

## **CHAPTER 32-16**

### **ACTION FOR PARTITION OF REAL PROPERTY**

#### **32-16-01. When may be brought.**

When several cotenants hold and are in possession of real or personal property as partners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein and for a sale of such property or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners. Real and personal property may be partitioned in the same action.

#### **32-16-02. What complaint must show.**

The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint specifically and particularly as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain, or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder so that such parties cannot be named, that fact must be set forth in the complaint.

#### **32-16-03. Necessary parties - Only interests of record.**

No person having a conveyance of, or claiming a lien on, the property, or some part of it, need be made a party to the action, unless such conveyance or lien appears of record.

#### **32-16-04. Lis pendens required.**

Immediately after filing the complaint in the district court, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties, so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action.

#### **32-16-05. To whom summons directed.**

The summons must be directed to all the joint tenants and tenants in common and all persons having an interest in or any lien of record by mortgage, judgment, or otherwise upon the property or upon any particular portion thereof, and generally to all persons unknown who have or claim any interest in the property.

#### **32-16-06. Service by publication - Notice required.**

When service of the summons is made by publication, the summons as published must be accompanied by a notice that the object of the action is to obtain a partition of the property which is the subject of the action, briefly describing the same.

#### **32-16-07. Requisites of answers.**

The defendants who have been served personally with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answer, fully and particularly, the origin, nature, and extent of their respective interests in the property, and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon, whether the same has been secured in any other way or not, and, if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

#### **32-16-08. Title, proofs, and judgment.**

The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action, and when a sale of the premises is necessary, the title must be

ascertained by proof to the satisfaction of the court before the judgment of sale can be made, and when service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered, except that when there are several unknown persons having an interest in the property their rights may be considered together in the action as not between themselves.

**32-16-09. When partial partition adjudged.**

Whenever from any cause in the opinion of the court it is impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court first may ascertain and determine the shares or interests respectively held by the original cotenants and thereupon adjudge and cause a partition to be made as if such original cotenants were the parties and sole parties in interest and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained or allotted as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof as they may desire.

**32-16-10. Referee to determine outstanding liens.**

If it appears to the court, by the certificate of the recorder, or the clerk of the district court, or by the verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon the real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court either must order such persons to be made parties to the action by an amended or supplemental complaint, or must appoint a referee to ascertain whether or not such liens or encumbrances have been paid, or, if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner and, if secured, the nature and extent of the security.

**32-16-11. Notice to appear before referee - Service - Report.**

The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee, appointed as provided in section 32-16-10, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place to make proof, by such person's own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person is absent or such person's residence is unknown, service may be made by publication or notice to such person's agent under the direction of the court in such manner as may be proper. The report of the referee thereupon must be made to the court and must be confirmed, modified, or set aside and a new reference ordered as the justice of the case may require.

**32-16-12. Sale or partition.**

If it is alleged in the complaint and established by evidence, or if it appears by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the making of requisite proof, it must order a partition according to the respective rights of the parties as ascertained by the court and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown or unascertained.

**32-16-13. Method and rule of partition.**

In making the partition, referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with

the necessary assistants to aid them. Before making partition or sale the referees, whenever it will be for the advantage of those interested, may set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties, nor sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs or assigns, in which case it shall remain such private way.

**32-16-14. Referee's report.**

The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided and the share allotted to each party with a particular description of each share.

**32-16-15. Judgment on report - Effect.**

The court may confirm, change, modify, or set aside the report of the referees and, if necessary, may appoint new referees. Upon the confirmation of the report, judgment must be rendered that such partition be effectual forever, and such judgment shall be binding and conclusive:

1. On all persons named as parties to the action and their legal representatives, who at the time have any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life.
2. On all persons interested in the property, who may be unknown, to whom notice has been given in the action for partition by publication.
3. On all other persons claiming from such parties or persons, or either of them.

No judgment is invalidated by reason of the death of any party before final judgment or decree, but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent as if it had been entered before the decedent's death.

**32-16-16. What tenants not affected.**

The judgment does not affect tenants for years, less than ten, to the whole of the property which is the subject of the partition.

**32-16-17. Payment of expenses.**

The expenses of the referees, including those of a surveyor and the surveyor's assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, must be apportioned among the different parties to the action equitably.

**32-16-18. Liens follow owner's share.**

When a lien is on an undivided interest or estate of any party, such lien, if partition is made, thenceforth shall be a charge only on the share assigned to such party, but such share first must be charged with its just proportion of the costs of the partition, in preference to such lien.

**32-16-19. Certain estates set off.**

When a part of the property only is ordered to be sold, if there is an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

**32-16-20. How proceeds of encumbered property applied.**

The proceeds of the sale of encumbered property must be applied under the direction of the court as follows:

1. To pay its just proportion of the general costs of the action.

2. To pay the costs of the reference.
3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due, and the amount due to be verified by affidavit at the time of payment.
4. The residue among the owners of the property sold, according to their respective shares therein.

**32-16-21. Lienor having other security.**

Whenever any party to an action who holds a lien upon the property, or any part thereof, has other security for the payment of the amount of such lien, the court in its discretion may order such security to be exhausted before distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof.

**32-16-22. Distribution by referee.**

The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. In case no direction is given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

**32-16-23. Part of action continued.**

When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court, if necessary, may require such parties to present the facts or law in the controversy by pleading as in an original action.

**32-16-24. How sales made.**

All sales of real property made by referees under this chapter must be made at public auction to the highest bidder upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

**32-16-25. Terms of sale fixed by court.**

The court, in the order for sale, must direct the terms of credit which may be allowed for the purchase money of any portion of the real property of which it may direct a sale on credit and for that portion of which the purchase money is required to be invested for the benefit of unknown owners, infants, and owners out of the state.

