is too high of a burden to place on the petitioning land owner; with the preference for in-kind division and one proof of substantial injury already, adding a multi-factor test and giving more discretion to clerks would cause even more difficulty in achieving the already difficult to achieve remedy of sale. There may be no remedy remaining for the party who seeks a partition. If a party cannot occupy his property, the property cannot be physically divided, and a forced sale cannot be had, then there is no remedy. This will lead to appeals to the heavily burdened superior court and add more costs to the parties involved. While certainly not the intent of the proponents of a multi-factor test, this will be the unintended effect.

New factors added to the existing law arguably will add expense and time to partition proceedings. Proponents of a multi-factor test want to assist landowners disparately affected by partition: poor farmers, minorities, and people who cannot afford counsel and are easily abused by developers. But, adding “squishy” factors into the consideration will ultimately put extra costs on these people, who will receive an even smaller return than they already would due to the inherent cost of defending appeals.

In addition to cluttering and adding expense to the existing process, consideration of substantive factors arguably will operate counter to the public policy against allowing land to lie dormant. Adding substantive factors and considerations as a further barrier to sellers might ultimately

154. This point was made by Mr. Thomas Steele of the North Carolina Bar Association, Chairman of the Real Property Section’s Committee on Partition, in the July 30, 2009, NC General Assembly Senate Judiciary II Committee meeting.

lead to dormant property. Scholarship provides that it is against public policy to restrain alienation and deter the free alienability of land.  

Length of ownership, historic use of property, and other non-economic considerations may not fairly be considered more important than the fair market value of property. Katherine Wilkerson, the Legislative Chair of the North Carolina Bar Association Real Property Section, noted, in a July 21, 2009 meeting of the Senate Judiciary II Committee, that these amendments elevate the rights of one property owner over other tenants. The example she offered to the senate committee can be summarized as follows: a sister may be living in the family home and brother has not been back in ten years, but that does not necessarily mean that the brother does not care about his family traditions and love his family property. It cannot be equitable to say that a person living on the property has a paramount right, while the rights of an individual removed from the property are worth less. The brother in this example, just like Bobby or Cliff in the above-mentioned hypotheticals, may need to recognize the value in his property rights in order to send his children to college or buy other land to build a home or start a business. Making such an owner put a lien on the property and wait for an uninterested third party to buy the land does not allow the owner to realize the value in his rights. The state cannot take one owner who happens to be in possession of property and elevate his rights to the detriment of all others. The possession, cultivation, or sentimental value of land is not more important than the equitable distribution among rightful interest holders of the value in property.

Another argument for retaining the existing law is that North Carolina's clerks of court are capable of analyzing partition matters fully and fairly under the existing legal structure. Clerks consider the totality

156. See STOEBUCK & WHITMAN, supra note 3, ¶ 1.2 at 3 (citing Richard Posner, ECONOMIC ANALYSIS OF LAW 10–13 (1972)). “If a property right cannot be transferred, there is no way of shifting a resource from a less productive to a more productive use through voluntary exchange.” Id.

157. See supra text accompanying note 80.

158. See Hypotheticals I and II supra Part I.A–B.

159. Of course, in equity, any co-owner who has incurred expense in the maintenance and upkeep of the property, or who has made improvements that increase the value of the property, may be entitled to fair compensation for those improvements. An example from Hypothetical II supra Part I.B would be if Andy has made substantial improvements (like adding a marketable standing structure) to the land, his cousin Cliff wants to sell the land, and the selling price is elevated due to Andy's expense. Andy will be compensated equally from each co-owner's share of the sales revenue. See N.C. GEN. STAT. § 46-28(c) (2009).
of the circumstances when deciding whether a partition in kind can occur by determining, before ordering a sale, that an in-kind division cannot occur. It is good to have an objective test by which all clerks can abide; bringing subjective emotion into the equation could introduce opportunities for inequitable or biased judgments. "[M]aterial impairment of any cotenant's rights" means all rights are considered.160 Opponents of change argue that North Carolina should not bring in value judgments that have no place in determining partition actions. Convincing reasons to do this may not exist. Besides, decisions of the clerks are always appealable to the superior court. Thus, further safeguards against inequity already exist without the institution of a new multi-factor test.

2. The Real Property Section of the North Carolina Bar Association Opposes a Multi-Factor Test

The Real Property Section of the North Carolina Bar Association, comprised of practitioners who focus on real property issues,161 is a valuable source of opinion on real property law and currently is the most outspoken opponent of the institution of a multi-factor test in determining whether partition in-kind or by sale is appropriate.162 The association proffers that the current system is equitable to all parties involved and provides for a relatively inexpensive resolution to what could otherwise be a protracted, costly matter for litigation.163 Changes would turn a simple process into a complex process. Section representatives at two different General Assembly committee meetings emphasized that public sale and a free market will afford fair value realization to all parties involved and should not face further obstacles than are already on the books.164 A sale is utilized only in the event that

160. See N.C. GEN. STAT. § 46-22(b)(2).
162. Position taken in a January 6, 2009, memo to The Joint Legislative Partition Sales of Real Property Study Committee from the Real Property Section of the North Carolina Bar Association (electronic memo, unpublished in print or web form); see North Carolina General Assembly committee meeting minutes for Senate Judiciary II Committee meetings on July 21 & 30, 2009.
164. See id. (statements of Thomas Steele and Katherine Wilkerson, Real Property Section, N.C. Bar. Ass'n.).
an actual division of property cannot be had. Any party to a partition action can petition the court to revoke its confirmation of a partition action and subsequent sale of real property; this provides for a non-petitioning party to interrupt a sale and enter their own bid on the property if they desire, and the petitioning party still will receive the fair market value of his interest in the property, to which he is entitled.

North Carolina attorneys have also voiced concerns about the state giving superior rights to one cotenant to the detriment of others. There could potentially be a constitutional “takings” argument if, via facilitative action, the state vests one co-owner with a superior right to the use or disposition of tenancy in common property. While Hypothetical II may seem unfair, all co-owners have equal rights to the full use and enjoyment of their property interest. A buy-out option may operate to prevent cotenants who oppose partition from being divested of their interest in the property, but it could also pose a “takings” issue. By definition, a right of first refusal will make the parcel less attractive to other bidders and therefore reduces the fair market value.

3. Co-owners Can Always Draft Around the Problems Associated with Tenancy in Common Ownership

North Carolinians can always draft out of intestate succession, which is an underlying cause of the problem of partition sales. Partition problems arise only in context of co-owners with conflicting goals.

165. N.C. GEN. STAT. § 46-22(a).
166. Id.; see also id. § 46-28.1(a).
167. Id. § 46-28.1(a).
168. This statement is not supported by any hard data, but instead is based on this Author's experience in speaking with North Carolina practitioners who focus on real property issues.
169. It does not seem that a multi-factor test would pose such a problem; but the remote possibility that such an argument could be crafted bears mentioning.
170. See Hypothetical II supra Part I.B.
171. STOEBUCK & WHITMAN, supra note 3, § 5.2 at 177.
172. See infra Section V, Part C.
173. The constitutional “taking” issues that may arise from partition actions are beyond the scope of this Comment. For an extensive discussion of the effects that partition has on valuation, see Thomas W. Mitchell et al., Forced Sale Risk: Class, Race, and the “Double Discount,” 37 FLA. ST. U. L. REV. 589 (2010).
Known as "heir's property," real property that passes through generations of decedents is susceptible to becoming owned by extended family and may ultimately be divided by partition. Drafting a will may ensure that title is free and clear in one owner or another. When title is in an individual outright, as opposed to a tenancy in common form of ownership, then there is no need to petition for partition. Without the threat of partition, there is no need to worry about partition sales. Thus, drafting a will is always an option to avoid the hassles and heartache of subsequent owners who face petitions for partition. This remedy exists already; there is no need introduce subjective variables into the partition statute when education about probate transfers can address the problem at its source.

4. North Carolina Should Wait for the Uniform Partition of Heir's Property Act to be Adopted in Other States

If the General Assembly desires to impose a multi-factor test on the existing statutory framework, it could at least wait until the NCCUSL's uniform partition act has been adopted in other states. Waiting for other state governments to adopt NCCUSL's act as controlling law will afford lawmakers a basis for comparing how a multi-factor statutory scheme will operate in North Carolina. The legislature should patiently allow at least a few other state governments to adopt this multi-factor test to observe how clerks and courts settle partition disputes with the subjective, "squishy" factors in place. To rush into bad public policy merely to appease vocal proponents of the multi-factor test would be irresponsible of North Carolina's elected representatives.