**32-16-26. Security for purchase money.**

The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, on such parts of the property as are directed by the court to be sold on credit for the shares of any known owner of full age, in the name of such owner, and for the shares of an infant, in the name of the guardian or conservator, if any, of such infant, and for other shares, in the name of the clerk of the district court, and the clerk's successors in office.

**32-16-27. Estate for life or years - Compensation.**

The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate which the person so entitled may consent, by an instrument in writing filed with the clerk of the court, to accept in lieu of such estate. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

**32-16-28. Compensation when consent not given.**

If such consent is not given, filed, and entered as provided in section 32-16-27 at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party or deposited in court for that party, as the case may require.

**32-16-29. Compensation when tenant unknown.**

If the person entitled to such estate for life or years is unknown, the court may provide for the protection of the person's rights in the same manner, as far as may be, as if the person was known and had appeared.

**32-16-30. Value of future estates settled by court.**

In all cases of sales, when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as will protect the rights and interests of the parties.

**32-16-31. Terms of sale made known at time of sale - Separate parcels.**

In all cases of sales of property the terms must be made known at the time of sale, and if the premises consist of distinct farms or lots, they must be sold separately.

**32-16-32. Who can purchase.**

No referee, nor any person for the benefit of any referee, can be interested in the purchase of any real property which is the subject of the action. Neither can any guardian or conservator of an infant party to such action be interested in the purchase of such property except for the benefit of the infant. All sales contrary to the provisions of this section are void.

**32-16-33. Report of sale.**

After completing a sale of property, or any part thereof, ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the district court where the action is pending.

**32-16-34. Order to convey.**

If the sale is confirmed by the court, an order must be entered directing the referees to execute conveyances and take securities pursuant to such sale. Such order also may give directions to them respecting the disposition of the proceeds of sale.

**32-16-35. Interested party may apply share on purchase price.**

When a party entitled to a share of the property, or an encumbrancer entitled to have that encumbrancer's lien paid out of the sale, becomes a purchaser, the referees may take their receipt for so much of the proceeds of the sale as belongs to them.

**32-16-36. Record and bar of conveyance.**

The conveyance must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

**32-16-37. Investment of unknown owner's or nonresident's share.**

If there are proceeds of a sale belonging to an unknown owner or to a person without the state who has no legal representative within it, the proceeds must be invested in bonds of the United States for the benefit of the persons entitled thereto.

**32-16-38. Securities taken in name of clerk.**

When security for the proceeds of a sale is taken, or when an investment of any proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court of the county where the papers are filed, and the clerk's successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

**32-16-39. Securities - When taken - The name of parties.**

When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they respectively are entitled, or when shares and proportions previously have been adjudged by the court, such securities must be taken in the names of and must be payable to the parties respectively entitled thereto, and must be delivered to such parties upon their receipts therefor. Such agreement and receipts must be returned and filed with the clerk.

**32-16-40. Clerk's duty.**

The clerk of the district court in whose name a security is taken, or by whom an investment is made, and the clerk's successor in office, must receive the interest and principal as it becomes due and apply and invest the same as the court may direct, and must deposit with the county treasurer all securities taken, and, in a book provided and kept for that purpose in the clerk's office, must keep an account, free for inspection by all persons, of investments and moneys received by the clerk thereon, and the disposition thereof.

**32-16-41. Compensation for inequality.**

When it appears that the partition cannot be made equal between the parties according to their respective rights without prejudice to the rights and interests of some of them, and a partition is ordered, the court may adjudge compensation to be made by one party to another on account of the inequality, but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose and that the infant's interest will be promoted thereby. In all cases, the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.

**32-16-42. To whom infant's share paid.**

When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale to the infant's guardian or conservator, if the infant has one, or as provided in section 30.1-26-03, or to the guardian ad litem appointed for the infant in the action, upon the guardian ad litem giving the security required by law or directed by order of the court.

**32-16-43. Share of insane and incompetent.**

The guardian or conservator who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting the person's own affairs, whose interest in real property has been sold, may receive in behalf of such person such person's share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking approved by a judge of the court, that the guardian or conservator will discharge faithfully the trust imposed in the guardian or conservator, and will render a true and just account to the person entitled thereto or to that person's legal representative.

**32-16-44. Guardian may consent to partition without action.**

Repealed by S.L. 1973, ch. 257, § 82.

**32-16-45. Costs, fees, and disbursements.**

The costs of a partition, including reasonable counsel fees, expended by the plaintiff or any of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided in proportion to their respective interests therein and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

**32-16-46. Single referee.**

The court, with the consent of the parties or when the complaint petitions and prays for the appointment of a single referee and there is no objection thereto, may appoint a single referee instead of three referees in the proceeding under this chapter, and the single referee, when thus appointed, has all the powers and may perform all the duties of the three referees.

**32-16-47. Abstract of title - How cost paid.**

If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any of the defendants shall have had such abstract afterwards made, the cost of the abstract, with interest thereon, from the time the same is subject to the inspection of the respective parties, must be allowed and taxed. Whenever such abstract is produced by the plaintiff before the commencement of the action, the plaintiff must file with the complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. If the plaintiff shall have failed to procure such abstract before commencing the action and any defendant shall procure the same to be made, the defendant, as soon as the defendant has directed it to be made, shall file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court or the judge thereof may direct, from time to time during the progress of the action, who shall have the custody of the abstract.

**32-16-48. Interest on disbursements.**

Whenever during the progress of the action for partition any disbursements shall have been made under the direction of the court by a party thereto, interest must be allowed thereon from the time of making such disbursements.