C. Rebuttal of Some Arguments Against the Institution of a Multi-factor Test in North Carolina

Some opponents of an amended partition statute say that any property owner is free to draft a will identifying single takers of fee interests in real property. Thus, there is no need for further forced sale protection because intestate succession and the resulting default tenancy in common ownership form are already easily avoided. While true, this


observation is not a defense to affording the people of North Carolina a fair partition statute. This theorization neglects the reality of intestate succession. There is no legal requirement that individuals utilize a will to dictate the distribution of property holdings at their death. In fact, North Carolina and most other states have intestate succession statutes for the exact purpose of directing the distribution of a decedent's property when he or she is without a will. The legislative grant of the option to use a will does not obviate the need for a fair partition statute; it is simply another means of influencing the public to secure legal counsel. In addition, testate devises to "children" or "issue" or any other non-discriminate class may still create problematic cotenancies, even though such devises were made by will.

Opponents of a multi-factor test also claim that it would be responsible to wait for the adoption of NCCUSL's uniform act in other states to see how it functions as controlling law. However, why delay the process any further when a clear case can be made currently for amendment of the partition scheme? While the operation of NCCUSL's uniform act elsewhere could give guidance to North Carolina concerning any partition amendments, the state has a responsibility to arrive at a solution as soon as possible without checking first to ensure that any commission is on board.

V. CONCLUSION: IS THE ADDITION OF A MULTI-FACTOR TEST THE RIGHT APPROACH?

A. Summary of the Basic Arguments

North Carolina's partition statute provides that a court can order a forced sale if the subject property cannot be divided without "substantial injury" to one of the parties. While this measure appears facially neutral and would seem to apply equally to both petitioning and non-petitioning co-owners, this is not the case. Courts have decided petitioners can meet this burden of proof by showing that an in-kind division would reduce the proportionate value of each interest in the property. To phrase it another way, the North Carolina statute does not allow courts to look at anything except economic factors in determining the appropriateness of a forced judicial sale. There is no investigation into

whether non-petitioners will be harmed, only whether petitioners will be economically disadvantaged by a partition in-kind.

Partition actions often mean someone loses. Under North Carolina's current statutory scheme, the losers are Andy and Bubba. Andy's long-standing family tradition of July Fourth barbeques on the same back porch and Bubba's sweat in the fields and satisfaction at the community farmer's market are not for sale, but the North Carolina partition statute forces a price tag upon them. Clerks of court are statutorily permitted to consider only economic factors when deciding whether it is appropriate to order a forced judicial sale of tenancy in common property. The historic use of common property, the fact that owners live on or that their family identity is tied up in the land—these and other important interests are neglected when the decision to sell common property is made.

The question is whether North Carolina's partition statute would be more equitable if Andy and Bubba came out as winners. Should Cliff be estopped from cashing-in his property interest and beginning the process of development simply because he has never lived on or derived an income from the land to which he lays claim, or because he wants to sell and not have to deal with the other owners? Should North Carolina law protect one sentimental or disadvantaged co-owner over another who has the same interest in the same property? The statutes cannot possibly provide for Amy and completely disregard Bobby, the potential litigants from Hypothetical 1. From a strict real property and constitutional perspective, the law must safeguard all interests and do so equitably. All parties must be afforded a remedy, not just persons occupying the land or those who have a particular emotional attachment to their property. The right to dissolve a tenancy in common is fundamental in property law; every owner of real property can choose to sell his land, to convert his property interest into income. In Hypothetical II, Cliff's real estate project will not only benefit him personally, but also bring jobs to a struggling rural community and contribute to the county tax base—a much higher economic purpose that the hand-to-mouth community farming conducted by his cousins. A partition scheme that would facilitate the forfeiture of this utility for the sake of sentimentality may be destructively inefficient.

The question ultimately becomes who the law will protect. Proponents of a multi-factor test insist that the General Assembly should

177. See Hypothetical II supra Part I.B.
178. See Hypothetical I supra Part I.A.
give clerks of court the authority to consider non-economic factors in ordering a forced judicial sale. Under this view, the statute should explicitly recognize that, in a case where the interest of a tax-paying occupant of the land is threatened by an absentee owner who does not contribute to the upkeep of or taxes on the property, that the occupant has a meritorious interest which is not quantifiable or recognized under a purely economic test. Because partition is an equitable remedy, maybe equitable principles should guide the legislature to promote fairness and protect landholders in possession who are utilizing land and not sleeping on their rights. The institution of a multi-factor test that includes provisions concerning the historic or ancestral use of common property, and whether the property is in cultivation or serves as a place of domicile, would protect co-owners who want to remain on or connected to their land despite challenges from co-owners to liquefy their interests. Opponents of such judicial considerations are interested only in the protection of the property interest of those co-owners seeking a partition; they do not acknowledge the property interest of the co-owners seeking to maintain their ownership. This desire to maintain ownership, to continue to farm or have family gatherings, implicates important property interests as well. Recall the Ark Land case from West Virginia: the property subject to partition was the site of a yearly family reunion of the Caudill family, a place that family members called home and a place that unified the Caudills and strengthened their core family values. Maintaining one’s “roots” is important; preserving familial relationships breeds reverence and responsible citizenship, ideals that law should protect.

However, opponents of any amendments to North Carolina’s existing partition statute emphasize that the law currently recognizes that land is a unique and special type of asset, and at the same time encourages its free alienability. The law allows for partial sale and partial division of common property, so as to protect co-owners’ property interests from being liquidated entirely. Justice is not just achieving what facially appears to be the fairest result; it is the difficult task of safeguarding all interests in property that all co-owners possess. No one co-owner is entitled to a sale; he is merely entitled to a remedy. In-kind partition is already the statutorily preferred remedy, and only

180. See N.C. GEN. STAT. § 46-22(a) (showing that partial division and partial sale is an option).
181. See id.
under specific circumstances will a sale be ordered over physical division of the land.\textsuperscript{182} If North Carolina courts begin considering factors such as historic, ancestral use of land or whether property is currently in cultivation, the statute may be facially appealing but ultimately unfair to petitioning interest holders. Even if an out-of-town interest holder swoops in and cashes out his interest to the detriment of other co-owners, this is his legal right as a property owner.\textsuperscript{183} Opponents of weighing emotion and other substantive factors urge that these added considerations will only cloud the issue; North Carolina may need a strict real property position in reference to partition actions.

In addition, opponents of a multi-factor test recognize that if landowners are denied public sale of their tenancy in common property when said property is found to be indivisible, then they are left without a remedy—or without an immediate remedy, at least. Because partition decisions can be appealed to the county superior court, the reality of partition opponents fighting partition sale by showing emotional or other attachment is that a judge is ultimately likely to order a sale of the common property anyway so that the petitioning co-owner will be able to realize the value in his property interest. Judges may or may not take into consideration the non-economic interests of the respondent co-owner before ordering a sale; but a showing of pure economic harm will likely ring louder than emotional upset during appeal proceedings. Proponents of a multi-factor test, in attempts to protect non-economic interests, may only be adding the cost of an appeal to the legal defense bills of respondents in partition actions.

\textbf{B. The reality of any potential amendment}

Opponents of the multi-factor test probably have a more tenable position than proponents of a new scheme. Opponents are able to verbalize complaints against the new test while at the same time defend their grounds by pointing to decades of “success” under the current law. Partition by forced sale is a relatively uncommon occurrence, and the issue does not garner wide attention or media coverage. Legislators are more likely to stick with something they “know” works; that is, a law that has been on the books for years without prompting mass mailings or overfilled voicemail and email folders at the statehouse. Proponents, on the other hand, face the more difficult task of leading a majority of

\textsuperscript{182} See id.

\textsuperscript{183} Recall “Cliff” from Hypothetical II supra Part I.B.
both chambers of the General Assembly into unfamiliar waters, unproven and unpopular with the respective authoritative section of the North Carolina Bar Association. The familiar is comfortable; it is a tougher sell to coax lawmakers into adopting a multi-factor test that, as even some proponents will admit, has its share of shortcomings.

C. A more realistic amendment to the existing statute

One possible response to complaints about North Carolina's partition statute may be to include a statutory "buyout" provision. A buyout option would both ensure that a co-owner petitioning for partition can realize the value in his interest in common property and, at the same time, protect co-owners in actual possession or those who have special sentimental or emotional attachments to their property. A statutory buyout option would be utilized only after the determination that an in-kind division of tenancy in common property is impractical. Under the current statutory scheme, when common property is physically indivisible, the petitioning co-owner can achieve a forced sale of the entire parcel. Such a remedy uses a hatchet in place of a scalpel; it forces non-petitioning cotenants out of possession, making them accept money payment in lieu of their continued ownership of their property. A buyout option would provide an alternate remedy wherein petitioners get paid and respondents can retain land; in other words, by which both parties "win."

Because the realization of value in one's interest is the (supposed) reason for seeking partition, petitioning parties should have little reason to care whether the purchaser of that interest—the payor of value—is a third party or one of their fellow co-owners. If a petition has been filed and a court has determined an in-kind division is not possible and thus a sale must occur, there should be no problem affording the non-petitioning party the principle opportunity to purchase his co-owner's interest. In a buyout, the petitioner will be paid the money to which he is entitled as an owner in the amount to which he would be entitled if a public sale has occurred. The non-petitioning party or parties who bought-out the petitioning co-owner would retain their interest in the common property, now augmented by the interest purchased from the petitioner.

A buyout option would prevent petitioners from predatorily forcing a sale of the entire common property. The petitioner could recognize the value in his interest, no more and no less. The petitioning party in a partition action has no right to the entire property currently; the
petitioner cannot leverage his fractional interest in a parcel to buy the whole tract on auction sale. Thus, buyout provisions do not operate to assist land speculators, real-estate developers, and the like who acquire a fractional interest in property for the purpose of bullying unwilling owners into a sale. 184 In addition, buyout options would allow non-petitioning parties to retain their interests in the subject property at the much lower cost of the petitioner's interest, as opposed to the cost of the entire parcel; a "right of first refusal" for the whole property would mean that respondents to partition petitions would have to purchase the entire tract, a much less realistic feat.

This suggestion, however, does present some problems. A buyout is inferior to an in-kind division because it would leave all of the non-petitioning owners (when there is more than one) in the same position as they were before buying their co-owner's interest. The property would still be a tenancy in common; the process would simply eliminate one owner. Thus, buyouts would provide a quick fix to the problem, but would not remedy the ultimate dilemma of co-ownership. This may be a trivial complaint, however, because the ultimate function of the partition statute would still be division of the property, albeit with a buyout option; and only after implementing both of these would a sale occur. But another potential problem with a buyout provision is that it might force petitioning parties to accept a less valuable consideration for their interest than could be secured in an open market auction sale. If the state statutorily mandates that non-petitioning parties be given the opportunity to buyout petitioners' interests prior to a public sale, there may be facilitative "takings" arguments against such a policy. 185


185. See supra Part IV.A.4 for mention of this unlikely argument. While the petitioning party will be a private owner and not actually the state, a "taking" may result because an under-value purchase is facilitated by the state through its statutory scheme. The assumption that this purchase would be at discount is based largely on the piece by Thomas W. Mitchell et al., Forced Sale Risk: Class, Race, and the "Double Discount," 37 FLA. ST. U. L. REV. 589 (2010) (describing how forced sale conditions result in depreciated returns in real property sales). Professor Mitchell and his co-authors recognize that it is highly unlikely that any economies of scale that a property would have will be recognized in a judicially ordered partition sale, because a partition sale is a forced sale. Id. The income from a forced sale is unlikely to match the income from an open market, unforced sale. Id.
D. Why the General Assembly Should Amend Section 46-22 to Provide For the Consideration of Non-economic Factors

Under North Carolina's current partition statute, a petitioning cotenant can achieve the remedy of judicial sale merely by showing that the value of his interest in co-owned real property would be materially less on actual partition than if the entire parcel was sold and he was compensated for his respective share. Stated more succinctly, the General Assembly only permits clerks of court and courts on appeal to consider pecuniary interests when determining whether to order in-kind partition versus partition by forced sale. While the current rigid section 46-22 affords the judiciary a bright-line rule, the General Assembly should sacrifice some clarity for equity. A flexible partition statute prompting the judicial consideration of non-economic factors is needed.

As discussed in this comment, there are convincing arguments both for and against the amendment of North Carolina's current partition statute. While both sides of this issue warrant careful consideration and each position invites criticism, the less rigid, multi-factor test should prevail. Although clerks and courts should not be vested with absolute discretion in determining the appropriateness of judicial sale as a partition remedy, flexibility built into the partition statute will insure: (1) the judiciary is granted the authority to continue its (arguably) current practice and (2) a just result may prevail over one justified by only dollars and cents. In forced sale situations, someone is going to lose. But, it seems just to vest in the judiciary at least the legal ability to determine that the losing party will not always be the non-petitioning cotenant who wants to maintain his family homestead or his place of business.

The addition to section 46-22 of several general factors courts may consider, along with a provision that no one factor should control to the exclusion of the others, will improve North Carolina's current statute. The current section 46-22(b)(1) ("Whether 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.") should remain as one legitimate factor by which the appropriateness of partition by sale is judged. However, additions to

186. N.C. GEN. STAT. § 46-22.
187. N.C. GEN. STAT. § 46-22(b).
188. See supra text accompanying note 80.
189. N.C. GEN. STAT. § 46-22(b)(1).
the statute are warranted to ensure economic value is not the only statutory benchmark. Section 46-22(b)(2) should be removed, and section 46-22(b) should include other factors that courts can and should consider. The General Assembly should insert after section 46-22(b)(1) language akin to that chosen by NCCUSL in its Uniform Partition of Heirs Property Act. Section 9 of the act, proscribing what courts may consider in ordering partition, reads as follows:

(a) In determining whether partition in kind would result in [great][manifest] prejudice to the cotenants as a group, the court shall consider the following:

(1) whether the heirs property practicably may be divided among the cotenants;

(2) whether partition in kind would apportion the property in such a way that the fair market value in the aggregate of the parcels resulting from the division would be materially less than the value of the property if it were sold as a whole, taking into account the condition under which the court-ordered sale would likely occur;

(3) evidence of the collective duration of ownership or possession of the property by a cotenant and one or more predecessors in title or predecessors in possession to that cotenant who are or were related by blood, marriage, or adoption to that cotenant or to each other;

(4) a cotenant's sentimental attachment to the property, including any attachment arising because the property has ancestral or other unique or special value to the cotenant;

190. "Whether an actual partition would result in material impairment of any cotenant's rights." N.C. GEN. STAT. § 46-22(b)(2). North Carolina courts have emptied this provision of any effect because "material impairment" has been determined to refer only to pecuniary loss. See Part III.A beginning supra p. 9 for cases explaining application of the current section 46-22. It is this Author's contention that courts have made this decision largely because the statute explicitly provides for economic value and only economic value to be utilized in determining when to order a sale. If section 46-22 calls for judicial consideration of non-economic factors, then North Carolina courts will be statutorily permitted to consider such factors and will thus have the ability in future partition actions to decide if economic interest will be the sole determining factor for ordering judicial sale.

(5) the use being made of the property by a cotenant and the degree to which the cotenant would be harmed if the cotenant could not continue the same use of the property;

(6) the degree to which the cotenants have contributed their pro rata share of the property taxes, insurance, and other expenses associated with maintaining ownership of the property or have contributed to the physical improvement, maintenance, or upkeep of the property; and

(7) any other relevant factor.

(b) The court may not consider any one factor in subsection (a) to be dispositive, but shall instead weigh the totality of all relevant factors and circumstances.

Adding to section 46-22 the above factors (3) through (7) will insert flexibility into the North Carolina statute. The addition will allow clerks to consider duration of family ownership and current use of land in determining when forced judicial sale is appropriate. The judiciary will at least have the option to weigh the competing interests that a family living on certain property for generations has against a long-removed, fractional interest-holder whose nominal pecuniary gain cannot rationally be compared to the uprooting of a family or interference with a resident owner's livelihood. The added factors will not dictate a result in partition actions; they will merely prompt clerks and courts on appeal to consider the totality of circumstances surrounding a forced sale. In addition to including specific, enumerated factors in the partitions statute, adding a charge that no one factor is dispositive to the exclusion of the others will afford courts the flexibility required in deciding difficult partition cases. Provision (b) above provides an example of such a charge and would be an appropriate addition to complete the revised section 46-22(b).

The amended section 46-22 proposed herein will be vague. However, it will be intentionally vague such that courts can, both in law and equity, determine on a case-by-case basis how the remedy of forced sale will operate. The judiciary must be afforded a more complete perspective of the circumstances surrounding petitions to partition before being asked to decide them. To afford this perspective, the General Assembly should amend section 46-22 to include specific, enumerated, non-economic factors by which clerks and courts can base their decisions. No longer should partition in North Carolina be all about the money; property owners deserve more.

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